**To**: Melissa P. Abatemarco, Esq.
Attn.: DEP Docket No. 04-22-04, PRN 2202-082
Office of Legal Affairs
Department of Environmental Protection
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**Date**: September 2, 2022

**Re**: DEP Dkt. No. 04-22-04
Proposal Number: PRN 2022-082

On behalf of the undersigned business entities, please accept our comments on the Department of Environmental Protection's proposed Environmental Justice Rules. The business community is fully supportive of efforts to address the environmental and health challenges being faced in many areas of the state where pollution impacts and social conditions may have led to conditions with enhanced risks and a lower quality of life. We were also largely supportive of the underlying Environmental Justice Law which these proposed rules seek to implement.

However, it is our strong belief that the proposal, as currently drafted, will not serve the interests of the communities it seeks to protect, but will rather lead to less economic opportunities, more abandoned properties, with only minimal, if any, environmental and health benefits. This proposal has significantly strayed from the balanced approach required by the underlying legislation and has, instead, imposed an overly proscriptive, command and control approach that will likely prove to be unnecessarily costly and unworkable in the real world. These rules represent a lost opportunity to improve conditions in these communities.

This letter will highlight our key concerns, but it is by no means an exhaustive list. Many of the signatories to this letter will be submitting more detailed, and entity-specific letters, as will many other members of the business and labor communities. There are however, two themes that connect the concerns reflected in this letter: The rules would be more effective in achieving real improvements in communities by relying on a more cooperative and less proscriptive approach; and these rules have not only stretched the parameters of the underlying statutory authority, they go beyond legislative intent.

Geographic point of comparison – By selecting parameters intended to deem as many overburdened communities as possible as being disproportionately impacted, the proposed rules have 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, the DEP stated that the use of the parameters ultimately proposed in the rule would result in over 90% of overburdened communities (OBCs) being deemed disproportionately impacted. Given this result, despite the statute's requirement for a comparison and analysis, the rules effectively deem nearly all OBCs as disproportionately impacted. Given that two-thirds of the state's population is located in OBCs and given that much of the rest of the state is either regulated as Highlands, Pinelands, or wetlands, a large proportion of the populated and developable area of the state will be a disproportionately impacted OBC and largely precluded from any new or expanded facilities. If the Legislature had intended this result, they would have merely deemed all OBCs as disproportionate and not bothered with the comparison. 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. Thus, the OBC is not compared to an "average" community, but rather, it is compared to a community that is above average in every single category.

Zero population and adjacency – The EJ law explicitly provides that it applies only to permits for facilities located, "in whole or in part, in an overburdened community." An OBC is clearly defined in the statute as a census block group with a specified percentage of certain populations. Despite this clear legislative language, the proposed rules seek to expand the statutory definition of "overburdened community" to include all unpopulated census block groups adjacent to an OBC. This provision exceeds DEP's jurisdiction under the EJ Law, which is limited to the communities that meet the statutory criteria for an OBC. Had the Legislature intended the EJ Law to apply in unpopulated areas, it would have included it in the statutory text.

In addition, this provision is counterproductive, as one of the goals of the EJ Law is for new facilities to be located in areas that are not populated. Nevertheless, the adjacency rule makes this more difficult, by holding certain unpopulated areas to a higher standard than populated areas. This provision makes even less sense when you consider the fact that a facility adjacent to an OBC, but not in a zero population block group would not be regulated but could have as much impact as those in zero block groups. The use of zero block groups to regulate facilities under the EJ law seems to be a means to regulate certain facilities and not a logical, or legal, means to address potential impacts. This extension of the rules to block groups that do not meet the statutory definition of an OBC clearly exceeds DEP's statutory authority, is contrary to the underlying law and should not be adopted.

Renewal Provisions – The provisions for renewals are of significant concern because they impact existing facilities with substantial investments and often long histories in neighborhoods. The Legislature recognized their special nature and thus prohibited the DEP from denying their renewal permit. However, the proposed rules would effectively deny renewal applications for facilities that are fully in compliance with all other laws due to the overly burdensome requirements being imposed to obtain a renewal. Requiring major source facilities to produce a new EJIS, host public hearings, and address all public comments every five years is excessive and unduly burdensome. Given these circumstances, the compliance period for major source facilities should be extended to every other permit renewal, instead of every permit renewal, especially if the permit renewal contains few or no changes.

The proposed rules require existing facilities to propose measures to avoid "contributing" to all adverse stressors, perform a facility-wide risk assessment to limit hazardous air pollutants (HAPS) and toxic substances to negligible levels, implement a feasibility assessment to control fine particulate matter, NOx, and VOCs, and then implement control measures to address all stressors not otherwise covered. In addition, for major sources, compliance with the EJIS requirements is duplicative of many of the requirements for Title V air permits. These analyses and control measures are being imposed on existing businesses which already meet DEP's emissions requirements at a community level.

These analyses and control measures far exceed what is required by existing law and require existing businesses to go beyond the levels of emissions the DEP has already deemed to be safe even at a community level. The cost, time, and unpredictability of these requirements on existing facilities could negatively impact the ability of businesses to operate in New Jersey. The benefits are likely minimal.

We remind the Department that these facilities all meet stringent DEP standards and are willing to do more to improve conditions in their communities. This rule, however, is several steps too far.

Compelling public interest test should include economic benefits – Despite the fact that the law partly defines an OBC based on a low-income population and that the proposed rules include unemployment as a stressor, the rules specifically do not allow consideration of the economic benefits to a community from a facility, the precise benefits that would help raise income levels and lower unemployment. By considering potential impacts but not economic benefits, the DEP is only looking at one side of the ledger. In fact, these rules could have the absurd result of denying a permit even where good-paying jobs would be brought to a community where the local elected officials and even if the community itself wants the facility to be located in the OBC. The rules allow for no flexibility to consider relevant factors, especially given the economic benefits can directly impact both the number of low-income

families in the community and the unemployment rate — one of the factors used to determine OBC status and one of the environmental and public health stressors sought to be addressed by the EJ Law, respectively.

The "no contribution to a stressor" standard is too strict – In various provisions in the proposed rules, facilities can avoid certain conditions or procedures if they can demonstrate it would not "contribute" to an adverse stressor. Given the fact that many of the stressors are broadly defined (*e.g.* air pollution impacts, traffic) it will be difficult, if not outright impossible for any facility to meet this test. By having a hard and fast rule, it also discourages facilities from changing processes or installing new equipment where the net environmental benefit may far outweigh a minimal contribution to a stressor. There needs to be some de minimis or minor impact threshold, especially with regard to minor modifications under a permit, rather than a seemingly "zero impact" test. Otherwise, this provision will have no practical meaning other than to increase costs and cause confusion.

The definition of a "new" facility is overly broad and vague – The EJ law makes a distinction between a "new" facility and the expansion of an "existing" facility. This distinction is significant as permits for "new" facilities can be denied whereas those for existing facilities cannot. Yet, despite this clear distinction and 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 a change in use or failed to obtain a permit. Absent a specific statutory definition, DEP is required to follow the plain and generally understood meaning of the phrase "proposed new facility", which does not include existing unpermitted facilities. DEP therefore does not have the authority to require existing unpermitted or lapsed permit facilities to comply with the requirements for "a proposed new facility".

The term "change in use" is ambiguously and 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 and ignores the plain language of the underlying statute. "New" should be defined by the plain meaning of that word: not existing before. Under the proposed rule's definition, if an existing facility fully in compliance with all laws added a third shift, switched from making widgets to masks during a pandemic, or changed the formula of one of its products, it will be treated as a new facility, trigger the EJ rule process, and then have the DEP compelled by law to deny its permit. This term is so vague that facility operators may not even know their actions would trigger the EJ law. This is not what the EJ law intended when it carved out the category of a "new facility."

Further, failure to obtain a permit, or letting one lapse, no matter how insignificant, harmless, or innocent, should not result in an EJ new facility analysis that would, very likely, result in the facility being denied a permit and forced to shut down.

The definition of an "expansion" is too broad and vague – The proposed rules define "expansion" to be a "modification" of "existing operations or footprint of development that has the potential" to increase contributions to a stressor. 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. This term could include almost any change at a facility and will have facilities continually triggering the EJ rules. Even if no further conditions are warranted or imposed, the facility will nevertheless be required to go through the costly and time-consuming EJIS and hearing process for every minor change. This uncertainty and cost could undoubtedly make operating in OBCs difficult if not impossible. There needs to be some de minimis threshold below which the EJ rules are not triggered. Similar de minimis thresholds already exist in land use regulations where permits are based on the size of a development's expansion.

Conclusion – We believe the DEP is missing an opportunity to encourage facilities to better engage with their community neighbors and to take actions to improve conditions for the long term. Rather, the DEP has proposed rules that seek to implicitly, if not explicitly, drive businesses out of OBCs. We can have both economic opportunities and healthy communities. These rules are a step backward in achieving that goal. We recommend that substantial amendments be made to these rules before they are considered for adoption.

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