IN THE MATTERS OF ADOPTION OF N.J.A.C. 7:1C	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO: A-002959-22 **CIVIL ACTION** ON APPEAL FROM FINAL AGENCY ACTION OF THE NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION

AMICI CURIAE'S BRIEF IN SUPPORT OF APPEAL AS TO THE NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION'S RULEMAKING ON ENVIRONMENTAL JUSTICE

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PRELIMINARY STATEMENT

The New Jersey Business & Industry Association ("NJBIA") calls upon the court to invalidate the adoption by the New Jersey Division of Environmental Protection ("DEP") of N.J.A.C. 7:1C (the "Rule"), which purports to implement the Environmental Justice Law, N.J.S.A. 13:1D-157 to -161 (the "EJ Law"). This Rule – ultra vires, vague, arbitrary and capricious, and otherwise incomplete – creates significantly more issues and problems than it could ever hope to cure. NJBIA asserts that a full review will lead the court to only one conclusion – the Rule is unjust and unnecessary, and therefore should be rejected and sent back to DEP for a complete reworking in compliance with the EJ Law, the Administrative Procedure Act, and common-sense.

NJBIA is the nation's largest statewide employer association, with members employing over one million people, with membership including contractors, manufacturers, retail and wholesale businesses, and service providers of every kind. The NJBIA fully supports the concepts underlying and intent behind environmental justice; it is the regulatory implementation by DEP that is flawed to a level that requires the Rule to be reconsidered, reconfigured, and reintroduced. Allowing this Rule to remain in effect would be not only improper and in violation of the legislative mandate underling the EJ Law and

the Administrative Procedure Act, N.J.S.A. 52:14B-1 through -31, but would also have a detrimental impact upon business, the State, and the very individuals sought to be protected by the Rule and the EJ Law.

NJBIA asserts that the Rule does not serve the interests of the communities it seeks to protect but, instead, leads to **fewer** economic opportunities, **greater** loss of business and development opportunities, and, ultimately, will lead to significant abandoned properties, with only minimal, if any, environmental or health benefits. This Rule has significantly strayed from the approach required by the underlying legislation and has, instead, created an overly proscriptive "command and control" approach that will prove to be unnecessarily costly and unworkable. The Rule represents a lost opportunity to improve conditions in overburdened communities. If, however, the intent of the regulations is to drive out manufacturers and de-industrialize the State, the Rule may very well achieve that goal.

As such, NJBIA calls upon this court to overturn the Rule and direct DEP to "go back to the drawing board" and provide a regulatory enactment that is complete, directed by statute, non-arbitrary and capricious, and fully fleshed out. Until such time, the Rule should be deemed nonoperative. Instead, DEP should work with, and not against, the business community in developing regulatory

standards that fall within the framework of the EJ Law, and which function to balance the need for new construction, renewals, new business development, reductions in stressors, and a fair opportunity for all stakeholders in the economy of the State – not just those local interests that can protest the loudest – to have an opportunity to work together under a reasonable and reasoned regulatory scheme, for the benefit of the entire State. No single group – be it residents, environmentalists, or business interests – should have the final say and an unlimited and unreviewable veto on development, construction, operation, and function of necessary and required businesses and industries.

DEP should go back to the beginning, engage a full collection of interests, and draft a regulatory process that both satisfies the clear legal authority and intent provided by the Legislature, as well as one that ensures that the arbitrary and capricious elements found in the current version of the Rule are removed and replaced with well-reasoned, rational, and effective procedures for balancing the needs of the State, the needs of the business and industry community, as well as the needs of the local community as a whole, and not just in terms of the loudest voice or the "no at any cost" contingent.

STATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

The NJBIA essentially adopts the Procedural History and Statement of Facts provided by the Appellant, and only highlights the following elements:

The NJBIA was founded in 1910, as the New Jersey Manufacturers Association. This organization began as a group of manufacturers sharing ideas about workplace safety, while recognizing the value and need of having a say in government policies affecting their businesses. As the State's economy changed over the years, the organization changed its name in the mid-1970s to the New Jersey Business & Industry Association. Today, its members represent every industry in the State, including contractors, manufacturers, retail and wholesale businesses, and service providers of nearly every kind.

NJBIA has a long history of advocacy on behalf of the business community and seeks to provide a calm and reasonable set of issues and positions to assist in this court in its review.

The underlying foundation of the regulations promulgated by DEP is the Environmental Justice Act, P.L. 2020, c. 92, codified as N.J.S.A. 13:1D-157 et seq. The EJ Law asserts that, historically, the State's "low-income communities

[1] Because of they are inextricably intertwined, Amici Curiae NJBIA has combined the Statement of Facts and Procedural History into one statement for better clarity and for the court's convenience.

and communities of color" have been subject to a higher level of "environmental and public health stressors" that have resulted in increased "adverse health effects," and that it is therefore in the "public interest for the State, where appropriate, to limit the future placement and expansion of such facilities in overburdened communities." N.J.S.A. 13:1D-157. The EJ Law goes on to define stressors as both sources of environmental pollution and conditions that may cause public health impacts, such as asthma, cancer, and developmental problems. N.J.S.A. 13:1D-158. The EJ Law also defines "overburdened community" as "any census block group" with at least 35% of the households qualifying as low income, at least 40% of the residents identifying as minority or recognized tribal community, or at least 40% of the households having limited English proficiency. N.J.S.A. 13:1D-158.

The Rule similarly provides a definition of "overburdened community" in N.J.A.C. 7:1C-1.5, using essentially the same language as used in the EJ Law. The DEP's addition to the definition comes in through the modification of "overburdened community" that comes in through the applicability section of the regulations. Under N.J.A.C. 7:1C-2.1(e), the DEP asserts that a facility located in block group that has a "zero population" immediately adjacent to an overburdened community shall be treated as though it had the highest "combined

stressor total" of any adjacent overburdened community. This regulatory pronouncement essentially provides that a "zero population" census block is an "overburdened community" for purposes of issuing permits and regulatory oversight.

The EJ Law then goes on to indicate that the DEP will deny permits for new or expanded facilities that "cause or contribute to adverse cumulative environmental or public health stressors in the overburdened community that are higher than those borne by other communities within the State, county, or other geographical unit of analysis as determined by the department pursuant to rule, regulation, or guidance". N.J.S.A. 13:1D-160(d).

LEGAL ARGUMENT

POINT I

THE DEPARTMENT OF ENVIRONMENTAL PROTECTION'S REGULATORY ENACTMENT FAILS TO CONFORM TO THE LEGISLATIVE SOURCE AND THEREFORE SHOULD BE REVOKED

The Appellant sets forth a concise and effective argument on the standard of review, the concerns with the ultra vires nature of the rulemaking, and the arbitrary, capricious, and unfounded elements of much of the Rules. NJBIA adopts these arguments.

NJBIA would like to highlight and reinforce the fundamental understanding that "[a]n administrative agency may not under the guise of interpretation extend a statute to include persons not intended, nor may it give the statute any greater effect than its language allows." Kingsley v. Hawthorne Fabrics, Inc., 41 N.J. 521, 528 (1964). This approach has been long held by the Court and is in no way controversial or unexpected. In fact, it forms the foundation of the review of regulatory actions and the use and misuse of agency discretion. It is equally clear that it is

> a court's responsibility to restrain agency action "[w]here there exists reasonable doubt as to whether such power is vested in the administrative body." In re Jamesburg High School Closing, 83 N.J. 540, 549

> (1980). Where such doubt exists, and where the enabling legislation cannot fairly be said to authorize the agency action in question, the power is denied. Ibid. See also Burlington County Evergreen Park Mental Hospital v. Cooper, 56 N.J. 579, 598 (1970); Swede v. City of Clifton, 22 N.J. 303, 312 (1956).
>
> [A.A. Mastrangelo, Inc. v. Commissioner of DEP, 90 N.J. 666 (1982) (internal citations omitted).]

As seen in the Chevron[2] deference matters currently before the Supreme Court of the United States, the notion of whether significant questions should be primarily addressed by the Executive Branch or the Legislative Branch remains a thorny discussion. Yet even under the most generous understanding of the delegation of authority, "a policy question of [great] significance lies in the legislative domain and should be resolved there. A court should not find such authority in an agency unless the statute under consideration confers it expressly or by unavoidable implication." Burlington County, 56 N.J. at 598. "Furthermore, we have stated that when regulations are promulgated without explicit legislative authority and implicate 'important policy questions, they are

[2] Chevron U.S.A. v. Natural Res. Def. Council, 467 U.S. 837 (1984).

better off decided by the Legislature.'" In re Centex Homes, LLC, 411 N.J. Super. 244, 252 (App. Div. 2009), quoting Avalon v. N.J. Dep't of Envtl. Prot., 403 N.J. Super. 590, 607 (App. Div. 2008), certif. dented, 199 N.J. 133 (2009); see also, pending decisions in Loper Bright Enterprises v. Raimondo, United States Supreme Court, Docket No. 22-451, and Relentless, Inc. v. Department of Commerce, United States Supreme Court, Docket No. 22-1219, both argued January 17, 2024 (seeking to overrule Chevron U.S.A. v. Natural Res. Def. Council, 467 U.S. 837 (1984)).

Interestingly, and significantly for this matter, the Rule includes an express purpose section – N.J.A.C. 7:1C-1.3. That section notes that the chapter has been promulgated to ensure participation, limit the placement of new facilities, and reduce the environmental and public health stressors in overburdened communities by requiring measures to avoid, minimize, or reduce what the facility produces. Nothing in that purpose reflects a desire to comply with the EJ Law. Perhaps that is an oversight; perhaps that is very telling. In either event, the Rule fails to serve the primary purpose of all proposed regulations – the implementation of the underlying legislative intent.

POINT II

THE ACTIONS TAKEN BY THE DEPARTMENT OF ENVIRONMENTAL PROTECTION FAILED TO INCORPORATE THE NECESSARY STEPS FOR IMPLEMENTING THE EJ LEGISLATION

Giving DEP the benefit of the doubt, it is likely that in the adoption of the Rule, it considered attempting to comply with the requirements of the Administrative Procedure Act, N.J.S.A. 52:14B-1, et seq., as well as the legislative mandate behind the Environmental Justice law, N.J.S.A. 13:1D-157 to -161. See generally Metromedia, Inc. v. Director, Div. of Taxation, 97 N.J. 742 (1984) (setting forth the need and obligation for a regulatory process to be founded upon the APA). Unfortunately, DEP failed. Whether through selection of parameters that involve far too many "overburdened communities," the use of language, terms, and ideas that were nowhere defined in the legislation, or through the adoption of arbitrary, capricious, and vague regulatory obligations, the Rule fails to satisfy the requirements of rulemaking in the State and thus should be rendered inoperative.

The EJ Law explicitly applies only to permits for facilities located, "in whole or in part, in an overburdened community." N.J.S.A. 13:1D-157. These overburdened communities ("OBCs") are the foundation for the application of the EJ law, and thus should serve as the foundation of the EJ regulations. DEP,

in issuing the regulations, did not stay within the boundaries of the EJ statute, and instead introduced new and undefined elements such as "zero population blocks," as well as effectively defining OBCs to a level that the legislative mandate to use them as a measuring device and subject to comparison became effectively meaningless.

The EJ law defines "OBCs" as "any census block group, as determined in accordance with the most recent United States Census, in which: (1) at least 35 percent of the households qualify as low-income households; (2) at least 40 percent of the residents identify as minority or as members of a State recognized tribal community; or (3) at least 40 percent of the households have limited English proficiency." N.J.S.A. 13:1D-158.

Yet, the Rule, by selecting parameters apparently intended to deem as many overburdened communities as possible as being disproportionately impacted, has effectively eviscerated the Legislature's direction to compare overburdened communities against other areas to determine which communities may be overburdened with stressors. During the stakeholder process for the adoption of the Rule, DEP stated that the use of the parameters ultimately proposed in the Rule would result in over 90% of OBCs being deemed disproportionately impacted. Regrettably, this is not a proper foundation for

comparison and analysis; rather, it is a regulatory determination that, effectively, deems nearly all OBCs as disproportionately impacted.

In fact, once consideration is made for the understanding that over one half of the State's population are located within those areas designated as OBCs, (see DEP Environmental Justice Overburdened Communities website, showing 5.1 million people in the State as being encompassed by an OBC, and the United States Census Bureau, showing a 2020 population of 9.3 million people)[3], and that the areas of the State not designated as OBCs are often regulated as Highlands, Pinelands, or wetlands, (see DEP Environmental Justice Overburdened Communities website, above), a large proportion of the populated and developable areas of the State remains as "disproportionately impacted OBCs," and thus subject to significant, expensive, and onerous regulations on the construction of any new or expanded facilities. In addition, the determination of whether an OBC is disproportionately impacted by adverse stressors is made by comparing the impacts on the OBC to the more restrictive of the countywide or statewide level. N.J.A.C. 7:1C-1.5. Thus, the OBC is not compared to an

[3] DEP information available at: https://dep.nj.gov/ej/communities/#:~:text=The%20State%20has%20updated%20mapping,percent%20low%2Dincome%20households%3B%20or and Census Data available at: https://data.census.gov/profile/New_Jersey?g=040XX00US34.

"average" community, but, rather, it is compared to a community that is above average in every single category.

This is a nonsensical result of regulations designed to implement the EJ law. Quite simply, if the Legislature had intended to designate all OBCs as "disproportionately impacted," there would have been no reason to design a comparison test. The Legislature would have simply declared it and moved on. They did not, and DEP should not do so either.

Likewise, the EJ law explicitly applies only to permits for facilities located, "in whole or in part, in an overburdened community." N.J.S.A. 13:1D-160(a). The EJ Law then goes on to define an OBC as a census block group with a specified percentage of certain populations. Ibid. Despite this clear and unambiguous legislative language, DEP expanded the statutory definition of "overburdened community" to include all unpopulated census block groups adjacent to an OBC; that is to say, census block groups that have absolutely nobody living in them. This is both conceptionally unnecessary and legislatively unfounded.

First, the inclusion of zero population blocks is counterproductive to the very nature of the EJ Law, as the EJ Law seeks to have facilities built in locations where there are less impacted individuals, and building in a "no population" area

is a reasonable and effective method for ensuring that a facility is not being located in direct contact with households or other populations. Further, because these zero population areas are unable to show a lack of impact or other impingement they are therefore automatically and unavoidably included in the regulatory oversight and restriction, no matter the reality of the location. Likewise, these blocks are no different than any other block adjacent to a real and actual – legislatively-defined – OBC, but which is not subject to regulation, such that the impact would still occur to groups outside of the OBC. As such, there is no logical foundation to treat zero population blocks different than non-OBC populated blocks, and thus the inclusion is not reasonable or needed.

Furthermore, these "zero population" blocks are nowhere to be found in the EJ Law; they are purely a construct of the DEP in the regulatory process, and represent a significant over-reach of authority and jurisdiction. The EJ Law, by its explicit statement, is designed to ensure that "no community should bear a disproportionate share of the adverse environmental and public health consequences that accompany the State's economic growth." N.J.S.A. 13:1D-157. Overburdened community areas are then defined, as noted above, based upon the percentage of households or residents in the census block. N.J.S.A. 13:1D-158. A "zero population" block, by its very definition, has a population

of households or residents of zero. Such blocks simply cannot satisfy the definition of an OBC set by the Legislature. The attempt to do so is an inappropriate and unauthorized overreach on the part of the DEP. At a minimum, this essential element of the Rule is so overbroad and overreaching as to require a "redo" of the regulatory scheme.

POINT III

THE STRESSORS ASSOCIATED WITH THE REGULATION FAIL TO ACCURATELY AND EFFECTIVELY PROVIDE REAL RELIEF FOR OVERBURDENED COMMUNITIES

The EJ Law explicitly seeks to protect and address those residents of the State who "have been subject to a disproportionately high number of environmental and public health stressors, including pollution from numerous industrial, commercial, and governmental facilities located in those communities" and "that, as a result, residents in the State's overburdened communities have suffered from increased adverse health effects including, but not limited to, asthma, cancer, elevated blood lead levels, cardiovascular disease, and developmental disorders". N.J.S.A. 13:1D-157. This seems well and good, and predicated upon a reasonable approach. Unfortunately, the implementation of the Rule does not follow through on the legislative process.

The Rule defines an "adverse environmental and public health stressor" as one of the listed stressors in an overburdened community that is higher than a geographic point of comparison or would be higher than a geographic point of comparison as a result of the new or changed facility. N.J.A.C. 7:1C-1.5. A "geographic point of comparison," in turn, is defined as the lower value of the State or the county's 50th percentile, not including overburdened communities. Ibid. This essentially means that a permit will be denied if an overburdened community has or will go above the 50th percentile on any of the combined stressors as compared to the non-overburdened community average. N.J.A.C. 7:1C-9.1.

Again – while DEP's choice seems designed to ensure that most overburdened communities are found to be subject to adverse environmental and public heath stressors by having DEP use the geographic point of comparison that has the lowest stressor amount and therefore creating the most likely chance of the new or modified permit causing or adding to the adverse environmental and public heath stressors, the process seems as though there is at least some element of rational behavior behind it. This is quickly shown otherwise when those stressors are considered.

Based upon DEP's own Environmental Justice Mapping, Assessment and Protection Tool (EJMAP), available online, DEP notes that "approximately 3121 out of 3576 OBC block groups (87%) are considered subject to averse cumulative stressors."

Thus, the regulations propounded by DEP go well beyond looking at the health and safety of persons living in OBCs. When considering the issuance of an air permit, the DEP regulations now include such "obvious and clear" health and safety issues as: the percentage of the population without a high school diploma, the community's potential for flooding, the amount of land in the community encumbered by a deed notice or classification exception area, the percentage of houses built before 1950, and the number of combined sewer outflows. N.J.A.C. 7:1C - Appendix. But, these factors have little to no connection to the potential impact of the air emissions of a facility on the health and welfare of the community; yet these factors are set, designed, and required to play a significant role in permitting decisions, providing for a drastically different level of scrutiny based on them.

Likewise, under the DEP regulations, an applicant, or indeed any entity, is unable to question or challenge the Department's determination that a community is subject to any adverse stressor. No matter the facts or argument,

once DEP has determined the existence of an "adverse stressor," even a showing that the adverse stressor has no impact on a community is immaterial to the scrutiny used in the permit application, a result that is simply arbitrary, capricious, and inappropriate from a regulatory point of view.

Furthermore, the adverse stressors identified by DEP have themselves multiple problems and issues. For example, DEP considers the percentage of impervious surface in an OBC to be as important as the cancer risk from diesel particulate matter. N.J.A.C. 7:1C – Appendix. Likewise, comparing an OBC to the statewide percentage of tree canopy and impervious surface is unfair, given much of the State is wooded. It also fails to account for the fact the OBC may be in an urban area and cannot reasonably be compared to suburban or rural areas based upon these factors.

Similarly, these adverse stressors appear to require that urban areas are unfairly compared to rural areas, where there are likely fewer stressors. This comparison is not just apples to oranges; this is apples to sewing machines. The State's urban and rural areas are fundamentally different, and the risks, rewards, and comparisons are likewise fundamentally different, rendering the comparison manifestly unfair.

Likewise, many of the other stressors are misguided, unfounded, or simply lack a rational connection to the alleged risk. Why measure potential lead exposure by the percentage of houses built before 1950 when the New Jersey Department of Health maintains a database for childhood lead exposure, listed by municipality? Or why treat 1. known contaminated sites, 2. Classification Exception Areas ("CEAs"), and 3. deed notices as three separate adverse stressors when they functionally identify the same issue of a contaminated property, especially as many remediated sites include both a deed notice and CEA – resulting in counting as 2 stressors – while a facility which has not been addressed at all would be counted only once.

These stressors need to be better thought out and designed to take into account the reality of the situation, the property, the communities, and EJ Law.

POINT IV

ECONOMIC IMPACT SHOULD BE A CONSIDERATION IN LIGHT OF THE ECONOMIC STRESSORS EXPLICITLY INVOKED BY THE RULE

Under the EJ Law, a permit can be issued despite adverse cumulative environmental or public health stressors where DEP finds that the new facility will serve a "compelling public interest in the community where it is to be located". CITE. When the EJ rule was issued, the DEP took the standard concept

of "compelling public interest," but engrafted a significant limitation. Specifically, under N.J.A.C. 7:1C-1.5, "compelling public interest" explicitly excludes the use of the economic benefits of the new facility for the community.

This restriction is arbitrary, capricious, and counter to the intent of the EJ Law. While the law explicitly defines, at least in part, an OBC based on a low-income population and includes unemployment as an explicit stressor, the Rule specifically does not allow consideration of the precise (economic) benefits that would help raise income levels and lower unemployment. By considering potential impacts but excluding economic benefits, the Department is only looking at half of the process – the problem, but not the solution. Why deny a permit where good-paying jobs would be brought to a community because that good-pay and community benefits are the "wrong" kind, and where even the local elected officials and the community itself wants the facility to be located? The Rule, by explicitly disallowing the consideration of highly relevant factors, ensures that the economic benefits which would directly impact both the number of low-income families in the community and the unemployment rate —factors used to determine OBC status and exactly the stressors sought to be addressed by the EJ Law – are not going to happen. This makes no sense and is, therefore,

arbitrary, such that it should be deemed in violation of the EJ Law and thus not implemented.

Similarly, the Rule makes clear that, in determining whether a compelling public interest exists, consideration is given to any "significant degree of public interest in favor of or against an application from individuals residing in the overburdened community." N.J.A.C. 7:1C-5.3(d). In a real sense, the DEP has made it clear that the denial or issuance of a regulatory permit has become a "popularity contest" and a function of who can shout the loudest and the longest. No party disputes that the identification and public discussion of factual matters – from the applicant, the opposition, the DEP, or the public – absolutely should be considered when applying regulatory standards. What is neither appropriate nor a standard foundation of regulatory process, is to apply a subjective standard of community support or opposition based on who is engaged from the community and who has the loudest voice. This sets a dangerous precedent for a regulatory agency, especially one that has been tasked with making difficult decisions based on science, sound policy, and law. DEP would not decide to open a hunting season on the North Atlantic Right Whale off the Jersey Shore simply because a group of individuals gathered together and protested loudly

about it. Decisions have not, and should not, be made based on who has the loudest voice.

POINT V

IDENTIFIED STRESSORS NEED TO BE BALANCED WITH REALITY AND DE MINIUMS IMPACTS SHOULD NOT BE THE BASIS FOR DENIAL

Under the Rule, approval of a permit requires satisfaction of a "no contribution to a stressor" standard. This is both too strict and entirely arbitrary. Under the Rule, facilities can theoretically avoid certain conditions or procedures if they can demonstrate it would not "contribute" to an adverse stressor. Yet the stressors are so broadly defined (e.g. air pollution impacts, traffic) that it will be functionally impossible to satisfy this obligation. These rules also discourage facilities from changing processes or installing new equipment where the net environmental benefit may far outweigh a minimal contribution to a stressor.

Without the recognition in the Rule of a "de minimis" or minor impact threshold, especially as applied to minor modifications under an existing permit, companies will be unwilling to take reasonable and appropriate steps where they are warranted and available. Instead, DEP should continue to use its discretion and its understanding of the interplay between regulation and business needs

that are seen in the land and air permitting programs, where a certain percentage of a footprint sought to be expanded without triggering more extensive reviews, or where a "minor modification standard" explicitly exists for major air facilities. In both cases, the use of such a standard would be a fair and reasonable recognition of the necessary balance between a standard and the reality of a regulated world.

POINT VI

TOO MANY ELEMENTS OF THE RULE ARE OVERLY BROAD, VAGUE, OR ILL-DEFINED SUCH THAT THE RULE SHOULD NOT BE ENFORCED

Throughout the Rule, various terms are used that are, at best, ill-defined, and, at worst, are overly vague and far too broad. For example, the definition of a "new" facility includes both new and existing facilities, despite the EJ law making a clear distinction. This is not an insignificant matter –permits for "new" facilities can be denied whereas those for existing facilities cannot. N.J.A.C. 7:1C-5.3. Yet, despite this clear distinction, and the plain meaning of the word "new," the DEP has blurred these lines by including "existing" facilities in the definition of "new" if an existing facility has had simply a change in use or has failed to obtain a permit. N.J.A.C. 7:1C-1.5. Similarly, the term "change in use" is ambiguously and far too broadly defined as "a change in the type of operation

of an existing facility" that increases a contribution to a stressor. This is an extremely broad standard which ignores the plain language of the underlying statute. After all, under this approach, if an existing facility fully in compliance with all laws added a third shift, switched operation due to market constraints, supply chain issues, or an emergency, or changed the formula of one of its products, it could well be treated as a new facility, triggering the full EJ rule process, and be at risk of the DEP denying its permit for what might be a tiny impact on a single stressor.

In fact, this term is so vague that facility operators may not even know their actions would trigger the EJ law. This cannot be what the Legislature intended when it carved out the category of a "new facility," and is not a reasonable extrapolation by the agency in developing the Rule.

In a similar vein, the failure to obtain a permit, or letting one lapse, no matter how insignificant, harmless, or innocent, should not result in an "new facility" analysis under the EJ Rules that would, very likely, result in the facility being denied a permit and forced to shut down. Such is a solution in search of a problem. Had the Legislature intended to treat existing unpermitted or lapsed permit facilities as a new facility, it would have made that clear. The Department

therefore does not have the authority to require existing unpermitted or lapsed permit facilities to comply with the requirements for "a proposed new facility."

Furthermore, the definition of an "expansion" is also overly broad and vague – the rules define "expansion" to be a "modification" of "existing operations or footprint of development that has the potential" to increase contributions to a stressor. N.J.A.C. 7:1C-1.5. A "modification" of operations or an increase of a footprint are extremely stringent standards, especially when combined with a "potential" to contribute to the broad categories of stressors. As above, this term could include almost any change at a facility and will have facilities continually triggering the EJ rules, with its the costly and time-consuming documentation and hearing process for every minor change, thereby subjecting the facility to the denial of permits for actions that have no impact upon the legislatively-mandated concerns.

Finally, the ability of the DEP to impose conditions and restrictions upon facilities based upon the DEP's desire and interest appears to be unfettered. Without a framework or guidance, the DEP's discretion appears to be based purely upon what the DEP believes, and not upon a foundation in the EJ Law or the Rule.

POINT VII

THE ENVIRONMENTAL JUSTICE IMPACT STATEMENT CREATES FAR TOO MANY PROBLEMS

The Environmental Justice Impact Statement designed under the Rule no doubt has value, but needs to be used in a reasonable and responsible manner. No question exists that creating an environmental justice impact statement is going to be a costly and time-consuming process, with significant impact upon the facility seeking approval.

For just one example, look at the public participation process. Applicants are required to accept, consider, and address public comments from all sources, without regard to the commenter's connection to the community. Requiring applicants to entertain and address issues raised by outside interest groups, which issues may have no relevance to or regard for the community in question, places an unreasonable burden on applicants, a burden which almost guarantees that the public process will not work within the framework designed by the EJ Law. If the Impact Statement is to have the value that the DEP wants it to have, and that the EJ law intends it to have, the Rule should, at a minimum, limit the scope of public comment to "interested parties," which should be defined to include residents, property owners, and individuals or organizations with some connection to the overburdened community or municipality.

Likewise, N.J.A.C. 7:1C-4.3(b) indicates if a party makes a "material change" to its permit application after it has completed the public notice or public hearings, "the Department will require the applicant...to conduct additional public notice and public hearings." Without a clear definition, "material change" is determined entirely at the discretion of the Department. It may even include changes in the facility plans that further limit emissions or impacts of stressors. With no timeframes given for this "additional public notice and public hearing," or whether the entire process, including responses to comments, must be repeated, applicants considering changes to the permit application to address public comments or DEP suggestions will be risking an additional public notice and public hearing process. This is, in application, a certain way to ensure that a developer does not change its project based upon public input. Because there is no clear path to know when DEP will consider a change "material" and thus demand a new round of notice and hearings, resulting in additional cost and significant delay, the current Rule perversely incentivizes applicants to ignore public input, and not to work to include it.

Even worse, this requirement can set up a never-ending "redo loop" of public comment, changes in response, more public comments, more changes, even more public comments, and so on *ad infinitum*. Not only could this not be

what the Legislature intended, it provides another clear incentive to an applicant to **not** seek to address concerns by modifying an application, rather than serving as an encouragement and incentive for the applicant to work with the community. It likewise provides a clear path for those opposed to any action – not simply specific elements of the proposed facility – to "tie up" the applicant for months or years in rounds and rounds of public hearings. While not explicitly mentioned or identified in either the EJ Law or the Rule, this process is bound to be expensive for the facility. The time and cost of going through this process will be prohibitive and will only serve to encourage bad behavior by those willing to take any steps to stop any opposed activity.

The Rule needs to consider the need, value, and mischief that this proposal can provide for the process, the development, and the overall function of the EJ Law as it is put into effect. The current process will not succeed in providing a robust, informed, and engaged process without guiderails and a better assurance of actions taken in goodwill being beneficial, while limiting the ability for bad actors to hijack the process.

POINT VIII

FACILITIES NEED SUFFICIENT UNDERSTANDING OF THE DATA AND LANDSCAPE TO MAKE LONG-TERM DECISIONS

One of the purposes of a legislative and regulatory scheme is to provide "regulatory certainty" to actors and participants in a field. See, e.g., New Jersey Department of Environmental Protection, Administrative Order 2021-25, FAQ, noting that the Administrative Order was "designed to provide guidance and certainty regarding the Department's expectations for facilities located or seeking to be located in overburdened communities"[4]; Federal Pacific Electric Co. v. New Jersey Dep't of Env't Prot., 334 N.J. Super. 323, 334 (App. Div. 2000) (quoting the Legislature in noting that "it is in the interest of the environment and the State's economic health to promote certainty in the regulatory process"). In order for this type of certainty to exists, those subject to the regulation need to know what is expected, the nature of that expectation, and have the ability to operate under that understanding for a period of time such that the expectations do not change during the operation and completion of projects. Changing the underpinnings of a regulatory scheme too often is, in a very real sense, likely more problematic than not changing them often enough.

[4] Available online at: https://dep.nj.gov/wp-content/uploads/ej/docs/njdep-ao-2021-25-faqs.pdf

Under the Rule, the Department has indicated its intention to update not only the census data every two years, but also the stressors. While likely coming from noble intentions, this overly frequent update of data will create substantial uncertainty in the business community. A facility currently not in an OBC might be in two years. An OBC not considered disproportionately impacted may be so in the next updated data set. This proposed frequency of data updates will result in a facility's inability to do long-term, and even short-term, planning. Businesses need predictability if they are to invest capital and create jobs. A total lack of predictability will result in a loss of capital investment or an increase in the cost based upon the inclusion of a risk premium.

Instead, DEP should provide a clear "runway" for the process; long enough to allow for the planning, development, construction, and approval of facilities under a current regulatory regime, as well as an understanding and foundation for setting forth changes as the environment and other stressors change and are better understood in their impact upon communities in the State.

CONCLUSION

The New Jersey Business & Industry Association fully supports the concept behind the Environmental Justice Law, and agrees that the New Jersey Division of Environmental Protection can and should play an ongoing role in assisting with the implementation of the core understanding that no group or region should be unfairly impacted by environmental stressors. However, the Rule DEP has proposed is not the correct, or even a functional method for this implementation. The disengagement with the EJ Law, as well as the apparent inability to consider and work with the realities of the development, construction, operation, and function of facilities and the business community in the State, has resulted in a Rule that fails to function as an appropriate implementation of the EJ Law.

Furthermore, the Rule, crafted by DEP, will likely cause chaos and is virtually certain to create uncertainty and a multitude of issues for the business community. NJBIA does not posit a "doomsday" scenario, nor does it "cry wolf" merely to prevent enactment and implementation of any rule to implement the EJ Law. It does, however, on behalf of its member organizations and their multitude of employees, urge the court to carefully review the deep flaws in this

proposal and, having done so, reject the Rule, not for all time, but as presently written. There simply has to be a better way to achieve environmental justice.

For these reasons, and for the reasons expressed above, the New Jersey Business & Industry Association supports the Appellant in seeking to have the Rule found deficient and its implementation denied.

Respectfully submitted,

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