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ENVIRONMENTAL LAW

New York Adopts Nation's Strongest Environmental Justice Law

Wednesday, May 10, 2023

On March 3, New York Gov. Kathy Hochul signed the strongest environmental justice (EJ) law in the United States. While federal guidelines and the laws of some other states— notably California, Massachusetts, and Washington— require analysis, disclosure and consideration of EJ issues, only a New Jersey law adopted in 2020 imposed substantive limitations, as we discussed in our May 12, 2021, column. New York's new law— building on enactments in 2019 and 2020— is even more restrictive.

The new law—which we'll call the EJL—provides that the Department of Environmental Conservation (DEC) “shall not issue an applicable permit for a new project if it determines that the project will cause or contribute more than a de minimis amount of pollution to a disproportionate pollution burden on the disadvantaged community.” Environmental Conservation Law (ECL) Sec. 70-0118.

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By
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And
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With some exceptions discussed below, DEC may not approve a permit modification if “the issuance of the permit would significantly increase the existing disproportionate pollution burden.” A similar bar applies to permit renewals, though it is not clear how this applies to permit renewals that do not involve modifications.

The EJL also provides that DEC “shall require actions to implement any appropriate operational changes that would reduce the pollution burden on the disadvantaged community as a condition of an applicable permit, only if such actions are reasonable and practicable, as determined by the department.”

In enacting the EJL, the Legislature “declare[d] that there has been an inequitable pattern in the siting of environmental facilities in minority and economically distressed communities, which have borne a disproportionate and inequitable share of

such facilities.” All in all, the EJL addresses the long-standing concern of EJ advocates that the cumulative impacts of multiple pollution sources have not been adequately addressed in the environmental review and permitting processes, and that certain communities are overburdened by pollution.

The EJL did not follow an easy path. EJ advocates had been calling for something of this sort for years. A version, S8830/A2103-D, received final passage in the Legislature on April 27, 2022. However, various business and municipal interests strongly objected and urged Governor Kathy Hochul to veto or weaken it. Months of negotiations ensued. On December 30, 2022 – the last business day of the 2021-2022 Legislature—Hochul signed the bill (which became Chapter 840 of 2022) but issued a memorandum indicating that she had reached agreement with the leaders of the Legislature to amend the law. Thus on

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Feb. 15, 2023, both houses of the Legislature passed a new bill (S1317/A1286), and on March 3, Hochul signed it into law as Chapter 49 of 2023. The effective date was pushed back from June 2023 to January 2025; DEC was afforded somewhat more flexibility; the types of DEC permits to which it applies were restricted; and other revisions were made. The EJL as described below reflects the 2023 amendments.

Applicability

The EJL applies when certain actions may contribute to pollution in any “disadvantaged community.” It incorporates the definition of that term found

in New York’s Climate Leadership and Community Protection Act (CLCPA)—“communities that bear burdens of negative public health effects, environmental pollution, impacts of climate change, and possess certain socioeconomic criteria, or comprise high-concentrations of low- and moderate-income households.” ECL Sec. 75-0101.5. The CLCPA, among other EJ provisions, dictates that such communities are to receive at least 35% with a goal of 40% “of the overall benefits of spending on clean energy and energy efficiency programs, projects or investments in the areas of housing, workforce development, pollution reduction, low income energy assistance, energy, transportation and economic development.” ECL Sec. 75-0117.

The CLCPA created a Climate Justice Working Group and gave it the task of establishing criteria to identify disadvantaged communities based on certain specified factors. ECL Sec. 75-0111. On March 27, 2023, the Working Group approved the criteria. DEC has posted a map of the areas that meet these criteria (35% of census tracts in the state).

The EJL’s substantive criteria apply only to certain DEC permits: those for water pollution; air pollution; liquified natural and petroleum gas; waste transporters; certain solid and hazardous waste management facilities; and water withdrawal of over 20 million gallons per day for cooling purposes.

Other EJ provisions—none as strong as those in the EJL—were enacted by the Legislature in 2019 and 2020, as discussed in our May 12, 2021, column.

Existing Burden Reports

The EJL directs DEC to require applicants to prepare an “existing burden report” for a new project subject to an applicable permit if the project “may cause or contribute more than a de minimis amount of pollution to any disproportionate burden

on a disadvantaged community.” Such reports are also required for permit modifications or renewals, except that for those, DEC “may elect not to require” a report “if the permit would serve an essential environmental, health, or safety need of the disadvantaged community for which there is no reasonable alternative.” An existing burden report is also not required for permit renewals if one has been prepared for the permit within the previous ten years.

Were it not for this exception, it might not be possible to renew the permits for facilities like wastewater treatment plants that indisputably serve an essential need of the community but cannot readily be relocated.

The EJL requires DEC, in consultation with the Department of Health, to develop the scope of the existing burden report. Among the items to be contained in the report are “relevant baseline data on existing burdens,” “the environmental or public health stressors already borne by the disadvantaged community as a result of existing conditions,” “the potential or projected contribution of the proposed action to existing pollution burdens in the community,” and “existing and potential benefits of the project to the community including increased housing supply, or alleviation of existing pollution burdens that may be provided by the project.”

The bill as passed by the Legislature in April 2022 contained considerable detail on what the existing burden reports must contain (including considerable new baseline monitoring), but that detail was removed in the 2023 amendment, leaving it to DEC to decide what must go into these reports.

SEQRA Amendments

The EJL amends the State Environmental Quality Review Act (SEQRA), the state law that requires environmental impact statements (EISs)

for certain actions that could have a significant impact on the environment.

Back in 2003 the DEC commissioner issued a policy statement, Environmental Justice and Permitting, that called for EJ analysis as part of the SEQRA and permitting processes. Several judicial and administrative decisions have endorsed this idea, and many EISs have discussed the issue. With the enactment of the EJL, these requirements are now written into the statute. However, the commissioner’s policy statement remains in effect and covers geographic areas that are not identical to those in DEC’s new map.

The EJL adds to the criteria for whether an action requires an EIS “whether it may cause or increase a disproportionate pollution burden on a disadvantaged community.” It also adds to the required contents of EISs “effects of any proposed action on disadvantaged communities, including whether the action may cause or increase a disproportionate pollution burden on a disadvantaged community.”

New Jersey Precedent

The EJL was to a certain extent modeled after New Jersey’s P.L. 2020, Chapter 92, which Gov. Phil Murphy signed into law on Sept. 18, 2020. That law requires the preparation of “environmental justice impact statements” that are somewhat similar to New York’s “existing burden reports.” It provides that the New Jersey Department of Environmental Protection (NJDEP) “shall, after review of the environmental justice impact statement ... deny a permit for a new facility upon a finding that approval of the permit, as proposed, would, together with other environmental or public health stressors affecting the overburdened community, cause or contribute to adverse cumulative environmental or public health stressors in the overburdened community that are higher than those borne by other communities.”

However, the New Jersey law contains an exception to this bar—where NJDEP “determines that a new facility will serve a compelling public interest in the community where it is to be located, the department may grant a permit that imposes conditions on the construction and operation of the facility to protect public health.” It also provides that NJDEP may impose conditions on permit renewal or facility expansion to protect public health.

Thus the New York law is stronger than New Jersey’s because New Jersey allows permits for new facilities that serve a compelling public interest; in New York, there is no such exception for new facilities, but only for permit renewals and modifications. Moreover, the New Jersey law allows NJDEP only to impose conditions on permit renewals and modifications, while the New York law requires denial of permit renewals and modifications unless they “would serve an essential environmental, health or safety need of the disadvantaged community for which there is no reasonable alternative.”

On April 17, 2023, NJDEP adopted detailed regulations implementing the New Jersey law. Despite the differences between the two laws, these regulations may be helpful in the drafting of New York’s regulations.

Presidential Executive Order

Amid all this state-level activity, a great deal is happening at the federal level. Most recently, on April 21, 2023, President Joseph Biden held a Rose Garden ceremony to sign his Executive Order on Revitalizing Our Nation’s Commitment to Environmental Justice for All. The new order builds upon and goes beyond Executive Order 12898, the EJ executive order that President William J. Clinton

issued on February 11, 1994, and his own Executive Order 13985, Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, which he signed on his Inauguration Day, Jan. 20, 2021. The new order announces “a whole-of-government approach to environmental justice.” Among many other things, it establishes a White House Office of Environmental Justice and requires each agency to prepare an Environmental Justice Strategic Plan within 18 months, and every four years thereafter.

Next Steps

The enactment of the New York and New Jersey laws stemmed in large part from community organizing over a period of years. The leading voices behind the New Jersey Cumulative Impacts Law included the Ironbound Community Corporation, New Jersey Environmental Justice Alliance, Southward, Environmental Alliance, and Clean Water Action New Jersey. In New York, the leading groups were WE ACT for Environmental Justice and South Bronx United, with the support of numerous other organizations across New York. These groups continue to press their elected officials for still stronger laws. As this article goes to press, the New York Legislature has just adopted another important law that also resulted from years of organizing—a ban on natural gas hookups in most new buildings.

DEC was already very busy drafting regulations to implement the scoping plan for the CLCPA. DEC must now draft regulations to implement the EJJL, including changes to the regulations and guidance under SEQRA and the Uniform Procedures Act. These regulations are certain to be controversial. Many hearings and other consultations are on the horizon.