Superior Court of New Jersey

Appellate Division

Docket No. A-002959-22

IN THE MATTER OF ADOPTION OF N.J.A.C. 7:1C.	:	CIVIL ACTION
	:	ON APPEAL FROM A FINAL AGENCY ACTION OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION OF NEW JERSEY
	:	AGENCY NO. 04-22-04

BRIEF ON BEHALF OF APPELLANT ENGINEERS LABOR EMPLOYER OF THE INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 825

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PRELIMINARY STATEMENT

Appellant Engineers Labor Employer Cooperative of the International Union of Operating Engineers Local 825 ("Appellant" or "ELEC") appeals the New Jersey Department of Environmental Protection's ("NJDEP") adoption of N.J.A.C. 7:1C (the "Rules") which implement the Environmental Justice Law N.J.S.A. 13:1D-157 to -161 (the "EJ Law"). The EJ Law imposes additional procedures and requirements for environmental permit applications for certain categories of facilities. N.J.S.A. 13:1D-160. In essence, the purpose of the additional requirements is for the NJDEP to consider whether a proposed permit for a facility in an "overburdened community" will cause "adverse cumulative environmental or public health stressors" in that "overburdened community" compared to other areas in New Jersey. If the NJDEP determines that such disparate impacts exist, the EJ Law grants the NJDEP with limited authority to impose certain measures on the facility seeking a permit.

ELEC challenges the Rules as they (i) are ultra vires by exceeding the plain language and scope of the EJ Law; (ii) are unconstitutionally vague; (iii) are arbitrary and capricious; and (iv) rely on specific regulatory requirements necessary to implement the Rules that were not properly included in or otherwise made subject to formal rulemaking under New Jersey's Administrative Procedure Act. As a whole, the Rules attempt to provide the NJDEP with an

arsenal of loopholes and indefinite standards that will be used to issue de facto permit denials to any kind of facility in an overburdened community, despite the clear parameters the EJ Law sets on the NJDEP's delegated authority. While the EJ Law pursues the worthy goal of improving environmental conditions in the State's most disadvantaged communities, the EJ Law is not intended to allow the NJDEP to overregulate long-existing businesses into extinction by way of administrative fiat, much less to prevent the construction of new facilities by imposing requirements beyond what the EJ Law allows.

As set forth below, several provisions of the Rules should be stricken. First, the Rules invent several terms and definitions that greatly exceed statutory authority and are unconstitutionally vague. Collectively, the Rules' definitions for "new facility," "existing facility," "expansion," and "change in use" are designed to provide the NJDEP with the ability to deny permits for long-existing facilities, which is in direct violation of the EJ Law's mandate that the NJDEP can only deny permits for new facilities that create a disproportionate impact and cannot demonstrate a "compelling public interest" in the overburdened community. Additionally, the NJDEP's definitions for "geographic point of comparison," and "compelling public interest," which excludes economic considerations for new facilities, exceed statutory authority, frustrate the EJ Law's purpose, and are arbitrary, capricious, and unreasonable.

Second, the NJDEP failed to subject one of the Rules' most critical components, the Environmental Justice Mapping, Assessment and Protection Tool, to the procedures required under the New Jersey Administrative Procedure Act. Third, without any legislative authority, the Rules create a new air pollution control standard known as Localized Impact Control Technology for new and expanded major source facilities in overburdened communities, which implement the strictest measures for emissions control available and exclude economic considerations. This new standard also conflicts with the well-established air pollution control standards created by the Legislature under the New Jersey Air Pollution Control Act. Fourth, the Rules impermissibly expand the scope of the EJ Law by applying its requirements to adjacent "zero population block groups." Fifth, the Rules' attempt to delegate the NJDEP's authority under the EJ Law to local environmental justice requirements is ultra vires. Sixth, the vague and indefinite "control measures" and "conditions" created by the Rules exceeds and alters the scope of the EJ Law.

Finally, the Rules' compilation of "environmental and public health stressors" exceeds statutory authority and is arbitrary. In addition, certain public health matters dealing with community planning and related medical and sociological impacts are arbitrary and capricious, and outside the scope of the NJDEP's expertise.

PROCEDURAL HISTORY AND STATEMENT OF FACTS[1]

I. THE PARAMETERS OF THE ENVIRONMENTAL JUSTICE LAW

On September 18, 2020, the New Jersey Legislature enacted the Environmental Justice Law, codified at N.J.S.A. 13:1D-157 to -161 (hereinafter the "EJ Law"). The EJ Law requires that certain facilities comply with additional permit procedures when seeking "a permit for a new facility or for the expansion of an existing facility, or any application for the renewal of an existing facility's major source permit, if the facility is located, or proposed to be located, in whole or in part, in an overburdened community[.]" N.J.S.A. 13:1D-160(a); see also N.J.S.A. 13:1D-158 (setting forth statutory definitions, listing facility categories, and listing the existing environmental permit schemes impacted by the EJ Law).

The EJ Law defines an "overburdened community" 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.] [2]

[1] The procedural history and statement of facts are combined to avoid repetition.

[2] N.J.S.A. 13:1D-158 sets forth statutory definitions for "limited English proficiency" and "low-income households."

Pursuant to the EJ Law, the NJDEP must designate overburdened communities in the State. N.J.S.A. 13:1D-159. As set forth above, the EJ Law expressly provides that the additional requirements apply to permit applications in overburdened communities for (i) new facilities, (ii) expansions of existing facilities, and (iii) the renewal of existing facilities' major source permits.[3] N.J.S.A. 13:1D-160.

More specifically, the EJ Law requires that facilities seeking applicable environmental permits prepare an "environmental justice impact statement that assesses the potential environmental and public health stressors associated with the proposed new or expanded facility, or with the existing major source, as applicable, including any adverse environmental or public health stressors that cannot be avoided if the permit is granted, and the environmental or public health stressors already borne by the overburdened community as a result of existing conditions located in or affecting the overburdened community[.]" N.J.S.A. 13:1D-160(a)(1). "Environmental and public health stressors" are "sources of environmental pollution" as listed in the EJ Law's definitions at N.J.S.A. 13:1D-158.

[3] "Major Source permit" is defined by the federal "Clean Air Act," 42 U.S.C. §§ 7401-7675, and in rules and regulations adopted by the NJDEP pursuant to New Jersey's "Air Pollution Control Act," N.J.S.A. 26:2C-1 to -68, or for a facility which directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant, or other applicable criteria set forth in the federal Clean Air Act.

Moreover, the EJ Law requires that the environmental justice impact statement be transmitted to the NJDEP, applicable local government, and the public of the overburdened community for review and comment, and that the permit applicant follow certain notice requirements leading up to a public hearing. N.J.S.A. 13:1D-160(a)(2)-(3). Following the public hearing, the NJDEP is required to consider the testimony presented and any written comments received, and evaluate the issuance of, or conditions to, the permit as necessary to avoid or reduce the adverse environmental or public health stressors affecting the overburdened community. N.J.S.A. 13:1D-160(a)(3).

With respect to permit applications for "new facilities," the NJDEP shall, after review of the environmental justice impact statement and any other relevant information, including testimony and written comments received at the public hearing, "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 within the State, county, or other geographic unit of analysis as determined by the department pursuant to rule, regulation, or guidance (. . .)." N.J.S.A. 13:1D-160(c). The exception to this directive is if the NJDEP "determines that a new facility will serve a compelling public

interest in the community where it is to be located." Ibid. In such a case, the NJDEP "may grant a permit that imposes conditions on the construction and operation of the facility to protect the public health." Ibid.

However, with respect to permit applications for the "expansion of existing facilities," NJDEP may only, after review of the environmental justice impact statement and any other relevant information, including testimony and written comments received at the public hearing, "apply conditions to a permit for the expansion of an existing facility, or the renewal of an existing facility's major source permit, concerning the construction and operation of the facility to protect public health, upon a finding that approval of a permit or permit renewal, 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 within the State, county, or other geographic unit of analysis [. . .]." N.J.S.A. 13:1D-160(d). As such, the EJ Law expressly prohibits the NJDEP from denying permits to existing facilities upon findings of adverse environmental or public health stressors impacting the overburdened community. The EJ Law only provides the NJDEP the ability to apply conditions for the expansion of an existing facility, or the renewal of an existing facility's major source

permit, concerning construction and operation to protect public health related to the expansion or renewal.

II. THE NJDEP'S RULES IMPLEMENTING THE ENVIRONMENTAL JUSTICE LAW

On June 6, 2022, the NJDEP published proposed regulations to implement the EJ Law on the New Jersey Register. 54 N.J.R. 971 (June 6, 2022). Pa1. On September 2, 2022, and September 6, 2022, ELEC submitted written comments to the proposed regulations with a group of industry stakeholders. Pa32, Pa36. On September 4, 2022, ELEC submitted separate written comments raising concerns regarding the *ultra vires* scope of the proposed regulations. Pa40.

As set forth in ELEC's September 4, 2022, comment letter, ELEC is a labor-management organization representing the combined interests of more than 8,000 members of the Operating Engineers Local 825 and the nearly 1,000 signatory contractors who employ them throughout New Jersey. Pa40. ELEC's members and contractors are responsible for billions of dollars in commercial, industrial, highway, utility and institutional construction projects annually. Ibid. ELEC also invests heavily in two state-of-the-art training facilities, apprenticeships and continuing education and credentialing to ensure a highly skilled and well-trained workforce. Ibid.

On March 9, 2023, after public notice and comment, the NJDEP adopted the Rules, codified at N.J.A.C. 7:1C, with an effective date of April 17, 2023. 55 N.J.R. 661(b) (April 17, 2023); Pa99.

On June 1, 2023, ELEC filed a Notice of Appeal and Case Information Statement challenging the Rules because they exceed statutory authority; are arbitrary, capricious, and unreasonable; and contain provisions that violate New Jersey's Administrative Procedure Act. See Pa249.

LEGAL ARGUMENT

I. STANDARD OF REVIEW

Courts generally defer to agency decisions and presume that the regulations they pass are valid because "agencies have the specialized expertise necessary to enact regulations dealing with technical matters and are 'particularly well equipped to read and understand the massive documents and to evaluate the factual and technical issues that ... rulemaking would invite.'" In re Freshwater Wetlands Prot. Act Rules, 180 N.J. 478, 488-89 (2004) citing N.J. State League of Municipalities v. Dep't of Cmty. Affairs, 158 N.J. 211, 222 (1999); see also Bergen Pines Cnty. Hosp. v. N.J. Dep't of Human Servs., 96 N.J. 456, 474 (1984).

However, while it is recognized that certain subjects are within the agency's particular competence, "less deference" is given to "newly minted

agency interpretation" such as agency interpretations that have not been subject to judicial scrutiny or time-tested agency interpretation. In re N.J.A.C. 17:2-6.5, 468 N.J. Super. 229, 233-34 (App. Div. 2021) (citing Kasper v. Bd. of Trs. Of the Tchrs.' Pension & Annuity Fund, 164 N.J. 564, 581 (2000)). In addition, no deference to agency policymaking and statutory interpretation is given when a regulation is contrary to the agency's statutory authority. See, e.g., In re Agric., Aquacultural, & Horticultural Water Usage Certification Rules, 410 N.J. Super. 209, 223 (App. Div. 2009) ("[A]dministrative agencies derive their authority from legislation, the terms of which they cannot alter, nor are they permitted to frustrate the legislative purpose.") (Internal citations omitted). Similarly, regulations that are promulgated without explicit legislative authority and implicate "important policy questions," are to be decided by the Legislature. See, e.g., In re Centex Homes, LLC, 411 N.J. Super. 244, 252 (App. Div. 2009); see also Borough of Avalon v. New Jersey Dep't of Envtl. Prot., 403 N.J. Super. 590, 607 (App. Div. 2008) ("In determining whether a power that has not been expressly granted should be implied, our courts have distinguished between rules or other agency actions that involve an assertion of authority that is simply 'incidental' to its expressly granted powers and ones that implicate 'an important policy question.'") (Internal citations omitted.) Furthermore, a regulation must be set aside if it is "arbitrary and capricious," or "alters the terms of the statute and frustrates the policies

embodied in it." See, e.g., In re Agric., 410 N.J. Super. at 223.

Finally, even if a regulation falls within the scope of the agency's legislative authority, it will nonetheless be invalidated if the agency "significant[ly]" fails "to provide ... regulatory standards that would inform the public and guide the agency in discharging its authorized function[.]" N.J. Soc'y for Prevention of Cruelty to Animals v. N.J. Dep't of Agric., 196 N.J. 366, 386 (2008) (quoting Lower Main St. Assocs. v. N.J. Hous. & Mortg. Fin. Agency, 114 N.J. 226, 236 (1989)) (alterations in original); see also In re Agric., 410 N.J. Super. at 224.

II. THE RULES INVENT CONTROLLING TERMS AND DEFINITIONS THAT MUST BE STRICKEN AS ULTRA VIRES (99a)

In interpreting statutory language, courts strive to effectuate the Legislature's intent. See, e.g., Cashin v. Bello, 223 N.J. 328, 335 (2015); DiProspero v. Penn, 183 N.J. 477, 492 (2005). "When construing a statute, courts initially consider the statute's plain meaning." New Jersey State League of Municipalities v. Dep't of Cmty. Affairs, 158 N.J. 211, 224 (1999) (citations omitted); see also DiProspero, 183 N.J. at 492 (the "best indicator" of intent is the statute's plain meaning). "[U]nless inconsistent with the manifest intent of the legislature," or "another or different meaning is expressly indicated," courts give legislation's words and phrases "their generally accepted meaning, according to the approved usage of the language." N.J.S.A. 1:1-1; TAC Associates v. New Jersey Dep't of Envtl. Prot., 202

N.J. 533, 541 (2010) ("In reading the language used by the Legislature, the court will give words their ordinary meaning absent any direction from the Legislature to the contrary.") Moreover, statutory language is construed "in context with related provisions so as to give sense to the legislation as a whole." Spade v. Select Comfort Corp., 232 N.J. 504, 515 (2018) (citations omitted). "If the plain language leads to a clear and unambiguous result, then [the] interpretive process is over." TAC Associates, 202 N.J. at 541; see also Johnson v. Roselle EQ Quick LLC, 226 N.J. 370, 386 (2016).

As set forth above, the EJ Law authorizes the NJDEP to deny a permit for a new facility if approving the permit will cause or contribute to adverse cumulative environmental or public health stressors in the overburdened community that are higher than those borne by other communities with the State, county, or other geographic unit of analysis as determined by the NJDEP. N.J.S.A. 13:1D-160(c). The exception for this mandatory denial is if the applicant can demonstrate that the new facility will serve a "compelling public interest" in the community where it is to be located. If a "compelling public interest" is demonstrated, the NJDEP may grant a permit with conditions on the construction and operation of the facility to protect public health. N.J.S.A. 13:1D-160(c).

However, the EJ Law does not allow the NJDEP to deny a permit for the

"expansion" of an "existing facility," or the "renewal of an existing facility's major source permit," upon a finding that approval of a permit or permit renewal would cause or contribute to disparate adverse cumulative environmental or public health stressors in the overburdened community. N.J.S.A. 13:1D-160(d). Instead, the NJDEP may only apply permit conditions to the construction and operation of a facility to protect public health. Ibid.

Despite the EJ Law's clear prohibition against the denial of permits for existing facilities, the Rules invent several terms and definitions that are intended to provide the NJDEP with the ability to deny permits for existing facilities. These definitions are in direct violation of the EJ Law's mandate that the NJDEP is only authorized to deny permits for new facilities that create a disproportionate impact and cannot demonstrate a "compelling public interest" in the overburdened community.

A. New Facility, Existing Facility, and Change in Use

The Rules create the following definitions for the terms "new facility" and "existing facility," and invent a new term and definition for "change in use":

> "New facility" means: 1) any facility that has not commenced operation as of April 17, 2023; or 2) **a change in use** of an existing facility. For the purposes of this chapter, an existing facility that has operated without a valid approved registration or permit required by the Department prior to April 17, 2023, shall be considered a new facility.

> "Existing facility" means a facility, or any portion thereof, which, as of April 17, 2023, possesses a valid approved registration or permit from the Department for its operation or construction and is in operation.
>
> "Change in use" means **a change in the type of operation** of an existing facility that increases the facility's contribution to any environmental and public health stressor in an overburdened community, such as a change to waste processed or stored.
>
> [N.J.A.C. 7:1C-1.5 (emphasis added).]

These terms and definitions must be stricken as exceeding statutory authority for the following two reasons. First, the term "change in use" seeks to conflate an "existing facility" as a "new facility" if a facility makes any "change in the type of operations to any environmental and public health stressor in an overburdened community[.]" This term is impermissibly vague and exceeds the EJ Law's plain language stating that the NJDEP does not have the authority to deny a permit for an "existing facility." Notably, the Rules do not provide an exception for any potential *de minimis* increase of environmental and public health stressors. Accordingly, any operation changes with the potential to increase the any one of the multitudes of environmental and public health stressors set forth in the Rules' Appendix can be interpreted by the NJDEP as a "change in use" of the existing facility. This combination of terms effectively creates a loophole whereby the NJDEP can deny a permit for a long-existing facility by arbitrarily construing it as a "new facility."

Second, these definitions ignore the plain and ordinary meanings of the terms "new facility" and "existing facility." Specifically, the EJ Law's use of these terms clearly focuses on whether facilities were constructed and operating at the time of the EJ Law's effective date, April 17, 2023. See N.J.S.A. 13:1D-160(c) (if a new facility with disproportionate impacts in an overburdened community meets a compelling public interest, "the department may grant a permit that imposes conditions on the **construction and operation** of the facility [. . .]") (emphasis added); N.J.S.A. 13:1D-160(d) (the department may "apply conditions to a permit for the expansion of an existing facility [. . .] concerning the **construction and operation** of the facility [. . .]") (emphasis added).

As such, the Rules' provision that an "existing facility" is deemed a "new facility" if the NJDEP determines it lacked a "valid approved registration or permit required by the [NJDEP] prior to April 17, 2023" is an administrative fabrication outside the EJ Law's scope. The plain and ordinary meaning of "new" involves "having recently come into existence" or "not existing before." Merriam-Webster Online Dictionary and Oxford English Dictionary Online, https://www.merriam-webster.com/dictionary/new (last visited Feb. 1, 2024). Accordingly, the NJDEP's invention of the terms "new facility," "existing facility," and "change in use" are ultra vires, ignore these terms' ordinary meaning and significance, and impermissibly enlarge NJDEP's authority outside the EJ Law's clear scope and

limitations. See DiProspero, 183 N.J. at 492 (courts ascribe "the statutory words their ordinary meaning and significance"); and In re N.J.A.C. 12:17-9.6 ex rel. State Dept. of Labor, 395 N.J. Super. 394, 406 (App. Div. 2007) ("when the provisions of the statute are clear and unambiguous, a regulation cannot amend, alter, enlarge or limit the terms of the legislative enactment.")

Furthermore, the Third Circuit's analysis in a similar case under the Clean Air Act is instructive. In Port Hamilton Ref. & Transp., LLLP v. U.S. Envtl. Prot. Agency, 75 F.4th 166, 173 (3d Cir. 2023), reh'g granted, 86 F.4th 1031 (3d Cir. 2023), and on reh'g, 87 F.4th 188 (3d Cir. 2023), the U.S. Environmental Protection Agency ("EPA") similarly asserted that it should be permitted leeway in expanding the definition of the term "construction" to include treating long-existing facilities as new facilities upon their restart. Specifically, under the EPA's so-called "Reactivation Policy," an existing facility was deemed "new" if the EPA concluded it had previously "shut down" and restarted. Id. at 168. In defending its regulatory interpretation, the EPA contended that the Clean Air Act's definition of "construction" was ambiguous as "it failed to address exactly what sort of construction triggers" the need for a Prevention of Significant Deterioration ("PSD") permit under the Reactivation Policy, and argued that the phrase "construction is commenced" could refer to "construction commenced at a shutdown facility in preparation for a restart." Id. at 173. The Third Circuit held that the EPA's

interpretation exceeded its statutory authority, and that the "type of construction that requires a PSD permit is construction commenced (. . .) that brings a major emitting facility into existence." Ibid.

Under the EJ Law, the clear statutory distinction between "new facilities" and "existing facilities" demonstrates a legislative intent to distinguish "new facilities" as those which are constructed and brought into existence after April 17, 2023, and "existing facilities" that have physically existed in an overburdened community, but may require additional approvals or permits to restart or expand operations.

Alternatively, any argument that these statutory terms are ambiguous and properly defined by the NJDEP's interpretation of legislative history must fail. A review of the legislative history reinforces the statutory language and intent to clearly delineate the EJ Law's requirements between "new facilities" and "existing facilities." See DiProspero, 183 N.J. at 492-493 ("[I]f there is ambiguity in the statutory language that leads to more than one plausible interpretation, [a court] may turn to extrinsic evidence, 'including legislative history, committee reports, and contemporaneous construction'") (citation omitted); see also TAC Assoc., 202 N.J. at 542 ("[A]mendments carry great weight in determining the intention of the original statute.").

In the instant case, the Legislature amended the draft EJ Law on July 20,

2020, to restrict permit denials to new facilities only upon a finding of disproportionate impacts. Assemb. Environment and Solid Waste Comm. Statement to S. 232, 3-4 (July 20, 2020), Pa290-293 ("delete[s] the requirement for the [NJDEP] to deny a permit for the expansion of an existing facility, or apply new conditions to the renewal of an existing facility's major source permit, and instead provide[s] that the [NJDEP] may apply conditions to such a permit.") See also Senate Committee Substitute [First Reprint] to S. 232, 6 (June 25, 2020), Pa282, Pa287 (modifying § c and creating § d in the draft EJ Law to distinguish the requirements between new facilities and existing facilities). As set forth in N.J.S.A. 13:1D-160(c) & (d), the EJ Law clearly states and intends that the NJDEP can only impose conditions on the construction and operation of existing facilities, not issue permit denials. The Legislature's distinction of the regulatory requirements between "new facilities" and "existing facilities" clearly sought to maintain a balance between maintaining and improving long-existing facilities in overburdened communities in which the State's economy has relied upon, and creating additional environmental restrictions to protect overburdened communities from the construction of new facilities in those communities which may contribute to or create disparate environmental and public health impacts. See, e.g., N.J.A.C. 7:1-1.1(a) ("[T]he Department's mission is advanced through effective and balanced implementation and enforcement of

environmental laws to protect these resources and the health and safety of New Jersey's residents. At the same time, it is crucial to understand how actions of the Department can impact the State's economic growth[.]")

Accordingly, the Rules' definitions for "new facility," "existing facility," and "change in use" must be stricken as ultra vires and contrary to the NJDEP's statutory authority. See, e.g., In re Agric., 410 N.J. Super. 223. Moreover, these definitions must be stricken as arbitrary and capricious, and so broad and open-ended that they violate due process by failing to provide clear regulatory standards to the regulated public. See, e.g., N.J. Soc'y for Prevention of Cruelty to Animals, 196 N.J. 366, 386 (2008).

B. Expansion of an Existing Facility

As set forth above, the EJ Law allows the NJDEP to issue conditions for the "expansion of an existing facility (. . .) concerning the construction and operation of the facility to protect public health, upon a finding that approval of a permit" would cause or contribute to disparate impacts to the overburdened community. N.J.S.A. 13:1D-160(d). However, the Rules invent an ultra vires definition of "expansion" which seeks to provide the NJDEP with unrestrained authority to impose additional permit conditions on any existing facility which requests to implement modifications to its processes with any "potential" to contribute to any environmental and public

health stressor in an overburdened community. Specifically, the Rules define "expansion" as:

> a **modification** or expansion of existing operations or footprint of development that has the **potential** to result in an increase of an existing facility's contribution to any environmental and public health stressor in an overburdened community, but shall not include any such activity that decreases or does not otherwise result in an increase in stressor contributions.
>
> [N.J.A.C. 7:1C-1.5 (emphasis added).]

As such, the Rules seek to create another loophole by which the NJDEP can impose additional conditions on an "existing facility" on the speculative basis that a process "modification" may have the "potential" to increase environmental impacts.

Any argument that the statutory term for "expansion" is also ambiguous and is properly interpreted by the Rules' definition must fail. A review of the legislative history demonstrates that the statutory definition of "expansion" is deemed to mean construction which would enlarge the footprint of the existing facility. Pa282, Pa287, Pa290-293. The Rules' definition of "expansion" must be stricken as arbitrary and capricious, unconstitutionally vague, and ultra vires.

C. Geographic Point of Comparison

Pursuant to the EJ Law, the NJDEP shall deny permits for a new facility, or apply conditions to a permit for the expansion of an existing facility, upon a finding that approval of the permit would "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 **geographic** unit of analysis as determined by the department[.]" See N.J.S.A. 13:1D-160(c) & (d) (emphasis added). As such, the EJ Law calls for a comparison between the overburdened community and all other communities, regardless of whether they are overburdened or not, in the geographic unit for comparison, whether it is the entire State, county, or other geographic region selected by the NJDEP (e.g., potential demarcations for northern, central, and southern New Jersey).

However, the Rules ignore the EJ Law's comparison requirement, and improperly transforms the express "geographic unit" comparison into a strictly economic or social inequity comparison by the arbitrary exclusion of other overburdened communities within the geographic region. Specifically, the Rules define "geographic unit of comparison" as:

> the comparison area and value used to determine whether an overburdened community is subject to one or more adverse environmental and public health stressors and is determined by selecting the lower value

> of the State or county's 50th percentile, calculated **excluding the values of other overburdened communities.**
>
> [N.J.A.C. 7:1C–1.5 (emphasis added).]

By excluding the values of other overburdened communities, the NJDEP creates a way to avoid its statutory obligation to do a comparison between overburdened communities and the "average" community, containing both non-overburdened and overburdened communities, within a specific geographic area (State, county, or other geographical boundaries designated by the NJDEP). As such, the Rules' definition greatly exceeds the EJ Law's language and scope.

In addition, the Rules' creation of this term sets forth an improper regulatory presumption that all "overburdened communities" are subject to the multitude of environmental and public health stressors in comparison to other communities in the State. Specifically, the Rules require a comparison of the stressors in overburdened communities to the lower of (a) the 50th percentile for that stressor in the State or (b) the 50th percentile for that stressor in the county. N.J.A.C. 7:1C–1.5. By excluding all overburdened communities from the State and county units of comparison, the NJDEP arbitrarily reduces the "50th percentile" for comparison as required by the EJ Law, as the comparison is no longer between the overburdened community and the "average community" in the area. The overburdened community will instead be compared to the 50th

percentile in New Jersey's most rural and environmentally healthy areas, which are by no means "average" communities in New Jersey as they likely contain few environmental or public health stressors compared to the rest of the State.

NJDEP's expansion of the point of comparison beyond the boundaries of a particular County also conflicts with the carefully crafted planning criteria in the Solid Waste Management Act, N.J.S.A. 13:1E-1 to -48. That Act requires each of the State's twenty-one counties and the New Jersey Sports and Exposition Authority (as successor to the Hackensack Meadowlands Development Commission) to develop a plan and to site facilities within their geographic jurisdiction to properly dispose of the solid waste generated within their jurisdiction. N.J.S.A. 13:1E-20. In determining where to site facilities, many of which would be subject to the EJ Law, counties have no authority to go beyond their geographic boundaries. This further illustrates the problem NJDEP has created with its point of comparison definition which creates a conflict with the Solid Waste Management Act.

Accordingly, the definition of geographic point of comparison must be stricken as it is arbitrary and capricious, and conflicts with the EJ Law's clear statutory mandates.

D. Compelling Public Interest

The EJ Law requires that the NJDEP deny a permit for a new facility that creates a disproportionate impact unless the NJDEP determines the new facility will serve a "compelling public interest in the community where it is to be located." N.J.S.A. 13:1D-160(c). In such cases, the NJDEP may grant a permit that imposes conditions on the construction and operation of the facility to protect the public health. Ibid.

The Rules define "compelling public interest" as:

> [A] demonstration by a proposed new facility that primarily serves an essential environmental, health, or safety need of the individuals in an overburdened community, is necessary to serve the essential environmental, health, or safety need, and that there are no other means reasonably available to meet the essential environmental, health, or safety need. **For purposes of this chapter, the economic benefits of the proposed new facility shall not be considered in determining whether it serves a compelling public interest in an overburdened community.**
>
> [N.J.A.C. 7:1C-1.5 (emphasis added).]

The Rules' definition results in an arbitrary exclusion of the consideration of economic benefits to the local community from the proposed new facility and must be stricken as arbitrary and capricious and for exceeding and altering the EJ Law's clear terms.

The EJ Law seeks to ameliorate the historical economic and environmental wrongs to overburdened communities. N.J.S.A. 13:1D-157 ("the legacy of siting sources of pollution in overburdened communities continues to pose a threat to the health, well-being, and **economic success** of the State's most vulnerable residents; and that **it is past time for the State to correct this historical injustice**.") (Emphasis added.) As such, the EJ Law defines an "overburdened community" as including a census block group in which "at least 35 percent of the households qualify as low-income households." N.J.S.A. 13:1D-158.

Notably, the Rules consider unemployment and education as public health stressors to be assessed under the EJ Law. N.J.A.C. 7:1C Appendix. However, the Rules assert that the economic benefits a new facility may have by employing local members of the community, or by increasing transactions with other local businesses in the overburdened community, should not be considered in determining whether a "compelling public interest" has been met. As such, the NJDEP's arbitrary exclusion of economic benefits from the definition of a "compelling public interest" directly obstructs the EJ Law's goal to ameliorate one of the main factors that the Legislature has determined is causing the "overburdening" of communities.

The Rules' arbitrary exclusion of economic benefits in the assessment of "compelling public interest" is also contrary to the Legislature's use of that term in other environmental laws. See Fair Share Housing Center, Inc. v. N.J. State

League of Municipalities, 207 N.J. 489, 502 (2011) (The Court must "presume that the Legislature is familiar with laws it already has enacted when choosing particular language for inclusion in a new statute.") Specifically, under the Freshwater Wetlands Protection Act the NJDEP must determine if proposed regulated activity in freshwater wetlands is in the "public interest," which includes consideration of "the interest of the property owners in reasonable economic development" and "the economic value, both public and private, of the proposed regulated activity to the general area." N.J.S.A. 13:9B-11(a) & (f).

Moreover, the Rules' exclusion of economic factors runs contrary to the NJDEP's longstanding mission and considerations of economic factors in other regulatory schemes that balance economic growth with conservation. See e.g., N.J.A.C. 7:1–1.1(a) (The NJDEP's stated mission includes "understand[ing] how actions of the Department can impact the State's economic growth, to recognize the interconnection of the health of New Jersey's environment and its economy, and to appreciate that environmental stewardship and positive economic growth are not mutually exclusive goals [and] the Department will continue to protect the environment while playing a key role in positively impacting the economic growth of the State."); see also N.J.A.C. 7:13-11.2(d)(3)(i) (implementing the Flood Hazard Area Control Act and allowing certain regulated activity within riparian zone if it is in the "public interest," including

"[t]he public interest in preservation of natural resources and the interest of the property owners in reasonable economic development").

Finally, the Rules' attempt to ignore all economic benefits that a new facility might create is a major policy decision with significant implications that must be expressly granted by the Legislature. "[W]hen regulations are promulgated without explicit legislative authority and implicate 'important policy questions,' they are better off decided by the Legislature.'" In re Centex Homes, LLC, 411 N.J. Super. 252 (quoting Borough of Avalon v. N.J. Dep't of Envtl. Prot., 403 N.J. Super. 590, 607 (App. Div. 2008)). Accordingly, the Rules' definition of "compelling public interest" must be stricken as arbitrary and capricious, and ultra vires.

III. THE ENVIRONMENTAL JUSTICE MAPPING, ASSESSMENT AND PROTECTION TOOL IMPLEMENTING THE RULES CONSTITUTES IMPROPER RULEMAKING AND MUST BE STRICKEN (99a)

The EJ Law requires that the NJDEP "shall publish and maintain on its Internet website a list of overburdened communities in the State [and] shall update the list of overburdened communities at least once every two years." N.J.S.A. 13:1D-159 ("The department shall notify a municipality if any part of the municipality has been **designated** an overburdened community pursuant to this act.") (emphasis added); see also N.J.S.A. 13:1D-161(a) ("[t]he department shall adopt, pursuant to the 'Administrative Procedures Act,' . . . rules and

regulations to **implement** the provisions of this act.") (Emphasis added.)

The NJDEP issued the Environmental Justice Mapping, Assessment and Protection Tool ("EJMAP Tool") and associated Technical Guidance ("Guidance") document which sets forth the mapping tool and methodology for the NJDEP to determine whether a facility is located in an overburdened community, and whether an overburdened community is adversely impacted by environmental and public health stressors. Pa333. As such, the EJMAP Tool and Guidance are critical components to the implementation of the EJ Law and Rules, as they provide the fundamental basis to designate overburdened communities that trigger the EJ Law's requirements.

However, the EJMAP Tool and Guidance, and the designation of specific census blocks as "overburdened communities," were not subject to any of the formal procedures for an administrative rule. As such, the NJDEP bypassed public input and comments regarding the actual designation of specific "overburdened communities" triggering the Rules.[4]

The New Jersey Administrative Procedure Act defines an "administrative

[4] Similarly, the NJDEP has recently issued an "EJMAP Update Notice" which updates the list of overburdened communities without the ability for public comment. Pa403. These update notices may trigger a "material change" to an EJIS under the Rules, N.J.A.C. 7:1C-1.5, and which may require an applicant in permit review to undergo further analysis and public comment based on changing standards.

rule" to include an "agency statement of general applicability and continuing effect that implements or interprets law or policy, or describes the organization, procedure or practice requirements of any agency." N.J.S.A. 52:14B-2; In re Provision of Basic Generation Serv. For Period Beginning June 1, 2008, 205 N.J. 339, 349 (2011) ("[t]he purpose of the [Administrative Procedure Act] rulemaking procedures is 'to give those affected by the proposed rule an opportunity to participate in the process, both to ensure fairness and also to inform regulators of consequences they may not have anticipated"). The factors to determine whether an agency has created an administrative rule are whether the agency requirement:

> (1) is intended to have wide coverage encompassing a large segment of the regulated or general public, rather than an individual or a narrow select group;
>
> (2) is intended to be applied generally and uniformly to all similarly situated persons;
>
> (3) is designed to operate only in future cases, that is, prospectively;
>
> (4) prescribes a legal standard or directive that is not otherwise expressly provided by or clearly and obviously inferable from the enabling statutory authorization;
>
> (5) reflects an administrative policy that (i) was not previously expressed in any official and explicit agency determination, adjudication or rule, or (ii) constitutes a material and significant change from a clear, past agency position on the identical subject matter; and

> (6) reflects a decision on administrative regulatory policy in the nature of the interpretation of law or general policy.
>
> [See Metromedia v. Division of Taxation, 97 N.J. 313, 331–32 (1984); see also Chemistry Council of New Jersey v. NJDEP, A-1439-15T4, 2017 WL 6492521 (N.J. App. 2017), Pa398]

The EJMAP Tool and Guidance meet all the factors set forth by the New Jersey Supreme Court in Metromedia, 97 N.J. 331-32. Namely, the EJMAP Tool is a critical component to implement the EJ Law's definition of "overburdened communities" and to uniformly apply the Rules to a large segment of the population residing or conducting business in the overburdened communities. In addition, the EJMAP Tool and Guidance designate whether an overburdened community is adversely impacted by environmental and public health stressors, thereby mandating additional permit requirements, control measures, and legal standards for prospective applicants pursuant to the EJ Law and Rules. Furthermore, the use of the EJ Map and Guidance is a unique and newly implemented procedure to implement the newly enacted EJ Law, which is one of the first of its kind in the United States. Pa1.

Other mapping "tools" and "guidance" implementing and designating regulated areas for environmental permitting schemes have also been found to be improperly promulgated administrative rules. For example, In Re

Authorization of Freshwater Wetlands Statewide Gen. Permit 6, the Court held that the NJDEP's "Nonstructural Strategies Point System" spreadsheet and user's guide posted online were required to have been adopted through the formal rulemaking process. 433 N.J. Super. 385, 410–11 (App. Div. 2013). Importantly, although the NJDEP described the spreadsheet and user's guide as a tool "to assist planners, designers, and regulators in determining" whether the site met the standards to be issued a freshwater wetlands permit, the Court found that those documents met all the Metromedia to constitute formal rulemaking. Id. at 415. See also Toll Bros., Inc. v. State, Dept. of Envtl. Prot., 242 N.J. Super. 519, 527-28 (App. Div. 1990) (holding that NJDEP's adoption of water quality management plans and amendments governing the physical parameters of sewer service areas constitute quasi-legislative agency rulemaking); and N.J.A.C. 7:13-3.5 (the designation of regulated areas under water quality management plans requires rulemaking and notice and comment).

NJDEP's lack of transparency with respect to the EJMAP Tool and Guidance, and the need to have it fully vetted through formal rulemaking specific to that process is further illustrated by NJDEP's response to comments concerning the EJMAP. For instance, it is not clear whether use of the EJMAP Tool is mandatory, or simply a tool that could be used if a regulated entity decides to do so. Pa191 (Response to Comments 417 & 418). It is also not clear

how the EJMAP Tool works and whether it in fact accurately provides information applicable to a particular site. Pa191-192 (Comments and Responses to Comments 420, 421, and 424). Moreover, NJDEP has indicated that it will update the EJMAP Tool every six months, which is contrary to the requirements in the statute which calls for an update every 2 years. N.J.S.A. 13:1D-159.[5] This more frequent update will in fact be unworkable for both NJDEP and the regulated entities, as the time it takes to implement the permitting process, including an environmental justice component, is almost always longer than six months.

The EJMAP Tool and Guidance must be stricken and NJDEP should be barred from using them, as they are critical components to the implementation of the EJ Law pursuant to N.J.S.A. 13:1D-161(a). In addition, these documents must be stricken as they meet all the Metromedia factors requiring formal rulemaking as they are agency statements of general applicability and continuing effect to implement the EJ Law.

[5] In addition, the EJ Law expressly requires that the NJDEP use the most recent United States Census, as set forth in the definition of "overburdened community." N.J.S.A. 13:1D-158. See also N.J.S.A. 1:1-2 defining "census" when used with reference to the population of this State, or any subdivision thereof, as the latest Federal census effective within this State. As such, the NJDEP's use of any other census data is ultra vires.

IV. THE RULES' LOCALIZED IMPACT CONTROL TECHNOLOGY STANDARD IS ULTRA VIRES AND CONFLICTS WITH THE NEW JERSEY AIR POLLUTION CONTROL ACT (99a)

Without any statutory authority in the EJ Law, the Rules create a new air pollution control standard referred to as "Localized Impact Control Technology" ("LICT") for new or expanded major source facilities. N.J.A.C. 7:1C-7.1. This new standard requires that an applicant for a new major source facility that serves a compelling public interest, or an expansion of an existing major source facility, that proposes construction, installation, reconstruction, or modification of equipment and control apparatus that is a significant source operation,[6] document LICT for the potential exceedance of air contaminants as set forth in N.J.A.C. 7:1C-7.1. The Rules' new LICT standard exceeds statutory authority under the EJ Law, is arbitrary and capricious, and is unconstitutionally vague as it conflicts with the New Jersey Air Pollution Control Act (the "APC Act"). See N.J.S.A. 26:2C-1 to -25.2.

Pursuant to the APC Act, the Legislature expressly established the governing standards for air pollution control in New Jersey. N.J.S.A. 26:2C-9.2. Specifically, the Legislature required that "[n]ewly constructed, reconstructed, or modified equipment and control apparatus shall incorporate advances in the art of

[6] N.J.A.C. 7:27-8.1.

air pollution control as developed for the kind and amount of air contaminant emitted by the applicant's equipment and control apparatus (…)" N.J.S.A. 26:2C-9.2(c). Depending on the location and type of source, the applicable standard could include the Reasonably Available Control Technology ("RACT") requirements;[7] the Lowest Achievable Emission Rate ("LAER") pursuant to the federal nonattainment area New Source Review;[8] or the Best Available Control Technology ("BACT") requirements under the federal Prevention of Significant Deterioration Program ("PSD") program.[9] Pursuant to the APC Act, the NJDEP's air pollution control regulations require that owners or operators of a source whose potential emissions exceed applicable emission thresholds in N.J.A.C. 7:27-8 Appendix 1 incorporate "advances in the art of air pollution control" that are commonly referred to as "State of the Art" or "SOTA." N.J.A.C. 7:27-8.12(a).

By virtue of the Legislature's statutory mandate of the applicable air pollution control standards in New Jersey, the creation of any new air emission standards is "an important policy question" which resides solely with the Legislature. See Borough of Avalon, 403 N.J. Super. 607; see also In re Freshwater Wetlands, 180 N.J. at 490-491. There is absolutely no language in the EJ Law to

[7] N.J.A.C. 7:27-16 & 19.
[8] 40 C.F.R. Part 60; N.J.A.C. 7:27-18.1.
[9] 40 C.F.R. 52.21 (b)(12).

indicate that the Legislature sought to modify or supplant its directives under the New Jersey APC Act, nor does the EJ Law expressly delegate authority to the NJDEP to create new air pollution control standards. In addition, the NJDEP's ability to promulgate such standards are not "incidental powers" that are "reasonably necessary or appropriate to effectuate" any expressly granted powers under the EJ Law. Ibid. The NJDEP's fabrication of LICT as a new air pollution control standard must be stricken as ultra vires.

Moreover, the LICT standard is arbitrary and capricious and subjects the regulated public to unconstitutional conflicting, indefinite, and vague standards. Specifically, LICT requires that the applicant demonstrate compliance through a top-down approach. To perform this top-down LICT demonstration, the applicant shall:

> 1. Identify and evaluate a list of air pollution control technologies or measures that may be applied to the source to reduce each contaminant identified at N.J.A.C. 7:27-7.1(b). This list shall not be limited to measures that have been applied to other existing sources in this same source category and shall include measures applied to sources in similar source categories, as well as innovative control technologies, modification of the process or process equipment, other pollution prevention measures, and combinations of the above measures.
>
> 2. Arrange the measures on the list in descending order of air pollution control effectiveness. The first-listed or "top" measure shall constitute LICT for the source unless the applicant provides one of the following:

> i. A demonstration that the top measure should be eliminated from consideration because it is technically infeasible, based on physical, chemical, or engineering principles, and/or technical difficulties that would prevent the successful application of the measure;
>
> ii. A demonstration that the top measure should be eliminated from consideration based on its environmental impacts. The justification shall show that the adverse environmental effects of the top measure, such as effects on water or land, or HAP emissions, when compared with its air contaminant emission reduction benefits, would make use of the top measure unreasonable; or
>
> iii. A demonstration that the top measure should be eliminated from consideration based on its energy impacts. The justification shall show that the top measure uses fuels that are not reliably available; or that the energy consumed by the top measure is greater than the proposed measure(s), and that the extra energy used, when compared with the air contaminant emission reduction benefits resulting from the top measure, would make use of the top measure unreasonable.
>
> 3. If the top measure is eliminated from consideration under any of the provisions at (c)2i, ii, or iii above, the applicant shall evaluate each successive measure on the list, using the procedures described at (c)2 above, until a measure is reached that is not eliminated. Upon the Department's approval of the LICT demonstration, this measure shall constitute the LICT for the source.
>
> [N.J.A.C. 7:1C-7.1(c)(2).]

However, without any legislative authority, the Rules seek to replace New Jersey's well-settled SOTA standard with conflicting standards in LICT. Compare N.J.A.C. 7:1C-7.1(a) with N.J.A.C. 7:27-8.12(a) and N.J.A.C. 7:27-

22.35. The LICT standard ignores the APC Act's case-by-case application of different emission reduction standards based on the different applicable criteria (i.e., BACT, RACT, etc.), and instead imposes the strictest reduction criteria to all permit applications for new and expanded major source facilities without any consideration of economic factors.

For example, a facility subject to BACT must assess the maximum degree of reduction for each regulated pollutant on a case-by-case basis, taking into account energy, environmental, and **economic** impacts and other costs. 40 C.F.R. § 52.21. In addition, the air contaminants subject to the documentation of SOTA under the APC Act set forth top-down approach almost identical to LICT, but expressly includes the consideration of economic factors. N.J.A.C. 7:27-8.12(f)(2)(iii). As such, the Rules invent a new standard to provide the NJDEP with a loophole to regulate long-existing facilities in overburdened communities under the most stringent air standards available, such as LAER, which does not provide for the consideration of economic factors in comparison to achievable emission reductions. See 40 C.F.R. § 51.165(xiii).[10]

[10] Notably, LAER applies in areas that have not achieved compliance with USEPA national ambient air quality standards (NAAQS) which are pollutant specific. N.J.A.C. 7:27-18.2 & 18.3. The controls are also specific to particular pollutants. N.J.A.C. 7:27-18.2. LICT would impermissibly expand this potentially to all air contaminants even if there are no specific criteria for them.

Accordingly, the NJDEP's creation of LICT not only exceeds the statutory authority set forth in the EJ Law and the APC Act but appears to be a purposeful avoidance of the APC Act's directives to the NJDEP. Although the LICT and SOTA standards are similar in various respects, the NJDEP attempts to remove economic considerations through the LICT standard in direct contradiction to the SOTA standard mandated by the Legislature. The LICT standard must be stricken from the Rules as ultra vires, and as arbitrary and capricious.

V. THE RULES' ATTEMPT TO REGULATE ZERO-POPULATION CENSUS BLOCKS IS ULTRA VIRES AND MUST BE STRICKEN (99a)

The Rules regulate zero-population census blocks if they are immediately adjacent to an overburdened community. N.J.A.C. 7:1C-2.1(e). These zero-population census blocks may consist of industrial parks which are far away from any communities. However, the Rules improperly seek to include facilities located in a zero-population block if the block shares any kind of physical border with an overburdened community. Specifically, the Rules provide that:

> Where an existing or proposed facility in a block group that has zero population is located immediately adjacent to an overburdened community**,** the existing or proposed facility shall be subject to the requirements of this chapter and shall utilize the highest combined stressor total of any immediately adjacent overburdened community for the purposes of this chapter. For the purposes of this section, immediately adjacent means directly abutting an overburdened community and includes those communities separated by a street, road, or right-of-way.

[N.J.A.C. 7:1C-2.1(e).]

However, the EJ Law expressly limits the NJDEP's regulatory scope to facilities sited **in** "overburdened communities" which are expressly defined as a census block consisting of (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; see also N.J.S.A. 13:1D-160(a) (the EJ Law applies only to facilities that are "located, or proposed to be located, in whole or in part, **in** an overburdened community[.]") (emphasis added); and N.J.S.A. 13:1D-157 (the Legislature intended "to limit the future placement and expansion of such facilities **in** overburdened communities.") (Emphasis added.)

As set forth above, there is no statutory language stating that zero-population census blocks adjacent to an overburdened community also fall within the statutory definition of an "overburdened community." In fact, such a requirement would be unworkable pursuant to the express public hearing requirements under the EJ Law. N.J.S.A. 13:1D-160(a)(3). Pursuant to the EJ Law's notice and public hearing provisions, the applicant is required to organize and conduct a public hearing **in** the overburdened community and publish a notice of the public hearing in at least two newspapers circulating **within** the

overburdened community. Ibid. However, the Rules apparently require that an applicant circulate such notices and organize a public meeting on a census block that does not contain any residents.

As set forth by the New Jersey Supreme Court, an agency's attempt to expand the size of regulated areas beyond those clearly delineated by statute must be rejected. In re Freshwater Wetlands Protection Act Rules, 180 N.J. 490-91 (the decision of whether to provide additional protection by expanding the width of wetland transition areas, or creating new buffers for wetlands of ordinary value, "resides with the Legislature," and "if the Legislature wanted to expand the transition areas, 'it would have specifically done so, [and would not have left] such a decision to the regulator's initiative.'") (Alteration in original) (citations omitted). Moreover, administrative agencies derive their authority from legislation, the terms of which they cannot alter. In re Agric., 410 N.J. Super. at 223. Accordingly, the Rules' attempt to regulate facilities in zero-population census blocks is ultra vires and must be stricken.

VI. THE RULES' DEFERENCE TO LOCAL ENVIRONMENTAL JUSTICE REQUIREMENTS IS ULTRA VIRES AND MUST BE STRICKEN (99a)

The EJ Law states that the NJDEP is the sole regulating entity for implementation of the EJ Law. N.J.S.A. 13:1D-158 ("Department" means the Department of Environmental Protection). Moreover, the EJ Law defines a

"Permit" as approvals for regulated activity under "**State laws**." Ibid. (emphasis added). The EJ Law does not provide any authority for the NJDEP to defer to local requirements.

However, the Rules improperly defer the NJDEP's authority to local municipal authorities and requirements. Specifically, the Rules require an Environmental Justice Impact Statement to provide evidence of satisfaction of any local environmental justice or cumulative impact analysis ordinances applicable to the facility. N.J.A.C. 7:1C-3.2(a)(5).

As such, the Rules provide that a facility will be subject to, and need to comply with, any local environmental justice requirements prior to proceeding with the NJDEP. Moreover, to the extent the NJDEP asserts that such reference to local authorities falls within the Legislature's implied grant of authority under the EJ Law, such an argument must fail. Specifically, a prior version of the draft EJ Law contained a provision prohibiting the NJDEP from approving an application for a project in an overburdened community unless the municipality adopted an ordinance approving the project. However, the Legislature removed this provision from the prior version of the EJ Law, demonstrating that the EJ Law does not intend for the NJDEP to condition its review of environmental justice impact statements to local approvals. Senate Environment and Energy Comm. Statement to S. 1700, 3 (Jan. 24, 2019); Pa406, Pa408 (Committee

Amendment 11).

Furthermore, a requirement that an applicant will be responsible to create multiple environmental justice impact statements violates the clear mandates of the EJ Law. See N.J.S.A. 13:1D-160(d) ("If a permit applicant is applying for more than one permit for a proposed new or expanded facility, **the permit applicant shall only be required to comply with the provisions of this section once**, unless the department, in its discretion, determines that more than one public hearing is necessary **due to the complexity of the [permit applications]** [. . .] Nothing in this section shall be construed to limit the authority of the department to hold or require additional public hearings, as may be required by any other law, rule, or regulation." As such, the Rules' attempt to defer the NJDEP's authority to local authorities must be stricken as ultra vires.

VII. THE RULES' IMPOSITION OF CONTROL MEASURES EXCEED THE NJDEP'S STATUTORY AUTHORITY, ARE UNCONSTITUTIONALLY VAGUE, AND ARE ARBITRARY, CAPRICIOUS, AND UNREASONABLE (99a)

The Rules' scope of imposed control measures are beyond the EJ Law's scope and delegation of authority to the NJDEP, are unconstitutionally vague by failing to provide sufficient notice of regulatory requirements and standards in violation of due process requirements, and are arbitrary and capricious.

Specifically, the EJ Law's authority limits the NJDEP to issue permit conditions to the construction and operation of a facility that is located in an

overburdened community. N.J.S.A. 13:1D-160(c) (for a new facility that demonstrates a compelling public interest, the NJDEP "may grant a permit that imposes conditions on the **construction and operation of the facility** to protect public health.") (emphasis added); and N.J.S.A. 13:1D-160(d) (for expansions of existing facilities, the NJDEP "may [. . .], apply conditions to a permit [. . .] **concerning the construction and operation of the facility** to protect public health [. . .]") (emphasis added).

However, the Rules exceed the EJ Law's scope by imposing permit conditions unrelated to the construction and operation of a facility. See N.J.A.C. 7:1C-5.4(b)(2)-(5), N.J.A.C. 7:1C-6.3(b)(2)-(5), and N.J.A.C. 7:1C-9.2(b). Instead, the Rules impose conditions having no relationship to the facility at issue or the subject matter of the permit, by requiring the assessment and potential imposition of:

> 1. All feasible measures to avoid facility contributions to environmental and public health stressors;
>
> 2. For any contribution that cannot feasibly be avoided, all feasible onsite measures to minimize facility contributions to environmental and public health stressors;
>
> 3. All feasible **offsite** measures within the overburdened community to reduce environmental and public health stressors to which the facility will contribute;
>
> 4. All feasible **offsite** measures within the overburdened community to reduce adverse environmental and public health stressors **to which the facility will not contribute**,

> with preference for the reduction of stressors from highest to lowest percentile in relation to the geographic point of comparison; and
>
> 5. All feasible offsite measures within the overburdened community to provide a net environmental benefit in the overburdened community.
>
> [N.J.A.C. 7:1C-5.4(b) (emphasis added); see also N.J.A.C. 7:1C-6.3(b).]

As such, the Rules ignore the ordinary meaning of the words "construction" and "operation" to allow the NJDEP to impose an unspecified, overburdensome amount of on-site and off-site conditions that are not related to the construction or operation of the facility, and which may have no relationship to the subject matter of facility in question. In essence, the Rules allow the NJDEP to issue a de facto denial by imposing an excess number of conditions to make the operation of the facility unfeasible.

In addition, businesses attempting to plan future operations at a facility are left with an unconstitutionally vague regulatory standard. However, "[t]he public is entitled to be governed by regulations that are clear, understandable, and reasonably predictable in uniform application." In re N.J.A.C. 12:17-2.1, 450 N.J. Super. 152, 167 (App. Div. 2017); see also N.J. Soc. for Prevention of Cruelty to Animals v. N.J. Dep't of Agric., 196 N.J. 366, 386 (2008) (regulations are unconstitutionally vague when they "significantly fail to provide regulatory standards that inform the public and guide the agency in discharging its

authorized function[.]" (internal quotations and citations omitted).

New Jersey courts have invalidated administrative agency regulations for failing to provide clear standards that would inform the public and guide the agency in discharging its authorized function, creating a substantial risk of arbitrary decision-making. N.J. Dep't of Envtl. Prot. v. Stavola, 103 N.J. 425, 435-38 (1986) (invalidating NJDEP's regulations because NJDEP's definition of "housing developments of 25 or more dwelling units" was not defined with enough specificity so as to determine whether deluxe beach cabanas were included); Crema v. New Jersey Dep't of Envtl. Prot., 94 N.J. 286, 303 (1983) (invalidating NJDEP's regulations because they failed to provide substantive and procedural criteria for a "conceptual approval"); Borough of Avalon v. New Jersey Department of Environmental Protection, 403 N.J. Super. 590, 608-09 (App. Div. 2008) (holding that NJDEP's requirement that a municipality seeking appropriation from the Shore Protection Fund had to provide additional parking spaces and restroom facilities "sufficient" to accommodate public demand was unconstitutionally vague, as NJDEP's case-by-case determinations lacked standards, "would create a substantial risk of arbitrary decision-making[,]" and would provide the municipality with "no way of knowing what requirements regarding additional parking spaces [the NJDEP] might impose.").

In the instant case, the Rules are unconstitutionally vague as they fail to

inform the regulated public what regulatory standards or criteria the NJDEP will deem as sufficient control measures. Instead, the Rules can impose any condition the NJDEP deems "appropriate" to "reduce adverse environmental and public health stressors, or provide a net environmental benefit in the overburdened community." N.J.A.C. 7:1C-9.2(b)(2). As such, these provisions of the Rules must be stricken as unconstitutionally vague, and as arbitrary and capricious.

VIII. THE RULES' REQUIREMENT THAT FACILITIES IN OVERBURDENED COMMUNITIES ASSESS ENVIRONMENTAL AND PUBLIC HEALTH STRESSORS UNRELATED TO FACILITY OPERATIONS ARE ULTRA VIRES, ARBITRARY, CAPRICIOUS, AND UNREASONABLE (99a)

The Rules' provisions related to the environmental and public health stressors to be assessed exceed statutory authority by requiring assessment of stressors not related to "facilities" or public health, and are arbitrary, capricious, and unreasonable. N.J.A.C. 7:1C Appendix.

The EJ Law defines "environmental or public health stressors" as:

> **sources of environmental pollution**, including, but not limited to, concentrated areas of air pollution, mobile sources of air pollution, contaminated sites, transfer stations or other solid waste facilities, recycling facilities, scrap yards, and point-sources of water pollution, including, but not limited to, water pollution from facilities or combined sewer overflows; **or conditions that may cause potential public health impacts**, including, but not limited to, asthma, cancer, elevated blood lead levels, cardiovascular disease, and

> developmental problems in the overburdened community.
>
> [N.J.S.A. 13:1D-158 (emphasis added).]

However, several categories of stressors in the Rules impermissibly depart from the statutory definition above. Specifically, the stressors identified under the "May Cause Potential Public Health Impacts" and the "Social Determinants of Health" do not cause the type of health impacts envisioned by the statute, such as asthma, cancer, elevated blood lead and cardiovascular disease. For example, NJDEP has identified stressors in this category as lack of recreational open space, lack of tree canopy, and amount of impervious surface. While these characteristics may be undesirable from a community planning perspective, the NJDEP has not demonstrated how such stressors amount to "sources of environmental pollution" or "conditions that may cause potential public health impacts" such as "asthma, cancer, elevated blood lead levels, cardiovascular disease, and developmental problems." N.J.S.A. 13:1D-158.

Moreover, in addition to being causally tenuous, such conclusions of adverse public health impacts caused by these community characteristics are medical, sociological, and community planning matters outside the scope of the NJDEP's expertise. See, e.g., Application of Boardwalk Regency Corp. for a Casino License, 180 N.J. Super. 324, 333-34 (App. Div. 1981) (stating "[w]here… [an agency's] expertise has not yet developed by experience or

special training, no particular deference need be accorded…"); see also Matter of the Application for Medicinal Marijuana Alternative Treatment Ctr. for Pangaea Health & Wellness, LLC, 465 N.J. Super. 343, 373 (App. Div. 2020); Clowes Terminix Int'l, Inc., 109 N.J. 575, 588 (1988) (deferring to Division on Civil Rights' expertise in recognizing acts of discrimination, but not to its findings on an employee's diagnosis of alcoholism, which it was "no better able to evaluate ... than is a reviewing court"). See also Pascack Ass'n, Ltd. v. Mayor and Council of Washington Tp., Bergen Cnty., 74 N.J. 470, 483 (1977) (basic local zoning policy is vested in local municipal officials); Rumson Estates, Inc. v. Mayor & Council of Borough of Fair Haven, 177 N.J. 338, 349 (2003) (municipalities have been tasked by the Legislature through the Municipal Land Use Law to adopt ordinances to regulate land development in a manner that will "promote the public health, safety, morals, and general welfare" using uniform and efficient procedures.); N.J.S.A. 40:55D-2(a) – (c), (g), and (j) (municipalities are to provide adequate open space and sufficient space for agricultural, residential, recreational, commercial, and industrial uses, addressing flooding, and preventing urban sprawl and degradation to the environment through improper use of land).

CONCLUSION

The Rules should be stricken as they (i) are ultra vires by exceeding the plain language and scope of the EJ Law; (ii) are unconstitutionally vague; (iii) are arbitrary and capricious; and (iv) rely on specific regulatory requirements necessary to implement the Rules that were not properly included in or otherwise made subject to formal rulemaking under New Jersey's Administrative Procedure Act. As set forth above, the Rules attempt to provide the NJDEP with an arsenal of loopholes and indefinite standards that will be used to issue de facto permit denials to any kind of facility in an overburdened community, despite the clear parameters the EJ Law sets on the NJDEP's delegated authority. The EJ Law is not intended to allow the NJDEP to overregulate long-existing businesses into extinction by way of administrative fiat, much less to prevent the construction of new facilities by imposing requirements beyond what the EJ Law allows.

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Dated: February 5, 2024

Superior Court of New Jersey

Appellate Division

Docket No. A-002959-22

IN THE MATTER OF ADOPTION OF N.J.A.C. 7:1C.	:	CIVIL ACTION ON APPEAL FROM A FINAL AGENCY ACTION OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION OF NEW JERSEY AGENCY NO. 04-22-04

BRIEF ON BEHALF OF *AMICUS CURIAE* THE CHEMISTRY COUNCIL OF NEW JERSEY IN SUPPORT OF APPELLANT ENGINEERS LABOR EMPLOYER OF THE INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 825

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INTEREST OF *AMICUS CURIAE*

The Chemistry Council of New Jersey ("CCNJ") is one of the nation's leading state trade associations advocating the interests and objectives of chemical and related industries in New Jersey. The business of chemistry in New Jersey directly employs more than 48,000 people throughout the State and indirectly supports hundreds of thousands of other jobs. (Certification of Dennis Hart, dated March 7, 2024, ¶ 6).

CCNJ is a reliable, fair, and forceful advocate for the interests of a variety of business sectors, including traditional petrochemical producers, pharmaceutical companies, flavor and fragrance formulators, precious metal companies, and research laboratories. (Id. ¶¶ 4, 5). CCNJ gathers frequently to discuss environmental issues of interest to members and meets regularly with the Commissioner of the New Jersey Department of Environmental Protection ("NJDEP") to provide input on key environmental policies and initiatives. (Id. ¶¶ 7, 8).

A substantial number of CCNJ's members are Title V permit holders in designated overburdened communities and are, therefore, facilities subject to the Environmental Justice Law ("EJ Law"), N.J.S.A. 13:1D-157 to -161. (Id. ¶ 10). For that reason, CCNJ and its members have a significant interest in NJDEP's promulgation of the environmental justice regulations, N.J.A.C. 71:C (the "EJ

Rules"), which implement the EJ Law. Like the Engineers Labor Employer Cooperative of the International Union of Operating Engineers Local 825 ("ELEC"), CCNJ finds the EJ Rules objectionable in that they (1) rely on specific regulatory requirements as foundational tools under the Law that were not subject to proper rulemaking procedure under the New Jersey Administrative Procedure Act, (2) are ultra vires by exceeding the plain language and scope of the EJ Law, and (3) are unconstitutionally vague, arbitrary, and capricious.

PRELIMINARY STATEMENT

The ELEC appeal addresses the unfortunate situation of the NJDEP taking the well-intentioned and important objectives of the EJ Law and implementing rules which will effectively overregulate long-standing businesses into extinction. For the reasons explained below, this Court should invalidate the EJ Rules. First, NJDEP failed to subject a foundational component of the EJ Rules—the Environmental Justice Mapping, Assessment, and Protection Tool—to proper rulemaking procedures. This tool is also arbitrary and capricious due to the lack of transparency and accountability related to the threshold and critical information it conveys during the permitting process and overbroad application of "geographic point of comparison" when comparing different environmental and public health stressors. Second, the NJDEP's review and determination process for the environmental justice analysis is arbitrary and capricious as it

fails to provide clearly defined timeframes, lacks any specified methodology for evaluating the creation or contribution of adverse cumulative stressors, and allows NJDEP to have unfettered discretion to retain experts at the permit applicant's expense. Third, the EJ Rules are unconstitutionally vague and provide the NJDEP with vast discretion to impose significant new conditions or restraints on facilities beyond what the EJ Law authorized, including an unprecedented air pollution control standard known as Localized Impact Control Technology. Fourth, the EJ Rules rely on the following terms and definitions which are vague, arbitrary, and capricious: "compelling public interest", "expansion," "change in use," and "net environmental benefit." Finally, the NJDEP has expanded the applicability of the EJ Law by applying an adjacent "zero population block groups" to the EJ Law requirements. In doing so, NJDEP usurps the Legislature's authority by supplementing the definition of "overburdened community" to include a concept that is beyond the scope of the statute.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

CCNJ incorporates by reference the Procedural History and Statement of Facts as set forth by Appellant ELEC in its Brief. Pb 4-9.[1]

[1] "Pb" refers to Appellant's brief in support of appeal; "Pa" refers to Appellant's appendix.

LEGAL ARGUMENT

Standard of Review

Courts generally afford administrative agency regulations "a presumption of validity and reasonableness" and should defer to an agency's "interpretation and implementation of its rules enforcing the statutes for which it is responsible." In re Freshwater Wetlands Prot. Act Rules, 180 N.J. 478, 488-89 (App. Div. 2004). Deference is particularly appropriate where the regulation at issue involves a "technical matter" within the agency's "specialized expertise." Id., 180 N.J. at 489. Notwithstanding, courts afford less deference to "a newly minted agency interpretation which has not previously been subjected to judicial scrutiny or time-tested agency interpretation." In re N.J.A.C. 17:2-6.5, 468 N.J. Super. 229, 234 (App. Div. 2021) (quotations omitted).

A regulation must be set aside if it is "proved to be arbitrary or capricious, plainly transgresses the statute it purports to effectuate, or alters the terms of the statute and frustrates the policy embodied in it." In re Agric., Aquacultural, & Horticultural Water Usage Certification Rules, 410 N.J. Super. 209, 223 (App. Div. 2009). Additionally, "an administrative agency may not, under the guise of interpretation, extend a statute to give it a greater effect than its language permits." GE Solid State, Inc. v. Dir., Div. of Taxation, 132 N.J. 298, 306 (1993); see also In re Freshwater Wetlands Prot. Act Rules, 180 N.J. at 489 ("[I]f

the regulation is plainly at odds with the statute, we must set it aside."). Even if a regulation falls within the purview of the relevant statute, "a rule that does not contain a clear or objectively ascertainable standard may not be upheld." In re N.J.A.C. 7:1B-1.1 Et Seq., 431 N.J. Super. 100, 128 (App. Div. 2013); see also In re Agric., 410 N.J. Super. at 224 (App. Div. 2009) ("[R]egulatory requirements must also be sufficiently specific to apprise those who are regulated of what the agency is requiring."). In other words, an agency cannot enforce vague or otherwise undefined regulatory standards. N.J. Soc. For Prevention of Cruelty to Animals v. N.J. Dep't of Agric., 196 N.J. 366, 412 (2008).

I. The EJMAP tool and corresponding Technical Guidance constitutes improper rulemaking and is arbitrary and capricious. (Pa99-248, 333-397).

1. NJDEP bypassed formal administrative procedures in its designation of overburdened communities in the EJMAP. (Pa99-248, 333-397).

The EJ Law requires the NJDEP to "publish and maintain on its Internet website a list of overburdened communities in the State." N.J.S.A. 13:1D-159. In response, NJDEP issued the Environmental Justice Mapping, Assessment and Protection Tool ("EJMAP") and the corresponding Technical Guidance. Pa333-397. Together, the EJMAP and its Guidance identify whether a facility is located in an overburdened community, and whether that community is

adversely impacted by environmental and public health stressors. Pa333-346. As such, they are foundational tools under the EJ Rules which set forth the key information required to identify overburdened communities, thereby triggering the requirements under the EJ Law. Nonetheless, NJDEP has bypassed formal administrative procedures regarding the actual designation of overburdened communities under the EJ Rules since it has not offered the public a formal opportunity to comment on its EJMAP tool, and its accompanying Guidance.

The Administrative Procedure Act sets forth specific detailed procedures by which an agency must provide the public with notice and the opportunity to comment prior to the enactment of new rules and regulations. See In re Provision of Basic Generation Serv. for Period Beginning June 1, 2008, 205 N.J. 339, 350 n.1 (2011). These procedures are necessary in order to protect "the interests of 'fairness and due process.'" Grimes v. New Jersey Dep't of Corr., 452 N.J. Super. 396, 407 (App. Div. 2017). An "administrative rule" is defined as an "agency statement of general applicability and continuing effect that implements or interprets law or policy, or describes the organization, procedure or practice requirements of any agency." N.J.S.A. 52:14B-2. Moreover, the factors to determine whether an agency has created an administrative rule include when the action:

> (1) is intended to have wide coverage encompassing a large segment of the regulated or general public; (2) is intended to be applied

> generally and uniformly to all similarly situated persons; (3) is designed to operate only in future cases; (4) prescribes a legal standard or directive that is not otherwise expressly provided by or clearly and obviously inferable from the enabling statutory authorization; (5) reflects an administrative policy that . . . was not previously expressed in any official and explicit agency determination, adjudication or rule . . .; and (6) reflects a decision on administrative regulatory policy in the nature of the interpretation of law or general policy.
>
> Metromedia, Inc. v. Dir., Div. of Tax'n, 97 N.J. 313, 331–32 (1984).

While not all of these factors need to be present for an agency action to be considered to constitute an administrative rule, id., the EJMAP and corresponding guidance meets each of the factors set forth by the Supreme Court in Metromedia, 97 N.J. 331-32. NJDEP will use EJMAP to determine if a permit applicant's facility is in an overburdened community, evaluate if and how that facility would adversely impact the community, and evaluate the proper control measures to avoid or reduce those impacts. See Pa184 (Response to Comments 390 and 391). Thus, these tools serve as essential components of implementing the EJ Law's definition of "overburdened communities" and to uniformly apply the EJ Rules to those designated communities. These tools are also intended to prescribe a standard, not clearly inferable from the EJ Law, which would essentially provide a pathway for NJDEP to deny a permit for a new facility or impose permit conditions on an existing facility. Indeed, the tool is used to determine whether a facility is located in an overburdened community—and,

therefore, subject to the EJ Rules—and whether an overburdened community is adversely impacted by environmental and public health stressors. See Pa336. NJDEP's failure to provide proper notice and an opportunity to comment on the EJ MAP and Guidance deprived the public of due process such that these tools, and the underlying data, should be found invalid.

2. NJDEP's use of the EJMAP tool is arbitrary and capricious. (Pa99-248, 333-397).

Even if NJDEP did follow the proper administrative procedure, NJDEP's use of the EJMAP and Guidance in its current form is also arbitrary and capricious due to fundamental flaws that render the tools unreliable. Specifically, the EJ Rules do not describe the process for updating the EJMAP tool, the frequency with which it will be updated, or how the NJDEP will update the EJMAP tool once a facility reduces environmental, health, and safety stressors in the overburdened community. It is similarly unclear how updates to the EJMAP tool affect nearby facilities, or new facilities that are just starting the EJ evaluation process. Furthermore, there is no indication or process set forth as to whether the NJDEP will notify municipalities when the census data blocks are updated or a designation as an overburdened community is removed. NJDEP's lack of guidance on these key issues frustrates fundamental principles of transparency and accountability during the permitting process.

The environmental and public health stressors, as provided in the EJMAP and set forth in the Appendix to the EJ Rules, are also arbitrary and capricious to the extent they are duplicative and do not accurately evaluate stressor impacts to a community. For instance, NJDEP has placed a heavy reliance on air quality stressors including two air toxics cancer risks, air toxics non-cancer risk, ground-level ozone, fine particulate matter, and permitted air sites. See Appendix to N.J.A.C. 7:1C. In essence, the NJDEP is double-counting inter-related stressors that are all reflective of air quality but regards them as individual metrics. This redundancy in NJDEP's list of stressors prohibitively skews an environmental justice analysis and NJDEP fails to provide clarity for evaluating the contribution of adverse cumulative stressors in this way. Additional stressors also appear duplicative; for instance, impervious surface and flooding stressors are similar in nature as they are a cause and effect to each other—areas of increased impervious surface are more vulnerable to flooding during heavy rainfall. See Appendix to N.J.A.C. 7:1C. As such, this significant, yet unexplained redundancy of certain environmental considerations fails to provide a predictable and efficient process that is scientifically supportable, and therefore, must be found invalid.

NJDEP's application of "geographic point of comparison" is also arbitrary, capricious, and overly broad. The EJ Law provides that NJDEP shall

deny permits for a new facility, or apply conditions to a permit for the expansion of an existing facility, upon a finding that approval of the permit would "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 geographic unit of analysis as determined by the department[.]" N.J.S.A. 13:1D-160(c) (emphasis added). The plain reading of this language indicates that the comparison between communities is regardless of whether the "other communities" in the geographic unit of comparison are overburdened. In other words, the EJ Law plainly directs that "other communities" be taken from a contiguous geographic unit—such as a State-wide, or county by county comparison.

However, the EJ Rules define "geographic point of comparison" to exclude other overburdened communities in the comparative areas:

> 'Geographic point of comparison' means the comparison area and value used to determine whether an overburdened community is subject to one or more adverse environmental and public health stressors . . . determined by selecting the lower value of the State or county's 50th percentile, *calculated excluding the value of other overburdened communities.*
>
> N.J.A.C. 7:1C-1.5 (emphasis added).

"Communities that are not overburdened" is not a cognizable geographic unit of analysis. By selecting parameters intended to deem as many overburdened communities as possible as being disproportionately impacted, the

EJ Rules have effectively eviscerated the Legislature's direction to compare overburdened communities against other (overburdened) areas to determine which communities may actually be overburdened with stressors. Indeed, NJDEP's definition is simply not a practical comparison based on the geographic make-up of the State, which consists of extremely rural areas in some parts and urban sections in others. Excluding "other overburdened communities" will inevitably mean a comparison unit of mostly rural areas, which will all but ensure that the overburdened community is disproportionately impacted. This comparison is especially problematic as some stressors have a value of "0." For instance, the 50th percentile for the state for the railways stressor is "0" per the EJMAP tool, so any overburdened community with a railway stressor value greater than "0" would be deemed adverse. By considering an overburdened community to be subject to adverse cumulative stressors simply because it faces a minimal increase of an environmental challenge when compared to the rural areas of the State warrants a finding that this comparison is ultra vires, arbitrary and capricious.

CCNJ further joins in the arguments raised by ELEC on this issue at Section II(C) of its brief. Pb22-23.

II. NJDEP's environmental justice review and determination process as set forth in the EJ Rules is unconstitutionally vague, arbitrary, capricious and unreasonable. (Pa99-248).

The EJ Law requires the Department to assess a facility's ability to avoid a disproportionate impact in the community. N.J.S.A. 13:1D-160. As implemented in the EJ Rules, this environmental justice review process is arbitrary, vague, and capricious, as it does not provide the regulated community with defined standards upon which it can rely to determine compliance, and will result in prejudicial and impermissible delays in the review and issuance of required approvals.

1. There are no clearly defined timeframes for the environmental justice review process. (Pa99-248).

Specifically, at N.J.A.C. 7:1C-2.2, NJDEP provides a procedural overview of the permitting process that will incorporate the environmental justice review requirements, including permit impact analysis and evaluation, stakeholder engagement, and department review. Notably, this process fails to provide any clearly defined timeframes for when a permit applicant should complete its environmental justice impact statement or when NJDEP must issue its environmental justice determination. While the EJ Rules do provide that NJDEP's "decision shall not be issued until at least 45 days after the public hearing," N.J.A.C. 7:1C-9.3, NJDEP is essentially giving itself unfettered discretion in the length of time it has to complete its administrative review,

creating unnecessary logistical complications, unpredictability, and unduly burdensome timeframes for the Title V permitting process. This will undoubtedly have serious implications for companies like many CCNJ members who rely on a reasonably predictable regulatory environment to manage their operations and make corresponding business decisions, such as when to make repairs or improvements on permitted equipment.

2. There is no threshold for measuring the creation or contribution of adverse cumulative stressors. (Pa99-248).

In addition, the EJ Rules lack any specified methodology for evaluating the creation or contribution of adverse cumulative stressors for NJDEP to determine whether a facility has a "disproportionate impact." See N.J.A.C. 7:1C-1.5. Likewise, there is no *de minimis* threshold for what would be defined as "creating adverse cumulative stressors," which means even a minimum amount of additional stressor(s) could result in a permit denial or imposition of permit conditions. Id. Facilities attempting to plan for future operations are therefore left with an unconstitutionally vague regulatory standard, which can be triggered by even the slightest operational change having the potential to increase even just one stressor. Instead, NJDEP has indicated that "the determination of whether a facility will create an adverse environmental or public health stressor" will be "determined on a case-by-case, fact specific basis." Pa198 (Response to Comments 440 through 453). As the New Jersey

Supreme Court has recognized, however, regulations, like the EJ Rules, must be invalidated when they have failed to provide clear "regulatory standards that would inform the public and guide the agency in discharging its authorized function." N.J. Soc. for Prevention of Cruelty to Animals, 196 N.J. at 386 (invalidating regulations, in relevant part, because they failed to include any objective criteria); see also Borough of Avalon v. New Jersey Dep't of Env't Prot., 403 N.J. Super. 590, 608 (App. Div. 2008) (finding NJDEP regulation requiring "sufficient" parking and restroom facilities, which was to be determined on a "case by case" basis, was so vague as to be invalid).

3. NJDEP has unfettered use to engage outside experts at the permit applicant's expense. (Pa99-248).

Under the EJ Rules, NJDEP has sole discretion during its review of an environmental justice impact statement[2], if necessary, "to engage one or more experts to evaluate any information submitted by the applicant." N.J.A.C. 7:1C-9.1(c). Notably, the cost of NJDEP engaging a third-party expert is borne by

[2] The "environmental justice impact statement" or "EJIS" requires an applicant to identify and analyze: (1) existing environmental and public health stressors; (2) any adverse environmental and public health stressors; (3) the presence or absence of adverse cumulative stressors; (4) potential environmental and public health stressors associated with a facility; (5) whether the facility can avoid causing a disproportionate impact; (6) the measures the facility will propose to implement to avoid or address any disproportionate impact; and (7) where applicable, how the new facility serves a compelling public interest in the overburdened community. N.J.A.C. 7:1C-1.5.

the applicant, despite the authority to identify the expert remaining with NJDEP. Id. Furthermore, an application cannot be considered complete until "NJDEP has received and reviewed the recommendations of the expert." Id. Because the timeline for which NJDEP can solicit and obtain outside expertise is without limit, this could cause unreasonable delays and costs to the applicant. Again, such predictability and certainty in the review process is critical for a facility to operate and plan for projects, which are often time sensitive.

In implementing the EJ Rules, NJDEP has again demonstrated a lack of clear, objective standards, as it has not set forth any standard for which retaining an expert would be warranted. Given the novelty of issues that may arise under the EJ Rules, this provision leaves the regulated community to potentially significant costs beyond their control and add a significant amount of time to the application process. NJDEP's unconstrained ability to engage outside experts at the applicant's expense is unreasonable and beyond the scope of the EJ Law. Indeed, nowhere in the EJ Law was the retention of experts for an environmental justice analysis contemplated. Accordingly, the Department review and decision process as set forth under the EJ Rules should be stricken.

III. The EJ Rules are unconstitutionally vague and provide the NJDEP with vast discretion to unilaterally impose significant new conditions or restraints on facilities. (Pa99-248).

1. Localized Impact Control Technology

Without any statutory authority, the EJ Rules create a new standard, known as "Localized Impact Control Technology" ("LICT") which applies to new or expanding major source facilities that serve a compelling public interest or an expansion of an existing major source facility, if an application proposes construction, installation, reconstruction, or modification of equipment and control apparatus that is a significant source operation. N.J.A.C. 7:1C-7.1. The analysis for LICT is a top-down demonstration of technically feasible control technologies, including: technologies or measures applied to existing sources; innovative control technologies; modification of processes or equipment; other pollutant prevention measure; or a combination of the above. N.J.A.C. 7:1C-7.1(c). The most effective air pollution control technology must be selected unless the applicant demonstrates it is technically infeasible, has unreasonable environmental impacts when compared to air contaminant reduction benefits, or uses fuels not readily available, or will have adverse energy impacts compared to the air contaminant emission reduction benefits. N.J.A.C. 7:1C-7.1(c).

This standard exceeds NJDEP's statutory authority under the EJ Law, as the Law makes no mention or suggestion of legislative intent to implement

entirely new air pollution control standards. Nor is there any suggestion under the EJ Law that the Legislature intended NJDEP to supplement or modify existing air pollution control standards expressly established under the Air Pollution Control Act, N.J.S.A. 26:2C-1 to – 25.2 ("APCA"). Pursuant to the APCA, owners or operators of a significant source are required to document "state of the art" or (SOTA) *only if* the source exceeds certain applicable emission thresholds. N.J.A.C. 7:27-8.12(a); N.J.A.C. 7:27-22.35. The LICT standard directly conflicts with these provisions, by requiring the most stringent air pollutant reduction criteria for *any* permit application for new and expanded major source facilities, without any regard for the thresholds set forth under the APCA. NJDEP's refusal to factor economic considerations as part of the LICT analysis is also directly at odds with SOTA standards, which includes economics impacts and costs as part of the analysis. N.J.A.C. 7:27-8.12(f)(2)(iii). As such, the LICT standard should be stricken as ultra vires.

The LICT standard is also arbitrary and capricious, as it unfairly burdens the industry by only taking into account technical feasibility without any consideration for economic feasibility. Under this model, a facility may be required to take an exponentially more expensive approach to limiting its environmental impact even if it results in only a marginal difference than a less expensive option. NJDEP has not demonstrated or offered any rationale that

this unprecedented standard is necessary to address localized impacts. Accordingly, well-established facilities that have already implemented air control technologies which meet permitting standards may be required to add a significant cost and competitive disadvantage without a justified environmental benefit. This layering on beyond compliance is arbitrary and capricious, and should be invalidated.

2. Conditions for new and existing facilities

The EJ Law authorized NJDEP to deny a permit to new facilities that create a disproportionate impact unless they can show a compelling public interest. N.J.S.A. 13:1D-160(c). If a compelling public interest is shown, the EJ Law only provides NJDEP with the authority to "grant a permit that imposes conditions on the construction and operation of the facility to protect public health." Id. For existing facilities, the EJ Law provides NJDEP with the ability to apply conditions "concerning the construction and operation of the facility to protect public health." N.J.S.A. 13:1D-160(c). However, NJDEP has broadly written the EJ Rules to allow NJDEP to impose conditions having no nexus to a facility's operations or the subject matter of the permit being sought. Specifically, NJDEP is authorized to propose the following:

1. *All feasible* measures to avoid facility contributions to environmental and public health stressors;

2. For any contribution that cannot feasibly be avoided, *all feasible* onsite measures to minimize facility contributions to environmental and public health stressors;

3. *All feasible offsite* measures within the overburdened community to reduce environmental and public health stressors to which the facility will contribute;

4. *All feasible offsite* measures within the overburdened community to reduce adverse environmental and public health stressors to which the *facility will not contribute*, with preference for the reduction of stressors from highest to lowest percentile in relation to the geographic point of comparison; and

5. *All feasible offsite* measures within the overburdened community to provide a net environmental benefit in the overburdened community.

N.J.A.C. 7:1C-5.4(b)(2)-(5) (emphasis added); N.J.A.C. 7:1C-6.3(b)(2)-(5) (emphasis added). See also N.J.A.C. 7:1C-9.2(b) (allowing NJDEP to impose conditions that "reduce adverse environmental and public health stressors, or provide a net environmental benefit in the overburdened community").

The EJ Law does not authorize NJDEP to impose offsite control measures or other measures that are unrelated to the construction or operation of the applicant's facility. The EJ Rules go beyond the ordinary meaning of the words "construction" and "operation" to provide NJDEP unfettered authority to impose conditions with no prescribed limit in scope or number. See DiProspero v. Penn, 181 N.J. 477, 492 (2005) (finding courts must ascribe "the statutory words their ordinary meaning and significance"). On their face, the EJ Rules go so far that

NJDEP could take the position that it has authority to require a permit applicant to perform an action *outside of its own property boundary*. The EJ Law simply does not authorize NJDEP to regulate a facility beyond its property boundary, and thus the EJ Rules are clearly contrary to this legislative mandate.

IV. Certain definitions under the EJ Rules are ultra vires, arbitrary, and capricious. (Pa99-248).

The EJ Rules implement several defined terms which should be stricken as ultra vires, arbitrary and capricious. "When interpreting a statute, [a court's] main objective is to further the Legislature's intent." TAC Assocs. V. N.J. Dep't of Envtl. Prot., 202 N.J. 533, 540 (2010). A court first looks "to the plain language of the statute in question," id. at 541, and give those "words their ordinary meaning and significance." James v. N.J. Mfrs. Ins. Co., 216 N.J. 552, 566 (2010). "[W]hen the provisions of the statute are clear and unambiguous, a regulation cannot amend, alter, enlarge or limit the terms of the legislative enactment. In re N.J.A.C. 12:17-9.6 ex rel. State Dep't of Lab., 395 N.J. Super. 394, 406 (App. Div. 2007). As detailed below, the terms "compelling public interest", "expansion," "change in use," and "net environmental benefit" violate this fundamental principle, and accordingly must be stricken.

1. Compelling Public Interest

The EJ Law requires the denial of a permit for a new facility where such approval would result in adverse cumulative environmental or public stressors,

unless an applicant can establish that the facility serves a "compelling public interest." N.J.S.A. 13:1D-160(c).

"Compelling public interest" is defined under the EJ Rules as:

> [A] demonstration by a proposed new facility that primarily serves an essential environmental, health, or safety need of the individuals in an overburdened community, is necessary to serve the essential environmental, health, or safety need, and that there are no other means reasonably available to meet the essential environmental, health, or safety need.

N.J.A.C. 7:1C-15. The definition of "compelling public interest" expressly excludes consideration of economic benefits and other investments of a particular facility to the local community. Id. ("For purposes of this chapter, the economic benefits of the proposed new facility shall not be considered in determining whether it serves a compelling public interest in an overburdened community."). This exclusion is notable, as it fails to accurately and holistically consider net cumulative impacts, especially in light of the fact that the very definition of an "overburdened community" considers the economic health of the community. N.J.S.A. 13:1D-158 (defining overburdened community as including a census block group in which "at least 35 percent of the households qualify as low-income households."). Additionally, the EJ Rules consider unemployment as a public health stressor to be considered as part of an environmental justice assessment. See Appendix to N.J.A.C. 7:1C; Pa12, Pa343. Notwithstanding, NJDEP will not consider the positive impacts that

economic investment, tax base, relatively low energy costs, and job creation will have on an overburdened community. Nor will NJDEP take into account the community service and community support that companies often provide to residents living near industrial facilities, such as volunteerism, educational and workforce training programs, or grants to improve services or quality of life in the local community and/or county. While CCNJ recognizes that economic contributions, standing alone, cannot meet the Legislature's environmental justice objectives, it is certainly a relevant component to the overburdened community analysis. In light of this irreconcilable conflict, it is clear that the exclusion of the consideration of economic benefits to the local community is arbitrary and capricious. CCNJ incorporates by reference additional arguments on this point from ELEC's brief at pages 24-27. Pb24-27.

2. Expansion

The EJ Law expressly applies to "the expansion of an existing facility" located in an overburdened community. N.J.S.A. 7:1C-2.1. The EJ Rules define "expansion" as:

> [A] *modification* or expansion of existing operations or footprint of development that *has the potential* to result in an increase of an existing facility's contribution to any environmental and public health stressor in an overburdened community, but shall not include any such activity that decreases or does not otherwise result in an increase in stressor contributions.

N.J.A.C. 7:1C-1.5 (emphasis added).

As defined by the EJ Rules, the definition of "expansion" is arbitrary, capricious, and beyond the scope of the EJ Law. The ordinary meaning of expansion is to increase in "size, amount, or importance."[3] The EJ Rule's definition's inclusion of a "modification," regardless of size, improperly subjects certain facilities undergoing *de minimis* changes in operations to a disproportionately burdensome and costly environmental justice review. This is also in direct conflict with the definition of "permit" under the EJ Law, which expressly excludes "minor modification of a facility's major source permit for activities or improvements that do not increase emissions." N.J.S.A. 13:1d-158. Notwithstanding, the EJ Rules make no such exemption, and only excludes activity that "decreases or does not otherwise result in an increase in stressor contributions." N.J.A.C. 7:1C-1.5. In addition, the reference to "has the potential" eliminates any potential guardrails NJDEP would have, no matter how remote or minor the possibility of a facility's increase in stressor may be. Indeed, by including the term "potential" in the definition, the scope of the term "expansion" is so broad that existing facilities that do not *actually increase* air emissions may be considered an expansion based on the purely speculative basis that NJDEP believes increased emissions are possible. As such, NJDEP's

[3] Oxford English Dictionary, https://www.oed.com/dictionary/expansion_n?tab=factsheet&tl=true (last visited February 27, 2024).

definition of the word must be stricken as unconstitutionally vague and beyond the scope of the EJ Law.

3. Change in use

As defined under the EJ Rules, a "new facility" means:

> 1) any facility that has not commenced operations [as of April 17, 2023]; or 2) *a change in use of an existing facility*. . . . [A]n existing facility that has operated without a valid approved registration or permit required by the Department prior to [April 17, 2023], shall be considered a new facility.

N.J.A.C. 7:1C-1.5 (emphasis added).

The EJ Rules define "change in use" as "a change in the type of operation of an existing facility that increases the facility's contribution to any environmental and public health stressor in an overburdened community, such as a change to waste processed or stored." N.J.A.C.7:1C-1.5. This definition is overbroad as it fails to give proper consideration for any potential *de minimis* increase of a stressor. Accordingly, any operational changes of a facility that would result in even an iota of an increase in one of the numerous stressors would be interpreted as a "change-in-use."

The term is also unduly vague. As applied to Title V holders, like many CCNJ members, the sole example in the definition—"change to waste processed or stored"— is of no relevance. Rather, a "change-in-use" should reasonably be tied to an increase in emissions or the addition of a pollutant not previously

permitted at the facility. NJDEP has failed to provide the necessary clarity for this term.

This ambiguity becomes all the more profound given the regulatory import of a "change in use." The EJ Law makes a distinction between a "new" facility and the expansion of an "existing" facility. N.J.S.A. 13:1D-160. This distinction is significant as permits for "new" facilities can be denied, whereas those for existing facilities cannot. Yet, despite this clear distinction in the statute, the EJ Rules blur these lines by including "existing" facilities in the definition of a "new" facility if an existing facility has had a change in use or failed to obtain a permit. *See* N.J.A.C. 7:1C-1.5. As a result, NJDEP's ability to deny a permit is impermissibly expanded beyond the intent of the EJ Law.

CCNJ joins in the additional arguments raised by ELEC illustrating why the definitions of "new facility" and "existing facility" exceed their commonplace meanings and impermissibly enlarge NJDEP's authority beyond the EJ Law's scope. Pb15-19.

4. Net environmental benefit

If a new or expanded facility cannot avoid contributions to adverse stressors, the EJ Rules provide that NJDEP may impose conditions to reduce offsite adverse environmental and public health stressors, and "provide a net environmental benefit in the overburdened community." N.J.A.C. 7:1C-

9.2(b)(2). "Net environmental benefit" means "a reduction of baseline environmental and public health stressors in an overburdened community or other action that improves environmental or public health conditions in an overburdened community, *as determined by the Department*." N.J.A.C. 7:1C-1.5 (emphasis added).

NJDEP has failed to identify specific standards or criteria as to how stressors and benefits will be weighted in this context. For instance, there is no guidance as to whether a facility that decreases certain stressors as a result of a change in operation could meet the "net environment benefit" definition, if it were to simultaneously increase other stressors. Again, the Department indicates, "[t]he determination of a net environmental benefit . . . will be a case-specific analysis . . . ." Pa202-03 (Response to Comments 455 through 477). In essence, this definition gives NJDEP unrestrained authority to impose any condition it deems appropriate to avoid a disproportionate impact. However, as stated above, this does not provide sufficient clarity required to inform the public and guide NJDEP is discharging its regulatory function. See Borough of Avalon, 403 N.J. Super. at 608.

V. NJDEP is not authorized by the Legislature to apply the EJ Law requirements outside of a statutorily defined overburdened community, yet the EJ Rules seek to include certain areas that are adjacent to overburdened communities. (Pa99-248).

The EJ Law is clear that, to be subject to its requirements, a facility needs

to be located in an overburdened community, as defined by the statute. See N.J.S.A. § 13:1D-160 (stating the requirements for permit applicants under the EJ Law "if the facility is located, or proposed to be located, in whole or in part, *in an overburdened community* . . . ") (emphasis added). Despite this clear mandate, the EJ Rules purport to extend the definition of overburdened community under the EJ Law by including non-overburdened community census block groups. Specifically, the EJ Rules provide that "an existing or proposed facility in a block group that has zero population [that] is located immediately adjacent to an overburdened community" is subject to the EJ Law requirements. N.J.A.C. 7:1C-2.1(e). As such, the EJ Rules require permit applicants to evaluate the potential impacts of relevant operations as though the facility is located in an overburdened community even if it is *completely* geographically outside of the relevant area. No where in the EJ Law is such an interpretation supported. In fact, in the EJ Rules proposal, NJDEP admits that adjacent populations are not overburdened communities, as "statutorily defined," but explains that it has decided to include them anyway:

> The Department recognizes that certain census block groups may now or, as a result of census reconfiguration, have zero population. To the extent these zero population census blocks are immediately adjacent to *statutorily defined overburdened communities*, the operations of new or existing facilities in the zero population block groups have similar potential for impacts to environmental and public health stressors as those located directly in the overburdened community that would not otherwise be considered. Accordingly,

> the Department proposes to require an analysis of impacts of those facilities on the immediately adjacent overburdened community.

Pa13 (emphasis added).

In addition, the EJ Law required the NJDEP to provide public notice of the census block groups that were considered overburdened communities, in the form of a list, within 120 days of enactment:

> No later than 120 days after [September 18, 2020], the department shall publish and maintain on its Internet website a list of overburdened communities in the State.

N.J.S.A. § 13:1D-159.

The concept of applying the EJ Law requirements to "adjacent" census block groups was never revealed until June 2022—well after 120 days—when NJDEP issued the proposed EJ Rules. This is clearly inconsistent with the EJ Law's requirement for transparency, including that the list of overburdened communities be published within 120 days.

As the Supreme Court has set forth in In re Freshwater Wetland Protection Act Rules, an agency's attempt to expand statutorily defined areas by adding a regulated buffer to such areas is ultra vires and cannot be sustained. 180 N.J. at 482 (finding that Department rule requiring a 20-foot buffer improperly expanded the size of wetlands transition areas beyond specified statutory limits). Analogous to this case, the definition of "overburdened community" is the result of a delicate legislative process which sought to implement a balanced

calculation of the census groups that have traditionally been subject to historical environmental wrongs. NJDEP cannot overstep the Legislature's decision-making by expanding the scope of the environmental justice requirements to a new geographic area not previously set forth in the EJ Law. If the Legislature wanted to include adjacency considerations, "it would have specifically done so, rather than leave such a decision to the regulator's initiative." See Matter of Freshwater Wetlands Prot. Act Rules, N.J.A.C. 7:7A-1.1 et seq., 238 N.J. Super. 516, 530 (App. Div. 1989). Therefore, the addition of zero-population areas adjacent to overburdened communities to the environmental justice analysis is ultra vires and should be invalidated.

CONCLUSION

In light of the foregoing, this Court should invalidate the EJ Rules, and corresponding EJMAP and Technical Guidance as they were not properly subject to proper administrative procedures before being implemented. Additionally, numerous key terms and provisions set forth in the EJ Rules are unconstitutionally vague, arbitrary, capricious, and unreasonable, and therefore must be stricken. Finally, NJDEP has taken clear and unambiguous language from the EJ Law and expanded its rulemaking authority beyond what the Legislature has clearly authorized, thus promulgating Rules which are ultra

vires. Therefore, this Court should find the EJ Rules are invalid and remand the Rules to NJDEP to be modified in accordance with the EJ Law.

Dated: March 11, 2024

Respectfully submitted,

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IN THE MATTER OF THE ADOPTION OF N.J.A.C. 7:1C	:	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION
	:	DOCKET NO. A-002959-22
	:	CIVIL ACTION

BRIEF OF *AMICUS CURIAE* NEW JERSEY PROGRESSIVE EQUITABLE ENERGY COALITION

Date Submitted: June 17, 2024

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INTERESTS OF AMICUS CURIAE

The New Jersey Progressive Equitable Energy Coalition (NJPEEC or NJPEEC Amicus) is a Black- and Brown-led coalition that seeks to "bridge the equity gap in energy and climate justice arenas to ensure inclusivity from the inception to implementation of policies and proposed energy reforms" and to protect "the health of systematically marginalized and overburdened low income populations and communities of color."[1] Accordingly, NJPEEC moves to be included as amicus curiae and submits this brief in support of their motion to participate as an amicus to protect the strength of the Environmental Justice (EJ Law or Law) and Environmental Justice Regulations (EJ Regulations or Regulations), and, by doing so, protect New Jersey's Overburdened Communities (OBCs).

PRELIMINARY STATEMENT

Pursuant to R. 1:13-9, the New Jersey Progressive Equitable Energy Coalition submits this proposed amicus brief in support of the Department of Environmental Protection's (DEP's) lawful adoption of the EJ Regulations at N.J.A.C. 7:1C-1.1 *et seq.,* which effectuated the intent of the New Jersey EJ Law at N.J.S.A. 13:1D-157 *et seq.* NJPEEC seeks to offer its expertise in environmental policy, social justice, and Environmental Justice (EJ) from the perspective of

[1] NJPEEC: About Us, https://www.njpeec.org/ (last visited June 17, 2024).

residents and advocates in EJ Communities for the benefit of the Court and the parties.

In this brief, NJPEEC explains the legislative purpose of the EJ Law, and how DEP's EJ Regulations align with that purpose. NJPEEC demonstrates that DEP's interpretation of the EJ Law and its inclusion of the environmental and public health stressors, definitions, and provisions of the challenged EJ Regulations are consistent with the Legislative mandate and intent to reduce the historic, cumulative pollution burdens faced by OBCs in New Jersey.

Contrary to the assertions by the Institute of Scrap Recycling Industries, Inc. (ISRI) and the Engineers Labor Employer of the International Union of Operating Engineers Local 825 (ELEC825) (collectively, Appellants), DEP's inclusion of lack of recreational open space, lack of tree canopy, percentage of impervious surface, flooding, unemployment percentages, and educational attainment as environmental and public health stressors is reasonable because each was appropriately identified as a relevant stressor through the DEP's thorough review of the literature and public hearings on cumulative impacts. DEP properly excluded economic benefits from the "compelling public interest" exception that allows for new polluting facilities that cannot avoid disproportionate impacts in OBCs, because this exception must be narrow, lest it swallow the rule. DEP's definitions of "new facility," "existing facility," "change in use," and "expansion" are

reasonable, and alternate definitions would allow completely new and previously unpermitted polluting uses to avoid the requirements of the EJ Law. Finally, DEP's coverage of immediately adjacent facilities in zero-population block groups is necessary to effectuate the Legislature's intent to protect OBCs from the impacts of these polluting facilities. The Court should uphold the DEP's reasonable and considered Regulations implementing New Jersey's innovative and long overdue EJ Law.

STATEMENT OF FACTS AND PROCEDURAL HISTORY[2]

NJPEEC incorporates by reference the Procedural History and Statement of Facts as set forth by Respondent DEP in its brief. DEPb4–15.[3]

ARGUMENT

I. THE INTENT OF THE EJ LAW IS TO ADDRESS THE CUMULATIVE AND DISPROPORTIONATE ENVIRONMENTAL AND PUBLIC HEALTH IMPACTS OF POLLUTING FACILITIES ON OBCs

On August 27, 2020, after many years of community organizing, the New Jersey legislature passed the EJ Law—the innovative environmental justice law that limits new pollution sources in communities already shouldering a

[2] For the sake of judicial efficiency and to avoid repetition, the statement of facts and procedural history are combined, and Amicus NJPEEC incorporates by reference the Procedural History and Statement of Facts in Respondent DEP's brief.

[3] "NJPEECa" refers to NJPEEC's appendix; "DEPb" refers to DEP's merits brief; "DEPa" refers to DEP's appendix; "ISRIb" refers to ISRI's merits brief; "ISRIa" refers to ISRI's appendix; "ELECb" refers to ELEC's merits brief; and "ELECa" refers to ELEC's appendix.

disproportionate burden of environmental and public health stressors. The EJ Law seeks to prevent the continued siting of covered polluting facilities[4] in low-income communities, language-isolated communities, and communities of color and provides an opportunity for meaningful participation and consideration of polluting facilities' contribution to the cumulative impacts on the community. The Governor signed the Law on September 18, 2020, stating "[t]oday we are sending a clear message that we will no longer allow Black and Brown communities in our state to be dumping grounds, where access to clean air and clean water are overlooked." NJPEECa113.

A. The purpose of the EJ Law.

Understanding the intent of the Law based on its text is important to understand how the Regulations promulgated by DEP lawfully effectuate that intent. "To determine if an agency had the requisite authority to issue a regulation, courts strive 'to determine the intent of the Legislature.' We begin with the statutory language, the best indicator of legislative intent." In re Adoption of N.J.A.C. 17:1-6.4, 17:1-7.5 & 17:1-7.10, 454 N.J. Super. 386, 396 (App. Div. 2018) (quoting Med. Soc'y of N.J. v. N.J. Dep't of Law & Pub. Safety, 120 N.J. 18, 26 (1990)).

[4] The facilities covered by the EJ Law are: (1) major sources of air pollution; (2) incinerators; (3) sludge processing facilities; (4) sewage treatment plants; (5) transfer stations, solid waste facilities, and recycling facilities; (6) scrap metal facilities; (7) landfills; and (8) medical waste incinerators. N.J.S.A. 13:1D-158; N.J.A.C. 7:1C-1.5.

The purpose of the EJ Law, as made clear in the text, is to correct the "historical injustice" to New Jersey communities that have been subject to a disproportionately high number of environmental and public health stressors by "limit[ing] the future placement and expansion of [polluting] facilities in overburdened communities." N.J.S.A. 13:1D-157. The EJ Law recognizes the harms caused by the "legacy of siting sources of pollution in overburdened communities." Id. The Law finds that this practice has caused severe harm to members of these communities, including increased rates of "asthma, cancer, elevated blood lead levels, cardiovascular disease, and developmental disorders." Id. The Law recognizes that children in these communities are particularly vulnerable and that the negative "health effects may severely limit a child's potential for future success." Id.

The Legislature explicitly balanced the interests in general "economic growth" with the right of individuals and families in OBCs to experience "growth, stability, and long-term well-being," and to "live, work, and recreate in a clean and healthy environment." Id. The Law is clear on the outcome of this balancing: equity and justice for those living in OBCs justifies heightened community participation requirements and stricter substantive requirements for certain polluting facilities. As primary bill sponsor Senator Troy Singleton put it, "[i]n order to achieve environmental justice, we must address the most egregious

imbalances that result from those with more financial resources and louder political voices crowding out those who are bereft of both." NJPEECa109. As NJPEEC explained in comments on the proposed rules, the purpose of the Law is "not to facilitate the development of polluting industries in OBCs but, rather, to create a framework for sustainable and responsible development that allows OBCs to recover from the historic over-siting of polluting facilities in their neighborhoods." NJPEECa192.

As to a remedy, the Legislature declared "that no community should bear a disproportionate share of the adverse environmental and public health consequences" that come with New Jersey's economic growth. N.J.S.A. 13:1D-157. The Legislature created heightened public participation and substantive requirements to address the harm. First, the Law provides OBCs with a "meaningful opportunity to participate in any decision to allow in such communities certain types of facilities which, by the nature of their activity, have the potential to increase environmental and public health stressors." Id. This includes requiring the permit applicant to prepare an Environmental Justice Impact Statement, provide notice, and hold hearings in the impacted OBC. N.J.S.A. 13:1D-160 (Requirements for permit applicants). Second, the Law allows, and in some cases requires, "limit[ing] the future placement and expansion of such

facilities in overburdened communities." N.J.S.A. 13:1D-157; see N.J.S.A. 13:1D-160(c)–(d).

B. The EJ Law requires an analysis of cumulative impacts.

With the EJ Law, the Legislature intended to address not just the effect of an individual permit decision for an individual facility, but the impacts taken "together with other environmental or public health stressors affecting the overburdened community" that would "cause or contribute to adverse *cumulative* environmental or public health stressors." N.J.S.A. 13:1D-160(c) (new facilities) (emphasis added); N.J.S.A. 13:1D-160(d) (existing facilities, expansions & renewals). Due to the nature of disproportionate impacts sought to be addressed, the Law intentionally departed from the prior practice that looked only at isolated impacts of a permitted facility. Instead, the Law expressly considered the incremental impacts in the context of the overall and existing stressors, or the cumulative impacts, to the community.

Under the old method of environmental permitting, only the individual permit's impact is considered, and there is no mechanism for considering how these individual decisions and existing circumstances combine to create clusters of polluting facilities and a dearth of green space in OBCs. This regulatory and planning failure resulted in communities like the one-square-mile Camden Waterfront South neighborhood, a designated OBC, containing over 25

pollution-emitting facilities releasing as many as 37 air pollutants. NJPEECa104; See S. Camden Citizens in Action v. N.J. Dep't Env't Prot., 254 F. Supp. 2d 486 (D.N.J. 2003). Residents there have historically experienced increased asthma and cancer rates, higher COVID-19 related deaths and higher mortality rates in general. NJPEECa105. The legislature determined that it was critical to limit the placement of more facilities in OBCs like Camden Waterfront South by requiring the consideration of cumulative impacts in future permitting decisions.

The Legislature intended to address current and historical discrimination in the oversiting of polluting facilities, and to protect all New Jersey residents, regardless of income, race, ethnicity, color, or national origin, by considering cumulative impacts. N.J.S.A. 13:1D-157. This holds covered facilities in OBCs to higher participatory standards, and requires the consideration of the context in which the facility will be built. It would be impossible to address the oversiting of polluting facilities in low-income and communities of color without looking beyond the four corners of the facility. As primary bill sponsor Assemblyman John McKeon stated: "An overhaul of the way infrastructure gets approved and built, and systemic reform that puts people and communities directly at the heart of decision-making is what New Jersey needs. This legislation will help get us there." NJPEECa109.

II. DEP'S RULES ARE CONSISTENT WITH THE LEGISLATIVE INTENT TO ADDRESS CUMULATIVE IMPACTS TO OBCs

A. Standard of review.

A court must give great deference to an agency's interpretation of a statute, particularly "when the case involves the construction of a new statute by its implementing agency." Caporusso v. N.J. Dep't of Health & Senior Servs., 434 N.J. Super. 88, 104 (App. Div. 2014) (quoting Natural Medical, Inc. v. New Jersey Dept. of Health & Sr. Services, 428 N.J. Super. 259, 270 (App. Div. 2012)). A court can invalidate an agency's rules "only in those rare circumstances when it is clear that the agency action is inconsistent with its legislative mandate." Id. at 111 (quoting Williams v. Department of Human Services, 116 N.J. 102, 107 (1989)). The New Jersey Supreme Court has repeatedly instructed that "the grant of authority to an administrative agency is to be liberally construed in order to enable the agency to accomplish its statutory responsibilities and . . . courts should readily imply such incidental powers as are necessary to effectuate fully the legislative intent." N.J. State League of Municipalities v. Dep't of Cmty. Affairs, 158 N.J. 211, 223 (1999) (quoting N.J. Guild of Hearing Aid Dispensers v. Long, 75 N.J. 544, 562 (1978)). Even "[t]he absence of an express statutory authorization in the enabling legislation will not preclude administrative agency action where, by reasonable implication, that action can be said to promote or advance the policies and findings that served as the driving force for the enactment of the legislation."

N.J. State League of Municipalities, 158 N.J. at 223 (quoting A.A. Mastrangelo, Inc. v. Comm'r of Dep't of Envtl. Prot., 90 N.J. 666, 683 (1982)). Because the DEP appropriately promulgated the EJ Regulations consistent with the mandates and legislative intent of the EJ Law, the Court may not act to overturn them.

B. DEP understood the Legislature's intent, performed a comprehensive review of cumulative impact materials, and held stakeholder meetings in OBCs to effectuate the Legislature's intent.

In creating the EJ Regulations, the DEP reviewed a vast array of studies and information to best address cumulative environmental and public health impacts faced by New Jersey's OBCs. DEP also held stakeholder meetings with EJ community leaders in New Jersey to engage impacted communities and further inform the EJ Regulations. DEPb3, 13; ELECa2. The record in this case reflects DEP's diligent efforts to effectuate the intent of the New Jersey Legislature, which is to undo the historic and disproportionate environmental and health burdens faced by New Jersey's OBCs. See N.J.S.A. 13:1D-157. To effectuate the Legislature's intent, DEP's regulations must account for and address *all* of the environmental and public health stressors faced by OBCs, instead of only considering pollution from individual facilities on a case-by-case basis.

In order to accurately capture the various stressors that comprise cumulative impacts to New Jersey's OBCs, DEP reviewed studies on equitable access to urban vegetation and green space, DEPa0522–0529; social determinants of health,

NJPEECa6–22; DEPa0581–0584; distribution of urban tree canopy in EJ communities, NJPEECa84–100; DEPa0465–0466; residential segregation and heat-related risks, DEPa0458–0464; health impacts of waste and waste management on Environmental Justice communities, DEPa0329–0334, 0425–0427; disproportionate impacts of poverty related to unemployment and race, NJPEECa1–5; air pollution impacts from metal recycling industries on EJ communities, NJPEECa23–35; disproportionate pollution impacts based on race, DEPa0585–0614; socioeconomic disparities in drinking water quality, DEPa0274–0288; health impacts of flooding, NJPEECa65–83; and more. The Legislature tasked DEP with addressing cumulative impacts, and DEP synthesized these materials in order to fully understand the sources of cumulative impacts to OBCs in New Jersey. These materials informed the list of environmental and public health stressors in the EJ Regulations.

For example, DEP considered the Center for Disease Control's (CDC's) work on Social Determinants of Health, which are "nonmedical factors that influence health outcomes" and include systemic forces like "economic policies and systems, development agendas, social norms, social policies, [] political systems," and racism. NJPEECa20. The CDC also describes more specific Social Determinants of Health, including "polluted air and water[] and access to nutritious foods and physical health opportunities." NJPEECa20. DEP also considered in its

rulemaking a study on the distribution of urban vegetation, such as trees, in cities across the country, including Newark, New Jersey. NJPEECa36–64. This study found that there is a negative correlation between "racialized minority status and urban vegetation," and found that "education and income are most strongly associated with urban vegetation distribution." NJPEECa36.

DEP used Social Determinants of Health and other studies to understand the existing stressors in OBCs and the context in which facilities covered by the EJ Law operate. DEP also reviewed studies analyzing the impacts of covered facilities in order to understand how best to manage covered facilities' impacts within the existing environmental and social contexts of OBCs. For example, DEP reviewed a study that found that scrap metal facilities located in Houston, Texas, emit carcinogenic metal air pollutants and were disproportionately sited near "residential areas that are often minority and socioeconomically disadvantaged." NJPEECa24. This study also found that these communities are "disproportionately impacted with increased risks of adverse health consequences associated with exposure to multiple environmental and social stressors." NJPEECa24. This study showed the links between the oversiting of scrap metal facilities in communities of color and low-income communities, the pollution caused by those facilities, and the resulting negative health impacts. Scrap metal facilities are also disproportionately sited in OBCs in New Jersey—for instance, in OBCs in and

around Camden and Newark.[5] DEP used this study and many others to ensure that the EJ regulations would address the real-world, disproportionate cumulative impacts on OBCs from covered facilities, and prevent further oversiting. These are just a few of the many studies and materials that DEP considered in promulgating the Regulations.

DEP also engaged with EJ leaders and members of OBCs themselves in a series of stakeholder meetings while developing the EJ Regulations. DEPb3, 13; ELECa2. This is another excellent source of information on which to determine which stressors are relevant to OBCs in New Jersey. DEP reviewed these studies, materials, and public comments for the purpose of defining and operationalizing the Legislature's finding in the EJ Law that "New Jersey's low-income communities and communities of color have been subject to a disproportionately high number of environmental and public health stressors." N.J.S.A. 13:1D-158. Addressing these legislative concerns requires extensive knowledge of cumulative impacts to ground the law in information and data, and DEP's extensive information-gathering process grounded its rulemaking in the relevant literature. This is a logical and rational approach to rulemaking that serves to implement the

[5] Environmental Justice Mapping, Assessment and Protection Tool, https://tinyurl.com/njdepejmap (last visited June 17, 2024) (showing over 20 scrap metal facilities in OBCs in the City of Camden and surrounding areas, also showing over 25 scrap metal facilities in OBCs in the City of Newark and surrounding areas).

Legislature's intent. More examples of how the DEP's rulemaking implements this intent are discussed below.

C. DEP's inclusion of the so-called quality of life stressors is necessary to effectuate the Legislature's intent to address cumulative impacts to OBCs.

The industry Appellants assert that DEP's inclusion of "quality of life stressors" is ultra vires and unreasonable because these stressors are unrelated to the operations of covered facilities and are simply "features of urban areas." ISRIb40, ELECb46. The stressors that Appellants challenge are lack of recreational open space, lack of tree canopy, percentage of impervious surface, flooding history, percentage of unemployed residents, and educational attainment. See N.J.A.C. 7:1C App. DEP reasonably included these stressors as part of the cumulative impact assessment required under the EJ Law, and therefore this "disfavored" ultra vires argument must be dismissed. New Jersey Guild of Hearing Aid Dispensers, 75 N.J. 544, 561 (1978).

The Legislature defined "public health stressors" as "*conditions that may cause potential public health impacts, including, but not limited to*, asthma, cancer, elevated blood lead levels, cardiovascular disease, and developmental problems in the overburdened community." N.J.S.A. 13:1D-158 (emphasis added). Accordingly, in its rulemaking, DEP reviewed many materials related to conditions in OBCs that may cause potential public health impacts, including studies and information discussing air pollution, water pollution, and the significance of these

and other socioeconomic factors on public health. DEP appropriately included lack of recreational open space, lack of tree canopy, percentage of impervious surface, flooding, unemployment levels, and educational attainment as stressors because the DEP reasonably concluded that these stressors "may cause potential health impacts." N.J.S.A. 13:1D-158. Nor is there any requirement in the EJ Law that the environmental and public health stressors *need* to be directly related to facility operations, as Appellants imply in their arguments. This is precisely the type of case-by-case analysis the Legislature intended to replace; taking instead a holistic analysis of the existing cumulative stressors on a community—not only facility impacts.

The DEP reviewed materials that demonstrate that when industries concentrate in a single area, their construction often increases impervious surfaces and reduces tree canopy coverage, which can lead to increased flooding and urban heat island impacts. See DEPa0134-0141. These are stressors that may cause potential health impacts because reductions in these aspects of communities result in a lack of environmental benefits to OBCs. For example, studies have linked higher amounts of urban tree canopy to reductions in childhood obesity rates; improvements in pregnancy outcomes; decreases in cognitive fatigue; and reductions in anxiety, anger, and depression. NJPEECa85; DEPa0458. Studies also show that increases in urban tree canopy and urban vegetation can result in

reductions of air and noise pollution from vehicle traffic, reductions in stormwater runoff and heat-island effects, and physical health improvements in residents due to increased access to recreational open space. See NJPEECa37, 41, 48, 85; DEPa0461–0462.

Moreover, there is a disparity in the amount of tree canopy in low-income versus high-income communities; low-income communities have less urban tree canopy and, therefore, do not experience these benefits at the same levels as high-income communities. NJPEECa85, 94. Disparities in the amount of tree canopy in communities are not just differences between urban and rural communities as Appellants assert, but rather, are caused by systemic discriminatory development practices that result in more stressors in OBCs compared to higher-income, white communities. See e.g. DEPa0458 (linking residential segregation and disparities in urban tree canopy and showing that minority neighborhoods tend to have lower amounts of tree coverage); ISRIb40; ELECb47. Thus, DEP appropriately included lack of tree canopy as an environmental and public health stressor.

DEP also appropriately includes impervious surface percentage as a public health stressor. Greater percentages of impervious surfaces can have extremely detrimental health effects on communities. DEPa0458. The prevalence of impervious surfaces among communities is also uneven. DEPa0458. Generally,

communities of color and residents who rent (as opposed to owning their homes) are more likely to experience heat-related risks associated with impervious surfaces, known as the "urban heat island effect." DEPa0458. Exposure to increased temperatures can also exacerbate existing racial and ethnic disparities in chronic illnesses, such as cardiovascular disease and diabetes. DEPa0462. These stressors layer, creating quintessential cumulative impacts: Where there is more impervious surface, it is more difficult to create urban tree canopy. DEPa0465.

DEP included flooding as a stressor to be considered under the EJ Law analysis as well. This was rational because communities of color, low-income communities, and language-isolated communities disproportionately live in flood-prone areas. NJPEECa72. For example, DEP reviewed a study that concluded that "Both Black and Hispanic populations [in Miami] are significantly more likely to reside in high (100-year) flood risk zones" when compared to other groups. NJPEECa72. Flooding can pose great risks to human health, including injury, death, anxiety, and depression; as well as the economic burdens caused by property damage. NJPEECa75.

While these environmental and public health stressors already exist in OBCs, new and existing facilities that oversaturate these communities can contribute to and worsen these existing stressors by reducing amounts of tree canopy and open space, increasing amounts of impervious surfaces, and increasing

flood risk. These existing environmental and public health stressors already disproportionately cause negative health consequences and decreases in environmental benefits to low-income communities, communities of color, and language-isolated communities. The EJ Law does not require that these environmental and public health stressors directly relate to facility operations, but it is clear that preventing further siting of covered facilities in OBCs is one way to improve conditions in these communities. Therefore, DEP reasonably included these "quality of life" stressors as environmental and public health stressors in the EJ Law.

DEP also appropriately included unemployment and lack of educational attainment in OBCs as public health stressors under the broad definition set by the Legislature. N.J.S.A. 13:1D-158. For example, "People with steady employment are less likely to live in poverty and more likely to be healthy," and "People with higher levels of education are more likely to be healthier and live longer." NJPEECa11, 16. Additionally, "Poverty and unemployment do not affect everyone equally" and "People of color suffer from both unemployment and poverty disproportionately." NJPEECa2. OBCs, which include communities of color and low-income communities, are disproportionately impacted by unemployment and have lower rates of educational attainment. N.J.S.A. 13:1D-158 (defining "Overburdened Community"). Therefore, communities of color and low-income

communities that are disproportionately impacted by unemployment and lower levels of education are subject to increased public health stressors. This information, which is in the record considered by DEP, supports the inclusion of unemployment and lack of education as public health stressors in the EJ Regulations.

D. DEP reasonably defined "compelling public interest" to exclude overreliance on potential economic benefits, which is necessary to effectuate the intent of the EJ Law to limit the placement of polluting facilities in OBCs.

The DEP placed one narrow carveout in the EJ Regulations to allow new facilities to be sited in OBCs—even if they cause disproportionate impacts in the community—*if* that facility can demonstrate that it will serve a "compelling public interest" in the OBC. See N.J.A.C. 7:1C-5.3. DEP defined compelling public interest in the EJ Regulations as the following:

> [A] demonstration by a proposed new facility that primarily serves an essential environmental, health, or safety need of the individuals in an overburdened community, is necessary to serve the essential environmental, health, or safety need, and that there are no other means reasonably available to meet the essential environmental, health or safety need. For the purposes of this chapter, *the economic benefits of the proposed new facility shall not be considered in determining whether it serves a compelling public interest* in an overburdened community.
>
> N.J.A.C. 7:1C-1.5 (emphasis added).

Appellants argue that this definition is "ultra vires, arbitrary, and capricious" because, they claim, a new facility might employ local residents, and the applicant

should be able to cite to that possible benefit in its application. ISRIb23; ELECb24. Contrary to Appellants' arguments, excluding speculative economic benefits from the compelling public interest analysis is consistent with the intent of the EJ Law to protect residents of OBCs by limiting future placement of polluting facilities in those communities. ISRIb23; ELECb24.

DEP properly excluded economic benefits from the compelling public interest analysis. The Legislature considered the economic impact of covered facilities on OBCs, and found that oversiting these facilities in OBCs is harmful: "[T]he legacy of siting sources of pollution in overburdened communities continues to pose a threat to the health, well-being, and *economic success* of the State's most vulnerable residents." N.J.S.A. 13:1D-157 (emphasis added). Whatever hypothetical economic benefit Appellants claim an individual facility could provide in the form of employment, and for which there is no guarantee that workers would be local, it cannot appropriately be used to justify the placement of a facility that cannot avoid disproportionate impacts in an OBC. As found by the Legislature, "no community should bear a disproportionate share of the adverse environmental and public health consequences that accompany the State's economic growth." Id.

Nor is there any factual support for Appellants' contention that a covered facility would offer a significant benefit to an OBC. Appellant ISRI claims without

evidence that "under the definition of compelling public interest, a new facility that would employ local residents—thereby reducing one of the very factors that makes it an OBC in the first instance—cannot cite that benefit in its permit application." ISRIb23. Neither Appellant offers any historical evidence of covered facilities having an overall economic benefit to the community, such as significantly reducing the low-income status or unemployment levels in OBCs. OBCs currently face greater rates of unemployment and are generally lower-income, even though polluting facilities covered by the EJ Law are *already oversited in these communities*. See DEPa00142–44. The Legislature reasonably came to the opposite conclusion from the Appellants: that polluting facilities actually depress economic growth in these communities. See N.J.S.A. 13:1D-157.

Appellants also attempt to paint the exclusion of economic benefits in the compelling public interest exception as requiring that "NJDEP completely disregard community members' support for a new facility that will provide meaningful economic benefits to the community, such as employment." ISRIb24. This conflates two important principles. DEP ensured the rules "specifically allow the consideration of support for a project in the overburdened community in determining whether a compelling public interest is present to ensure its decisions meet the needs of community members." DEPa0010–0011. Still, DEP reasonably held firm in disallowing the consideration of economic benefits, which "would be

difficult, if not impossible, for the Department to effectively quantify, appropriately condition, and meaningfully enforce, particularly in light of the Act's requirement that any benefits must be localized to the overburdened community." DEPa0010–0011. It was reasonable for DEP to exclude the consideration of alleged economic benefits in the narrow compelling public interest exception, which *only* applies when the applicant is seeking to justify a *new* facility that cannot avoid disproportionate impacts to an OBC, in order to effectuate the intent of the EJ Law. N.J.A.C. 7:1C-1.5, 7:1C-5.3(a).

The Legislature intended for the application of the compelling public interest exception to be very narrow. In DEP's response to comments on the EJ Regulations, DEP agreed with commenters that "consistent with the act's express language and intent, [the compelling public interest definition] serves as a *narrow* exception to the requirement that the Department deny the issuance of a permit to a new facility that cannot avoid a disproportionate impact." DEPa0006 (emphasis added). DEP's Regulations appropriately circumscribed a narrow exception to be consistent with the EJ Law's purpose to protect the right of OBC residents to "live, work, and recreate in a clean and healthy environment." N.J.S.A. 13:1D-157. To allow the speculative economic benefits of a new facility to justify its placement, despite its inability to avoid disproportionate impacts, could swallow the exception and undermine the intent of the EJ Law.

E. DEP's definitions of "new facility," "existing facility," "change in use," and "expansion" are all reasonable because they are consistent with the legislative purpose of the EJ Law.

i. New and Existing Facility

Appellants argue that the EJ Regulations would result in de facto permit denials for existing facilities because the "new facility" definition is overbroad and would allow DEP to "overregulate long-existing businesses into extinction[.]" ISRIb14–20, ELECb13–14. This argument is specious. With the right technology and protections, many facilities defined as "new" or "existing" under the EJ Regulations can operate in OBCs. Facilities can also be sited outside of OBCs without needing to comply with the EJ Regulations. New facilities—including facilities previously operating without required and valid permits or registrations—are not subject to automatic permit denial, nor is there anything in the Law that would force them to shut down, other than an unwillingness to avoid disproportionate impacts in OBCs.

DEP may deny a permit for a new facility (including changes in use) only if the new facility *cannot avoid* disproportionate impacts on the OBC. N.J.A.C. 7:1C-5.2(b). Appellants overstate the applicability of this mandate; the EJ Law and Regulations do not give DEP the power to force "long-existing" facilities that are not changing their uses to shut down. Rather, the EJ Law and Regulations provide for a holistic review of existing stressors and impacts of new and existing facilities

on OBCs. This review allows DEP to determine whether to deny a permit, where appropriate, or impose permit conditions on facilities to prevent continued disproportionate impacts on OBCs.[6] See, e.g., N.J.A.C. 7:1C-5.2(b); 7:1C-6.2(b).

If a new or existing facility is not located in an OBC or an adjacent zero population block group, then it is not covered by the EJ Law and does not have to meet any of its requirements. See N.J.A.C. 7:1C-2.1(a); 7:1C-2.1(e). Alternatively, if a facility *is* located in an OBC but *can* avoid a disproportionate impact, then it only needs to engage in the meaningful public participation process and its permit application cannot be denied under the EJ Law, but DEP may impose conditions necessary to avoid those disproportionate impacts. See N.J.A.C. 7:1C-9.1; 7:1C-9.2. *Even if* a new facility *does* have disproportionate impacts, there is a narrow exception where a facility will not be subject to permit denial if it serves a "compelling public interest." N.J.A.C. 7:1C-5.3; see supra Section III.D.

It was also rational for DEP to include existing facilities "without a valid approved registration or permit" required by DEP in the definition of "new facility." N.J.A.C. 7:1C-1.5. Doing so subjects previously operating facilities that have avoided DEP regulation and oversight to the stricter requirements of new

[6] DEP can only *deny* permits for new facilities that have disproportionate impacts on OBCs and has no authority to deny permits for existing facilities under the EJ Law. N.J.A.C. 7:1C-5.2(b). Conversely, there are at least five circumstances where DEP can allow permits to proceed to review under the underlying substantive environmental law. See N.J.A.C. 7:1C-5.1; 7:1C-5.3; 7:1C-6.1; N.J.A.C. 7:1C-6.2; 7:1C-8.1; 7:1C-8.2; 7:1C-9.2. There are also multiple circumstances where DEP is required to impose conditions on permits for new and existing facilities to be protective of OBCs. N.J.A.C. 7:1C-9.2(a); 7:1C-9.2(b).

facilities; allowing such facilities to benefit and be considered "existing" facilities would run counter to the purpose of the EJ Law. Without this oversight, DEP would not have the information required to assess the impacts of a previously operating but unpermitted facility. Additionally, because DEP's permit denial power is narrow and only applies in the context of a covered new facility that cannot avoid disproportionate impacts, even a facility operating without a valid permit or registration—and, thus, categorized as a new facility under the EJ Regulations—would be able to continue operating in an OBC if it can avoid a disproportionate impact or serve a compelling public interest.

Accordingly, there is only *one* circumstance where DEP *must* deny a permit application: When a *new* facility *cannot avoid* disproportionate impacts on the host OBC *and* it also does not serve a compelling public interest. N.J.A.C. 7:1C-5.2(b); 7:1C-9.2(b)1. Appellants misconstrue these definitions in the Regulations, leading to overblown fears that covered facilities will be forced to shut down.

ii. Change in Use and Expansion

Appellant ELEC825 also opposes DEP's definition of "change in use," and both Appellants oppose DEP's definition of "expansion." ISRIb20; ELECb20. The EJ Regulations cover existing facilities that have undergone a "change in use" in its definition of "new facility." N.J.A.C. 7:1C-1.5. A "new facility" is "1) any facility that has not commenced operation as of April 17, 2023; or 2) *a change in use of an*

existing facility." N.J.A.C. 1.5 (emphasis added). The regulations define a "change in use" as "a change in the type of operation of an existing facility that increases the facility's contribution to any environmental and public health stressor in an overburdened community, such as a change to waste processed or stored." Id. The EJ Regulations also define facility expansions as "a modification or expansion of existing operations or footprint of development that has the potential to result in" increases in a facility's contributions to stressors in an OBC. Id. Appellant ELEC825 argues that this "change in use" language "exceeds statutory authority" and is "unconstitutionally vague." ELECb2. Both Appellants argue that the definition of "expansion" is overly broad and contrary to the EJ Law's intent. ISRIb20–21; ELECb19–20. However, this definition is consistent with the intent and purpose expressed by the Legislature in the EJ Law, because it is protective of OBCs.

If DEP were to allow changes in types of use and expansions that increase the facility's impacts to an OBC to be regulated as mere existing facilities, this would undermine the intent of the EJ Law by allowing completely new or expanded polluting facilities to be legacied into OBCs as existing facilities. A facility could change its operations drastically, resulting in significantly different types of emissions and environmental or public health impacts, but evade the appropriate scrutiny under the EJ Law. A facility expansion could also result in

drastic increases or contributions to stressors in an OBC, and could also avoid scrutiny. See DEPa0029.

Facilities that change their type of operations and increase pollution *should* be considered new facilities because such changes could result in significantly different or greater impacts on surrounding OBCs. Additionally, existing facilities that expand their operations should be subject to the EJ Law because such expansions could have negative impacts on OBCs. Treating a facility that changes its type of operation as the same existing facility is nonsensical, and these types of changes in use must be considered new facilities to effectuate the Legislature's intent to limit the placement of polluting facilities in OBCs. N.J.S.A. 13:1D-157. Facilities that expand operations and contribute to stressors in OBCs should also not be able to avoid regulatory scrutiny under the EJ Law, so DEP can most effectively determine facility impacts on OBCs and take action to protect those communities in accordance with the EJ Law's purpose. Id. See DEPa0027–28.

Thus, DEP's definitions of "new facility," "existing facility," and "change in use" are all reasonable and consistent with the EJ Law's legislative intent, and Appellants' fears of automatic permit denials for currently operating facilities are unfounded. There are many circumstances where the EJ Law does not mandate a denial, though DEP may have other legitimate grounds for such a denial, and only one situation in which DEP *must* deny a new permit.

F. DEP appropriately regulates facilities directly adjacent to OBCs in zero-population block groups to ensure that all facilities that impact OBCs are covered.

The EJ Regulations require that proposed or existing facilities that directly border OBCs, but are located in adjacent zero-population block groups, must meet all of the EJ Law's mandates. N.J.A.C. 7:1C-2.1(e). Appellants argue that the EJ Law only allows DEP to regulate facilities located *in* or proposed to be located *in* OBCs. ISRIb9–10; ELECb38–39. Far from being an "unlawful expansion by administrative fiat," ISRIb9, this "adjacency provision" is necessary "to promote or advance the policies and findings that served as the driving force for the enactment of the legislation." See id.; N.J. State League of Municipalities, 158 N.J. at 223 (quoting A.A. Mastrangelo, Inc., 90 N.J. at 683).

The purpose of the EJ Law is to correct the "historic injustice" of disproportionate impacts that polluting facilities have *on* OBCs—including by harming the health of children and the "well-being, and economic success of the State's most vulnerable residents." N.J.S.A. 13:1D-157. Air pollution—and its associated health impacts—is not contained by an arbitrary block line. Accordingly, it is consistent with the EJ Law's intent to regulate facilities that directly abut OBCs and are merely separated by a block group line, because these facilities can have the same impacts on the community as facilities sited within OBCs. DEPa0043.

Again, the types of pollution emitted by many of these facilities, especially air pollution—but also noise, odors, pests, and truck traffic—do not respect anthropogenic municipal or block group boundaries. When DEP performs a risk assessment for an air pollution control permit, it assesses the impacts of that pollution for up to five kilometers, or about 16,000 feet. NJPEECa125. This risk assessment can show potential health impacts thousands of feet away from the source of the air pollution, and DEP uses these risk assessments to inform the emission rates and permit conditions for the evaluated facilities. NJPEECa125. Because this pollution from covered facilities can have health impacts to communities *thousands* of feet away, it is reasonable for DEP to subject facilities directly adjacent to OBCs, but in zero-population block groups, which could be just across the street from homes in a designated OBC, to the requirements of the EJ Law.

Communities that are right next to a large industrial zone are called "fenceline" or "frontline" communities, and are often hit first and worse by the pollution from industrial facilities. DEPa0537. For example, the Waterfront South community in Camden is located immediately adjacent to a large industrial area, comprising two census blocks separate from the adjacent OBCs, which contain multiple scrap metal facilities, one major source of air pollution, and one major solid waste incinerator that are separated from adjacent OBCs by only a road or the

block group boundary line.[7] N.J.A.C. 7:1C-2.1(e). These facilities would not be subject to the EJ Law without the adjacency provision. This would subvert the intent of the Legislature to protect the state's most vulnerable communities.

CONCLUSION

The EJ Regulations promulgated by DEP are consistent with the legislative intent of the EJ Law and must be upheld. Specifically, DEP reasonably included "quality of life" stressors in the EJ Regulations; reasonably excluded economic benefits from the definition of "compelling public interest"; reasonably defined "new facility," "existing facility," and "change in use" in ways that are protective of OBCs and consistent with the purpose of the EJ Law; and appropriately regulated zero-population block groups adjacent to OBCs. Appellants' attempt to gut the EJ Regulations would defeat the Legislature's intent and allow business to proceed as usual, meaning New Jersey's OBCs would continue to experience the disproportionate harms of these polluting facilities. The EJ Regulations must be upheld as they are written in order to create a more equitable New Jersey.

Respectfully submitted,

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[7] See Environmental Justice Mapping, Assessment and Protection Tool, https://tinyurl.com/njdepejmap (last visited June 17, 2024).

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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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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

Docket No. A-002959-22

IN THE MATTER OF THE ADOPTION OF N.J.A.C. 7:1C

CIVIL ACTION

Submitted: June 28, 2024

BRIEF ON BEHALF OF *AMICI CURIAE* IRONBOUND COMMUNITY CORPORATION, SOUTH WARD ENVIRONMENTAL ALLIANCE, AND NEW JERSEY ENVIRONMENTAL JUSTICE ALLIANCE IN SUPPORT OF RESPONDENT NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION

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STATEMENT OF INTEREST OF AMICI

Ironbound Community Corporation, South Ward Environmental Alliance, and New Jersey Environmental Justice Alliance (collectively, "Environmental Justice Amici") represent overburdened communities in the Ironbound and South Ward areas of Newark and throughout New Jersey. Environmental Justice Amici were granted amicus status in both cases on November 13, 2023. Order on Motion, A-002936-22, No. M-000968-23 (Nov. 13, 2023); Order on Motion, A-002959-22, No. M-000969-23 (Nov. 13, 2023). For decades, Environmental Justice Amici have been urging the New Jersey government to address the injustice of the disproportionate concentration of pollution in their communities and the resulting adverse public health and environmental outcomes. They vigorously advocated for the enactment of the Environmental Justice Law ("EJ Law"), which places new substantive and procedural requirements on permits issued by Respondent Department of Environmental Protection ("DEP") that are designed to minimize or eliminate environmental disparities in overburdened communities. Environmental Justice Amici were also active during the subsequent rulemaking process to ensure that DEP's implementing rules carry forth the protections enshrined in the EJ Law.

Environmental Justice Amici file this brief to highlight real-life examples from their communities and points from their rulemaking comments and other

record documents. The amicus brief uses this information to explain how the EJ Rule is well within DEP's authority and that the arguments to the contrary of Appellants New Jersey Chapter of the Institute of Scrap Recycling Industries, Inc. ("ISRI") and Engineers Labor Employer Cooperative of the International Union of Operating Engineers Local 825 ("ELEC") are baseless.

PRELIMINARY STATEMENT

Appellants ISRI and ELEC present a laundry list of arguments against DEP's Environmental Justice Rule ("EJ Rule"). None of these arguments have merit.

Appellants' arguments contravene the text, structure, and purpose of the EJ Law, and are often based on misreadings of the Law or EJ Rule. In all instances, the EJ Rule provisions that Appellants challenge are either required by the EJ Law or within DEP's broad implementation authority. Appellants barely rely on the record, nor could they, because the record overwhelmingly supports DEP's findings and rulemaking decisions.

All of Appellants' arguments seek to weaken the EJ Law's innovative protections of overburdened communities ("OBCs") like those of Environmental Justice Amici. Facilities like those Appellants represent have contributed to disproportionately poor environmental conditions in Amici's communities for decades. With the EJ Law, the Legislature required DEP to correct the injustice

of such disproportionate environmental burdens. DEP's EJ Rule is a reasonable and necessary implementation of these legislative goals.

PROCEDURAL HISTORY AND STATEMENT OF FACTS[1]

New Jersey's broad authority to regulate sources of pollution and promote public health stems from the State's police power, vested in the Legislature and delegated to DEP in its organic act and through a number of resource-specific environmental statutes.[2] Many of these statutes direct DEP to conduct its oversight by way of site-specific permitting programs and explicitly state that DEP has the right to condition, revoke, or deny permits and permit applications.[3]

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[1] The procedural history and statement of facts are closely related, so Amici have combined them here for efficiency and the court's convenience.

[2] See N.J.S.A. 13:1D-9 ("The department shall formulate comprehensive policies for the conservation of the natural resources of the State, the promotion of environmental protection and the prevention of pollution of the environment of the State."); State v. Traffic Tel. Workers' Fed'n of N. J., 2 N.J. 335, 353 (1949) ("The Legislature indubitably has power to vest a large measure of discretionary authority in the agency charged with the administration of a law, enacted in pursuance of the police power, to secure the health and safety of the people.").

[3] See e.g., N.J.S.A. 13:9A-2 (Wetlands Act) ("[DEP] . . . may adopt, amend, modify or repeal orders regulating . . . coastal wetlands"); id. 13:19-5.1 (Coastal Area Facility Review Act) ("[DEP] shall approve, approve with conditions, or disapprove an application for a general permit pursuant to this section"); id. 58:1A-8 (Water Supply Management Act) ("Every permit issued . . . shall include provisions . . . [p]ermitting [DEP] to modify, suspend or terminate the permit"); id. 58:10A-7 (Water Pollution Control Act) ("[DEP] may modify, suspend, or revoke a permit in whole or in part during its term for cause"); id. 58:16A-55.2(a) (Flood Hazard Area Control Act) ("No structure or alteration . . . shall be made, rebuilt or renewed by any person without the approval of [DEP] and without complying with such conditions as the department may prescribe");

DEP's permitting discretion is cabined by federal environmental statutes that set regulatory floors for environmental protection, but, apart from rare instances of federal preemption, federal statutes generally reserve a State's ability to impose requirements beyond the federal floor to better protect public health.[4]

Despite DEP's broad authority under State and federal law to regulate pollution through its permitting programs, DEP has thus far failed to exercise that power in a way that prevents the disproportionate overconcentration of pollution in New Jersey's low-income communities and communities of color. At certain times, DEP has expressly disclaimed its obligation to consider the disproportionate impacts of its permitting program.[5] Meanwhile, multiple studies, including DEP's own, acknowledge the direct correlation between

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see also N.J.A.C. 7:38-11.7(a) (Highlands Water Protection and Planning Rule) ("[DEP] shall approve or deny an application for a Highlands general permit within 120 days"); id. 7:27-8.14(a) (Air Pollution Control Rule) ("[DEP] shall deny [a permit] application" under certain conditions).

[4] See Bell v. Cheswick Generating Station, 734 F.3d 188, 190 (3d Cir. 2013) ("[S]tates are expressly allowed to employ standards more stringent than those specified by the federal [Clean Air Act] requirements."); Envtl. Comm. of Fla. Elec. Power Coordinating Grp., Inc. v. Envtl. Prot. Agency, 94 F.4th 77, 93 (D.C. Cir. 2024) (explaining that, while the Clean Air Act "subject[s] the states to strict minimum compliance requirements," "states generally have 'the power to determine which sources w[ill] be burdened by regulation and to what extent.'").

[5] See EJa32-33; S. Camden Citizens in Action v. DEP, 145 F. Supp. 2d 446, 487-88 (D.N.J. 2001) (disagreeing with DEP's "insist[ence] that [DEP] is neither obligated to consider the data [on disproportionate environmental burdens] . . . nor conduct its own inquiry before permitting" a polluting facility); EJa184 ("High-percent minority areas [in New Jersey] tend to have a weaker record of [DEP's] environmental enforcement as compared to low-percent minority areas.").

demographics and the concentration of environmental stressors. See EJa25-28.[6] For example, DEP's own research found that in some areas of the state, people of color were exposed to three to four times more environmental stressors than other groups, and that statewide, the cumulative environmental impacts in a census block increased whenever the percentage of minorities or percentage of people living in poverty in that block group increased.[7]

In 2020, the New Jersey Legislature passed the EJ Law in an express attempt to ameliorate these disparities by requiring DEP to exercise its existing permitting powers in a way that better protects public health.[8] Like the floors of federal environmental statutes, the EJ Law limits DEP's discretion to *under*-regulate. Its procedural safeguards require DEP to more deeply scrutinize

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[6] Throughout this brief, "EJa" refers to Environmental Justice Amici's appendix, "DEPb" to DEP's June 10, 2024 brief, "DEPa" to DEP's appendix, "ISRIb" to ISRI's brief, "ISRIa" to ISRI's appendix, "ELECb" to ELEC's brief, "ELECa" to ELEC's appendix, and "CCNJb" to the amicus brief of Chemistry Council of New Jersey.

[7] See S. Camden Citizens in Action v. DEP, No. CIV.A. 01-702 (FLW), 2006 WL 1097498, at *9 (D.N.J. Mar. 31, 2006) (EJa804, 809-10) (citing EJa196); EJa27-28 (citing DEP's Preliminary Screening Method to Estimate Cumulative Environmental Impacts).

[8] See N.J.S.A. 13:1D-157. Other States have proposed or enacted laws to address environmental disparities that take similar approaches as New Jersey's EJ Law. See, e.g., N.Y. Env't Conserv. Law § 70-0118 (2024) (New York); Minn. Stat. Ann. § 116.065 (2023) (Minnesota); 2021 Mass. Legis. Serv. Ch. 8 § 102C (S.B. 9) (implemented at 310 Mass. Code. Regs. 7.02(14) (2024)) (Massachusetts); see also H.B. 2520, 103rd Gen. Assemb. (Ill. 2023) (Illinois); S.B. 743, 2023 Reg. Sess. (Md. 2023) (Maryland).

permits for sources of pollution in the OBCs that bear a disproportionately high amount of pollution. N.J.S.A. 13:1D-160(d). And its substantive safeguards limit DEP's discretion to approve a subset of those permit applications – DEP now must deny applications for new facilities in cumulatively adverse OBCs for which there is no "compelling public interest." Id. 13:1D-160(c).

On June 6, 2022, DEP issued its proposed regulations to implement the EJ Law. 54 N.J.R. 971(a) (June 6, 2022) (ELECa1). This proposed rule was informed by 10 prior public-engagement sessions with industry, government, and citizen stakeholders. 55 N.J.R. 661(b), 668 (Apr. 17, 2023) (DEPa8). The proposed rule received over 1,000 pages of written comments and over 100 oral comments provided at five hearings. 55 N.J.R. at 661 (DEPa1). On April 17, 2023, DEP promulgated the final EJ Rule that is the subject of Appellants' challenge. Ibid.[9]

ARGUMENT

I. The EJ Law Does Not Allow DEP To Consider Economic Benefits As Part of the "Compelling Public Interest" Analysis.

Appellants challenge the EJ Rule's exclusion of a facility's supposed "economic benefits" from consideration when determining whether a "compelling public interest" allows DEP to permit a new facility that the EJ Law otherwise

[9] Amici incorporate by reference the standard of review as set forth by Respondent DEP in its brief. DEPb16-20.

prohibits. ISRIb22-26; ELECb24-27. But Appellants' desired outcome is barred by the EJ Law's text, structure, and intent.

In the EJ Law, the Legislature found that "the legacy of siting sources of pollution in overburdened communities continues to pose a threat to the . . . economic success of the State's most vulnerable residents," and that the State must promptly "correct this historical injustice." N.J.S.A. 13:1D-157. The Legislature could not be more clear: new sources of pollution are a "threat" – not a potential contributor – to an OBC's economic success. The Law therefore forecloses DEP's ability to consider a facility's proffered economic benefits when determining whether a "compelling public interest" exists to build yet another new source of pollution in an OBC.

Moreover, when the Legislature uses the same terminology as a particular judicial standard, it is presumed to adopt that standard into the statute, DiProspero v. Penn, 183 N.J. 477, 494-95 (2005), and case law indicates that the "compelling public interest" standard is "not a standard to be lightly applied" because it refers to only those public interests that are "profoundly important." Schundler v. Donovan, 377 N.J. Super. 339, 347 (App. Div. 2005). Courts routinely find that, under a "compelling public interest" standard, economic interests do not outweigh

environmental protections.[10] Moreover, the Legislature's deliberate use of the term "*compelling* public interest" distinguishes this standard from the "public interest" standard in other statutes, so Appellants' reliance on statutes that concern "public interests" that are not "compelling" is inapposite. See ISRIb25-26; ELECb26-27; see also Nagy v. Ford Motor Co., 6 N.J. 341, 348 (1951) ("[A] change of language in a statute 'ordinarily implies a purposeful alteration in [the] substance of the law'").

In addition, then Assemblywoman (and current Senator) Britnee Timberlake, a prime sponsor of the bill, testified that the Legislature "specifically wrote [the compelling public interest language] for environmental health or safety," and that to "expand th[e] definition" to cover economic and corporate interests would create a "giant loophole" at odds with the legislative intent. EJa608. Indeed, accepting Appellants' interpretation would upend the intent and structure of the EJ Law by creating a "compelling public interest" exception so broad that it swallows the Rule. See State v. Reynolds, 124 N.J. 559, 564 (1991) ("A construction that will render

[10] See U.S. v. Wheeling-Pittsburgh Steel Corp., 818 F.2d 1077, 1088 (3d Cir. 1987) (characterizing environmental protection as a "compelling public interest" that is not overcome by State's economic interests in the continued operation of steel facilities); Realty Income Tr. v. Eckerd, 564 F.2d 447, 456 (D.C. Cir. 1977) (finding "compelling public interest" in the enforcement of National Environmental Policy Act notwithstanding resulting "substantial additional cost"); see also Shapiro v. Thompson, 394 U.S. 618, 627–28 (1969), overruled in part on different grounds by Edelman v. Jordan, 415 U.S. 651 (1974) (State's interest in preserving the fiscal integrity of its public assistance programs was not a compelling government interest); EJa586-87, 589-90.

any part of a statute inoperative, superfluous, or meaningless, is to be avoided."). Appellants' interpretation would rewrite the EJ Law by ensuring that *any* facility could avoid the EJ Rule's prohibitions simply by promising to employ and buy locally, see ISRIb23-24; ELECb25, with no safeguard after the facility is built and operating should that promise not be kept. An exemption with such broad application – i.e., because any facility could assert that it will pay its employees and will engage in transactions in the marketplace – would undermine the EJ Law's core provisions, and the Legislature did not purposely plant such a poison pill in the Law. See Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001) ("Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions – it does not, one might say, hide elephants in mouseholes."); see also DEPb34.

Moreover, the record supports DEP's position by showing that polluting facilities harm – not help – an overburdened community's economic development.[11]

[11] EJa3, 34-36 (explaining that higher pollution levels correlate to lower incomes); 54 N.J.R. at 988-89 (ELECa18-19) (noting pollution reduction results in long-term economic benefits); 55 N.J.R. at 667-69 (DEPa7-9) (citing U.S. EPA study that quantified benefits from reduced pollution from Clean Air Act amendments at $2 trillion, over 30 times more than the compliance costs); EJa292 (citing study that found that pollution is one of the top five barriers to upward economic mobility); ISRIa169 / EJa369 (finding national costs of medical care and lost economic opportunity from environmentally mediated neurodevelopmental disorders are $74.3 billion); EJa355 (finding outdoor recreation opportunities provide $8.7 billion in value to the New Jersey economy).

Appellants, on the other hand, point to no evidence in the record in support of their assumption to the contrary. For all these reasons, their challenge to the EJ Rule's definition of "compelling public interest" should be rejected.

II. The EJ Rule Properly Defines a "New" Facility.

Appellants take issue with the EJ Rule's definition of a "new facility" based on the date of the facility's permitting instead of the date of the start of its operations. ISRIb14-20; ELECb15-16. While the EJ Law does not define the term "new," it does define "facility" by identifying categories of facilities based on their permitting classifications (e.g., "major source of air pollution," "resource recovery facility," etc.), N.J.S.A. 13:1D-158, so DEP's definition of "new facility" based on permit date is entirely consistent with this language. This definition of "new facility" is also consistent with the structure of the Law, which is itself all about permitting. Additionally, DEP's definition is rational because, as a permitting agency, DEP can be expected to keep thorough permitting-related records, but not necessarily records relating to construction or operation activities of facilities without permits.[12]

[12] ELEC relies on a case about the federal Clean Air Act, Port Hamilton Ref. & Transp., LLLP v. U.S. Envtl. Prot. Agency, 87 F.4th 188, 190, 194-5 (3d Cir. 2023), to support its argument that previously constructed facilities cannot be considered new, but that case was about the "construction is commenced" language specific to the federal Act. The EJ Law does not contain this same language, and at any rate sets the floor for environmental protection higher than federal statutes. See Procedural History and Statement of Facts.

ISRI suggests that DEP might treat any existing facility as a "new" facility if DEP determines *in the future* that the facility must obtain a new type of permit. ISRIb15, 18-20. But this is a misreading of the definition of "new facility," which covers "an existing facility that has operated without a valid approved registration or permit *required by the Department prior to April 17, 2023*." N.J.A.C. 7:1C-1.5 (emphasis added). Under the canons of statutory construction, "prior to April 17, 2023" applies to its direct antecedent, "required by the Department," and not the phrase "existing facility that has operated" at the beginning of the sentence. See Lockhart v. U.S., 577 U.S. 347, 351 (2016) ("[A] limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows."). In contrast, to read the Rule as ISRI seems to, so that it applies to any "existing facility that has operated . . . prior to April 17, 2023," would not only contradict this statutory canon but also would result in surplusage, because there would be no need for DEP to specify that a facility operating prior to April 17, 2023, is "existing." See Nielsen v. Preap, 586 U.S. 392, 414 (2019) (quoting A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts, 174 (2012)) ("[E]very word and every provision is to be given effect [and n]one should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence."). Indeed, DEP's response to comments clarified that this April 17, 2023, date is the cut-off date for the DEP permit requirement, not the date of the

facility's operation, and that this provision "prevent[s] facilities from being unduly impacted by future regulatory changes."[13] Thus, scrap yards covered by the permits that were required prior to April 17, 2023, need not fear about being considered "new" facilities if DEP determines in the future that they must obtain new types of permits.

ELEC argues that the inclusion of a "change in use" in the definition of a "new facility" improperly allows DEP to treat an existing facility like a new facility. ELECb15-16; see also CCNJb24-25. But the purpose of the EJ Law is to reduce the overconcentration of polluting sources in OBCs, so it would be contrary to the Law for the Rule to allow new facilities to avoid the Law's requirements altogether if they are built within the exact same plot of land as a current facility in an OBC. An example of this situation is the Passaic Valley Sewerage Commission wastewater treatment plant in the Ironbound section of Newark. That facility currently has no gas-fired power plant within its borders, but it has applied to build just such an onsite gas plant, which would be the fourth gas plant in this one neighborhood of the Ironbound. See EJa9. Coal-fired power plants in the region have similarly been

[13] 55 N.J.R. at 668 (DEPa8) (explaining that this language is necessary to ensure that delinquent facilities operating without agency oversight prior to the Rule were not rewarded by being allowed the same benefits as existing facilities that had been compliant with registration and permits); DEPb27-28.

seeking to convert their sites to gas-fired plants.[14] Under ELEC's preferred approach, these future new gas plants and other new polluting facilities could entirely avoid the EJ Law's requirements for new facilities simply by being located within the confines of a pre-existing facility. ELECb14. The EJ Rule properly closes this loophole by treating all new facilities as "new facilities" under the Law, even if they are built within the borders of an existing facility. And while ELEC suggests that the "change in use" language allows DEP to shut down "long-existing facilit[ies]," ibid., that is not the case – even if DEP denies a permit modification application for a change in use, that, by itself, does not prevent the facility from continuing to operate under its existing permit and designated uses.

III. DEP's Definition of "Expansion" is Appropriate.

Appellants incorrectly assert that DEP's definition of "expansion" exceeds DEP's statutory authority because the definition is based on a facility's "potential" to increase stressors and because it includes the term "modification." ISRIb20-22; ELECb19-20. But the statutory text and structure do not support these arguments.

[14] See, e.g., In the Matter of Greenidge Generation LLC, Applicant, 2024 WL 2273410, at *3, *9 (May 8, 2024) (EJa833, 835, 839) (affirming permit denial for a "historically . . . coal-burning electrical generating facility" in a New York disadvantaged community that "convert[ed] . . . to primarily natural gas-firing," then subsequently sought to "substantially alter[] the primary purpose of the Facility's operation" by converting from sporadic "peaking" operation to constant operation).

The plain text of the EJ Law compels DEP to consider a facility's "potential" to emit when determining if an "expansion" under the Law has occurred. The EJ Law expressly provides that the State should "limit the future placement and *expansion*" of "facilities, which . . . have the *potential* to increase environmental and public health stressors." N.J.S.A. 13:1D-157 (emphasis added). The Law then requires facilities to make publicly available an assessment of the "potential" stressors associated with the facility. Id. 13:1D-160(a)(1). And as for air permits specifically, the Law expressly covers air permits based on a facility's "potential to emit" pollutants. Id. 13:1D-158 (definition of "major source"). It is therefore appropriate for DEP to interpret the EJ Law's language about minor modifications that "do not increase emissions," ibid. (definition of "permit"), to cover either "actual or *potential* emissions," N.J.A.C. 7:1C-1.5, because the Law already directs DEP to regulate based on the metric of "potential to emit."

In addition, DEP, and the court, "must strive to harmonize" "statutes relating to the same subject matter," Burt v. W. Jersey Health Sys., 339 N.J. Super. 296, 304 (App. Div. 2001), and DEP's "potential to emit" language here properly harmonizes the EJ Law with other environmental statutes that use the "potential to emit" metric. For example, the federal Clean Air Act, the New Jersey Air Pollution Control Act, and DEP's implementing rules all regulate sources based on their "potential" to emit

air pollutants.[15] This makes sense, since permits must be obtained *before* the requested construction or modification takes place, so predicted "potential" emissions are typically the only emission data available at the time of permitting decisions. "The Legislature is presumed to be familiar with its own enactments," In re Agric., Aquacultural, & Horticultural Water Usage Certification Rules, 410 N.J. Super. 209, 228, (App. Div. 2009), so it was proper for DEP to presume that the Legislature intended the EJ Rule's definition of "expansion" to use the same "potential to emit" metric as in other statutes.

ISRI also takes issue with the inclusion of the term "modification" within the definition of "expansion," because it apparently interprets DEP's definition to apply to *any* "modification," whether it has the potential to increase emissions or not. ISRIb21-22; see also CCNJb23.[16] ISRI apparently reads DEP's definition to cover

[15] 42 U.S.C. § 7412(a)(1) (classifying a source as "major" based on its potential to emit); N.J.S.A. 26:2C-2 (same); id. 26:2C-9.2(c) (requiring emission limits based on a facility's "potential to emit" certain pollutants); see also N.J.A.C. 7:27-21.3; id. 7:27-22.2; id. 7:27-8.12; id. 7:27-19.2; id. 7:27-21.10; id. 7:27-21.2; id. 7:27-22.6 (all regulating or imposing requirements on the basis of potential to emit).

[16] Environmental Justice Amici agree with DEP that a "'modification' that does not trigger a separate permitting requirement . . . falls outside the EJ Rules," DEPb30, insofar as DEP refers to a separate requirement to submit a permit application, but caution not to read the statement as suggesting that the EJ Rule's "modification" provisions apply only when a *separate permit* is required – even if a facility with only an air permit seeks to modify its existing air permit (as opposed to seeking a new type of permit like a stormwater permit), that permitting action may still be covered by the EJ Rule.

either *any* "modification" (a one-word category) or alternatively, only those "expansions" that are an

> expansion of existing operations or footprint of development that has the potential to result in an increase of an existing facility's contribution to any environmental and public health stressor in an overburdened community, but shall not include any such activity that decreases or does not otherwise result in an increase in stressor contributions

(a 53-word category). N.J.A.C. 7:1C-1.5. Contrary to this interpretation, canons of statutory construction hold that when a modifier (here, "that has the potential to [increase stressors]") is placed after a straightforward, parallel series of nouns (here, "a modification or expansion"), the modifier normally applies to each noun in the series. Matter of Proposed Constr. of Compressor Station, 476 N.J. Super. 556, 568 n.10 (App. Div. 2023) (citing A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts, 147). Thus, the phrase "that has the potential to result in an increase . . . [in a] stressor" should be read to apply to both the terms "modification" and "expansion," and not solely the latter.[17]

IV. The EJ Rule's Provisions About Permit Conditions Do Not Exceed DEP's Authority And are Not Impermissibly Vague.

Appellants note that the EJ Rule contemplates permit conditions beyond the minimum requirements of pre-existing law, and on this basis they incorrectly

[17] Indeed, as noted above, the definition of "permit" in both the EJ Law and EJ Rule specifically exclude air permit modifications "that do not increase" emissions. N.J.S.A. 13:1D-158; N.J.A.C. 7:1C-1.5.

contend that the Rule exceeds DEP's statutory authority. ISRIb30; ELECb33-38, 42.[18] But that is precisely the purpose of the EJ Law – it creates a new floor of environmental protection that is higher than the floors under pre-existing law. See Procedural History and Statement of Facts. The EJ Law expressly provides a broad grant of authority to DEP to require new cumulative-impacts solutions to address cumulative-impacts problems, N.J.S.A. 13:1D-160(c) to (d) (empowering DEP to set conditions on permits to protect public health and the environment from the cumulative effects of pre-existing stressors and potential future stressors caused by the facility); id. 13:1D-157; id. 13:1D-158; id. 13:1D-160, and the EJ Rule is properly crafted to achieve those legislative ends. See Lourdes Med. Ctr. of Burlington Cnty. v. Bd. of Rev., 197 N.J. 339, 361 (2009) ("[W]e give considerable latitude when [an agency] construes the 'express and implied powers' of a statute for the purpose of carrying out legislative intent."). And while the EJ Rule provides the framework for DEP's future decisions on permit conditions, it does not, by itself, mandate any particular condition in any particular permit, so disagreements about future permit conditions are better addressed through an as-applied permit challenge, as ELEC has recognized. See ELEC's Mem. of Law in Opp'n to Community

[18] ISRI incorrectly contends that the federal Clean Air Act preempts all DEP regulation of mobile sources, ISRIb37, but the Act expressly reserves "existing State authority" to regulate mobile sources that congregate at facilities. Air Plan Approval; California; South Coast Air Quality Management District, 88 Fed. Reg. 70,616, 70,622 (proposed Oct. 12, 2023); 42 U.S.C. §§ 7410(a)(5), 7416.

Group's Mot. to Intervene, A-002959-22, M-006733-22 at 14 (Sept. 5, 2023) ("The EJ Law does not guarantee what action the NJDEP will take on any permit application," so parties that disagree with permitting decisions under the EJ Law instead "can challenge the issuance of a permit in the underlying environmental permitting scheme.").

Appellants also argue that the EJ Rule's provisions about permit conditions are impermissibly vague, ISRIb32-36; ELECb44, but Appellants ignore that permitting programs are by their nature site-specific reviews that cannot plan out all conceivable future permitting situations. That is why DEP's pre-existing permitting regulations, for example, are broadly drafted to allow DEP to include in water permits "conditions . . . as required on a case-by-case basis," N.J.A.C. 7:14A-6.3(a), and to include in air permits "any operational requirement necessary to assure compliance," id. 7:27-22.16(a); compare with id. 7:1C-9.2(b)(1)(ii) (EJ Rule providing for permit conditions "as necessary"). Indeed, DEP issues individual water permits for scrap yards with shredders in order to "consider the unique conditions associated with shredding" and ensure that the permits are "tailored specifically to actual operations." EJa376. Similarly, DEP's air permits have required more frequent monitoring at facilities like the Newark Energy Center gas plant in the Ironbound

because of circumstances specific to the facility and surrounding environment.[19] It is because of the need for this type of site-specific review that the Legislature requires DEP to issue individual permits to individual facilities, as opposed to promulgating broadly applicable rules that apply to all facilities at once. See Procedural History and Statement of Facts. The EJ Rule merely carries that same principle forward, as required by the EJ Law.

Appellants' vagueness challenge is therefore misplaced and, as noted above, premature. The EJ Rule provides that a final permitting action under the Rule shall be a "decision, in writing, with a summary of facts, the Department's analysis, and identification of any [permit] conditions." N.J.A.C. 7:1C-9.3(a). Asking whether these framework regulations are vague with regard to permit conditions is the wrong question, since DEP's decisions about permit conditions will be made and explained at a later date. Any purported vagueness about permit conditions should be dispelled by this detailed written decision explaining the permit conditions, or otherwise resolved through an as-applied challenge to that written decision.

[19] EJa863 (explaining that at the time of initial permitting – well before the enactment of the EJ Law – DEP chose to require more frequent stack testing than usual (testing once per quarter instead of once per 5-year permit term) in gas plant's air permit because the gas plant had the potential to emit 97.5 tons of particulate matter a year (just under the 100-ton regulatory threshold) and was in an area that did not meet federal particulate-matter air-quality standards).

Case law also supports the notion that the EJ Rule is not impermissibly vague. "[R]egulations must only be 'sufficiently definite to inform those subject to them as to what is required,'" In re N.J.A.C. 7:1B-1.1 Et Seq., 431 N.J. Super. 100, 129 (App. Div. 2013), and courts routinely uphold DEP's regulations as sufficiently definite. See id. at 130-31 (upholding "unduly burdensome" language because it had "some standard[]" and more rigid language could impede DEP's discretion); Matter of Crown/Vista Energy Project, 279 N.J. Super. 74, 85 (App. Div. 1995) (definition of "complete" based solely on DEP's determination that it had all necessary information was "a sufficient standard"). Here, the EJ Rule easily passes the "sufficiently definite" bar because DEP provides clear guidance about when additional conditions might be required, what stressors those conditions would need to address, and an appeals process.[20] The cases on which Appellants rely are therefore inapposite because here, the Rule has clear definitions and an appeals process, unlike in Borough of Avalon v. DEP, 403 N.J. Super. 590, 608–09 (App. Div. 2008) and N.J. Soc'y for Prevention of Cruelty to Animals v. N.J. Dep't of Agric., 196 N.J. 366, 412 (2008), and here it is not "impossible to foretell" DEP's future regulatory decisions, unlike in Crema v. DEP, 94 N.J. 286, 303 (1983).

[20] See N.J.A.C. 7:1C-9.2(b)(1)(ii); id. 7:1C-9.3; id. 7:1C-9.5; id. 7:1C-1.5; id. 7:1C-2.2(d); id. 7:1C-2.2(b)(2); see also EJa913-14 (OBC Stressor Summaries that are publicly available on the EJMAP website and provide clear guidance to permit applicants about which stressors are adverse in an OBC and if the OBC is cumulatively adverse).

V. The EJ Rule's Application to Zero-Population Block Groups is Consistent with the EJ Law and Compelled by the Statutory Intent.

Appellants take issue with the EJ Rule's application to facilities located in zero-population census block groups, ISRIb9-13; ELECb38-40, but the EJ Law and the record support DEP's position here. The EJ Law categorizes a census block group as an "OBC" based on the *percentage* of the population that is low-income, minority, or with limited English proficiency, not the aggregate *number* of these residents. N.J.S.A. 13:1D-158. So, for example, a block group is an OBC if the number of residents that identify as minority (in the numerator) over the number of total residents (in the denominator) exceeds 40 *percent*. Ibid. But in a zero-population block group, it is not clear what the percentage of minority residents is – the block group could just as easily be 100% minority as it could be 0% minority, since both the numerator and denominator are zero (0/0).[21] Faced with the mathematical ambiguity of zero-population block groups, DEP has discretion to adopt the EJ Rule's compromise position, in which the Rule applies only when a facility in a zero-population block group is "immediately adjacent" to an OBC. N.J.A.C. 7:1C-2.1(e). The Rule thus applies only to a subset of facilities within a subset of the State's zero-population block groups.

[21] See Rose Acre Farms, Inc. v. United States, 559 F.3d 1260, 1270 (Fed. Cir. 2009) ("[B]asic mathematical principles [provide that] . . . the result of dividing a real number by zero is undefined.").

Moreover, Appellants' preferred approach here would frustrate the legislative purpose of the EJ Law, and should be rejected on that basis alone. See Aponte-Correa v. Allstate Ins. Co., 162 N.J. 318, 323 (2000) ("Where a literal reading will lead to a result not in accord with the essential purpose and design of the act, the spirit of the law will control the letter."). Most block groups are smaller than 0.5 square miles in area, EJa330, and in dense urban areas a block group can consist of just a few city blocks, resulting in jigsaw-like patterns of adjacent populated and unpopulated block groups.[22] New Jersey has many block groups that cover industrial or commercial land uses only (and thus have zero population) but have residences just past their borders.[23] These areas of concentrated industry next to residences are the EJ Law's primary areas of concern, and it would be contrary to the legislative purpose for DEP to entirely exempt them from the Law's protections.

[22] See, e.g., EJa910 (Screenshot of Downtown Trenton from DEP's EJMAP tool. Block group borders are shown in gray outlines. OBCs are shaded aqua, and zero-population block groups are shaded yellow. In the yellow area, the EJ Rule applies only to facilities that are immediately adjacent to the aqua area. Appellants would have the EJ Law and EJ Rule not apply to any facility in the yellow area.).

[23] See EJa910-12 (EJMAP screenshots of Trenton, Camden, and Newark showing zero-population census block groups (shaded yellow) that cover industrial or commercial tracts of land, with residential OBC block groups (shaded aqua) directly across the street); see also Block Groups for the 2020 Census—Final Criteria, 83 Fed. Reg. 56,293, 56,294 & tbl.3 (Nov. 13, 2018) (instructing that zero-population block groups should be drawn around "employment centers" like the commercial and industrial areas where polluting facilities are located).

In addition, the record shows that the types of facilities covered by the EJ Law have adverse environmental impacts that can extend out for many miles,[24] and thus do not stop at the boundaries of these comparatively small block groups.[25] So if anything, DEP's position is insufficiently protective because it fails to cover facilities that are not "immediately adjacent" to the block-group boundary that are still impacting OBC residents up to many miles away.[26]

VI. The EJ Law's Text and Intent Require DEP to Exclude OBCs from the Definition of Geographic Point of Comparison.

Appellants argue that it is impermissible for DEP to define "geographic point of comparison" ("GPOC") such that an OBC's stressors are compared to stressors of only the *non*-OBC block groups in the state or county, instead of comparing to *all*

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[24] EJa591-93 (oil refineries have impacts out to 10 miles); id. (power plants have impacts out to three miles); 54 N.J.R. at 978 (ELECa8) and EJa342 (scrap yards have impacts out to 600 meters); EJa391 (carcinogenic emission impacts out to one mile); EJa465-66 (same); EJa474 (copper smelter impacts out to two miles).

[25] See EJa437 (noting that "a hazardous facility could be so close to the boundary of the host [census] unit that a neighboring spatial unit could be equally exposed to pollution" and that "census units . . . are unlikely to represent the shape or size of the area potentially exposed to the entire range of environmental health hazards associated with a polluting facility or hazard source," so one cannot assume that "the adverse impacts of environmental hazards are confined only to the boundaries of their host [census] units.").

[26] ELEC suggests it is illogical for DEP to "apparently require that an applicant circulate [newspaper] notices and organize a public meeting [i]n a census block that does not contain any residents," ELECb40, but provides no support for the notion that the commercial or industrial buildings in such a block group would have no newspaper circulation nor indoor spaces for meetings.

OBC and non-OBC block groups, as they prefer.[27] ISRIb27-28; ELECb22. But the EJ Law commands DEP to assess whether approval of a permit would "cause or contribute to adverse cumulative . . . stressors in the [OBC] that are higher than those borne by *other communities* within the State, county, or other geographic unit." N.J.S.A. 13:1D-160(c) to (d) (emphasis added). This "other communities" language forecloses Appellants' preferred approach, which would impermissibly include in the GPOC the OBC where the facility in question is located. Ibid. Even if "other communities" could be interpreted to mean all OBCs and non-OBCs *except* for the single OBC where the facility is located, that approach would mean that every OBC has a different GPOC, so DEP would have to recalculate the GPOC stressor values and stressor score for every OBC. It was therefore reasonable for DEP to interpret the Law to only require the calculation of stressor scores for 22 different GPOC (the State and 21 counties), as opposed to the multiple thousands of bespoke stressor scores that DEP would need to calculate for each of the approximately 3,500 OBCs.[28]

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[27] Amicus CCNJ relatedly complains that "[e]xcluding 'other overburdened communities' will inevitably mean a comparison unit of mostly rural areas," CCNJb11, but provides no factual support for this conclusion, nor any reasoning why, even if true, the EJ Law would prohibit such a result.

[28] See 55 N.J.R. at 679 (DEPa19) (noting New Jersey has "approximately 3,500 overburdened communities").

DEP therefore properly designates the "State [and] county" as the geographic units of analysis, then compares OBCs with the "other communities" within those geographic units. N.J.S.A. 13:1D-160(c) to (d). Appellants argue that DEP's true "geographic unit of analysis" is neither the State nor county but rather the group of all non-OBC census blocks, see, e.g., ISRIb28, but even so, the EJ Law broadly allows DEP to designate the "State, county, *or other geographic unit of analysis as determined by the department*." N.J.S.A. 13:1D-160(c) to (d) (emphasis added). DEP is thus free to select a non-State or non-county "geographic unit" of its own choosing. Ibid. While ELEC argues that DEP must select "the average community" for this geographic unit, the EJ Law provides no such limitation. ELECb22.

Though Appellants argue that DEP's approach results in the designation of too many OBCs as cumulatively adverse, ISRIb27-29; ELECb21-23, the record shows that this result is a feature, not a bug, of the EJ Rule given the significant correlation between race and income and exposure to stressors.[29] DEP rightfully adopted the approach that provides the EJ Law's protections to additional OBCs with combined stressor totals above the GPOC. See EJa595-96. While Appellants may prefer fewer OBCs be designated as cumulatively adverse, that alone is no basis to ignore the clear statutory language that allows DEP to define GPOC as it did.

[29] See Procedural History and Statement of Facts and note 7; EJa24-28, 34-36.

VII. DEP's Choice of Stressors is Consistent with the EJ Law and Supported by the Record.

Appellants disagree with DEP's designation of certain metrics as the "environmental or public health stressors" that DEP considers when conducting the cumulative-impact analysis required by the Law. ISRIb38-43; ELECb46-48. But the EJ Law expressly requires the stressors to include "scrap yards," "concentrated areas of air pollution," and "point-sources of water pollution," N.J.S.A. 13:1D-158, so ISRI's discontent with the EJ Rule's listing of these stressors – and any supposed "double-counting" that may result – is not something that DEP has discretion to change. See ISRIb42-43. Furthermore, the record supports the notion that scrap yards have negative impacts on air and water quality, and thus are appropriately considered among the stressors that address sources of air and water pollution.[30] The EJ Law, after all, was enacted to require DEP to consider cumulative impacts in its permitting decisions, so it would be contrary to the Law if the EJ Rule were to look at only some scrap yard impacts while ignore the other impacts, as ISRI wishes. And merely operating in compliance with a permit does not erase those impacts, as ISRI suggests, ISRIb42-44, since permits by definition grant permission to pollute, and

[30] EJa342; EJa357; EJa374; see also Cert. of Deborah Kim Gaddy ¶¶ 17-18, A-002936-22, M-006732-22 (Aug. 8, 2023); Cert. of Maria Lopez Nuñez ¶ 15, A-002936-22, M-006732-22 (Aug. 2, 2023) (certifications of Environmental Justice Amici about the impacts of living close to scrap yards, including the constant fear for their health and safety due to poor air quality, stormwater runoff, and fires).

facilities still emit pollution and contribute to environmental stressors even when in full compliance with their permits.

In addition, Appellants take issue with stressors like tree canopy that, they argue, are not related to the public-health outcomes listed in the EJ Law. ISRIb38-41; ELECb48. Yet the record shows that these indicators are indeed linked to those enumerated health outcomes.[31] At any rate, the "including, but not limited to" language of the law's definition of "public health stressor" allows DEP to consider factors that lead to other health outcomes not listed in the Law. N.J.S.A. 13:1D-158. And while ISRI argues that DEP should ignore stressors that do not directly originate from permitted facilities, ISRIb39, the EJ Law clearly instructs that stressors include not only "*sources* of environmental pollution" but also "*conditions* that may cause potential public health impacts." N.J.S.A. 13:1D-158 (emphasis added).[32] ELEC is similarly incorrect to assert that such public-health related determinations are outside

[31] 54 N.J.R. at 980 (ELECa10) (studies showing positive correlation between increased greenery and tree coverage and reductions in childhood obesity, asthma, diabetes, and other health impacts); see also DEPa581 (social determinants of health); DEPa339 (green spaces and mental health); and DEPa465 (tree canopy impact on urban heat effect as environmental justice issue).

[32] ISRI argues that DEP's designation of stressors infringes on municipal powers like zoning, ISRIb38-41, but provides no explanation about how the stressors, which merely describe current public health conditions, somehow prevent municipalities from exercising their traditional powers.

of DEP's expertise – to the contrary, DEP was founded as a public health agency,[33] and the Legislature plainly delegated to DEP the task of designating "stressors" that address "public health." N.J.S.A. 13:1D-158.

VIII. No Basis Exists to Strike the EJMAP.

Appellants argue that the Environmental Justice Mapping, Assessment and Protection Tool ("EJMAP") and the EJMAP Technical Guidance should both be stricken since, according to Appellants, the public did not have the opportunity to comment on these documents.[34] ISRIb44-48; ELECb27-32. This is incorrect. DEP publicly released its first version of EJMAP on January 19, 2021, nearly a year and a half before the Proposed Rule, and links to the map were shared and referenced in subsequent stakeholder meetings.[35] Appellants and others did indeed comment on the EJMAP and the Technical Guidance during the stakeholder and rulemaking

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[33] N.J.S.A. 13:1D-7(a) ("[A]ll the functions, powers and duties heretofore exercised by the Department of Health, the commissioner thereof, and of the Public Health Council relating to air pollution, water pollution . . . are hereby transferred to, and vested in The Division of Environmental Quality and the Commissioner of the Department of Environmental Protection . . .").

[34] Amicus CCNJ criticizes the EJ Rule for an alleged lack of transparency and detail regarding the frequency of EJMap updates. CCNJb8. Yet the Rule clearly states that updates will be released every two years and provides applicants with a public website link to where the updates can be found. N.J.A.C. 7:1C-2.1(d).

[35] EJa672 (noting that the first excel spreadsheets, GIS mapping tool, and pdfs of maps were released on January 19, 2021); ELECa336 / DEPa88 ("Simultaneous with the formal rule proposal in June 2022, the Department released a beta version of the [EJMAP] tool and its companion technical guidance document on the Department's website."); see also DEPa219 / ISRIa376; EJa677; EJa680.

process.[36] And DEP duly responded to those comments in the Final Rule.[37] While Appellants now complain about DEP's public engagement process, at the time, industry lauded the "excellen[ce]" of DEP's stakeholder engagement and the ample opportunities for public input.[38]

Even assuming DEP did err in not designating a separate, formal comment period for the EJMAP or Technical Guidance, it was harmless error because ample opportunities to comment on these documents were provided, and therefore cannot be a basis to strike either document. See Am. Farm Bureau Fed'n v. U.S. Envtl. Prot. Agency, 984 F. Supp. 2d 289, 335 (M.D. Pa. 2013), aff'd, 792 F.3d 281 (3d Cir. 2015) (collecting cases) (rejecting challenge to sufficiency of comment period under "the well-settled and well-reasoned rule that a regulation is not automatically invalidated even where notice-and-comment errors are committed by the agency

[36] ISRIa140 / EJa249 (Comments on EJMAP and Technical Guidance included in ISRI's comments on the Proposed Rule); EJa207 (Comments on same in Amicus CCNJ's comments on the Proposed Rule); EJa257; EJa800.

[37] See, e.g., 55 N.J.R. at 701-02, 710-11, 713-14, 728-29 (DEPa41-42, 50-51, 53-54, 68-69).

[38] See, e.g., EJa789 (1:42:39 of https://tinyurl.com/24uk6ms4) (statement of Ray Cantor, Amicus New Jersey Business & Industry Association VP of Government Affairs) ("I want to echo earlier comments that this has been an excellent series of stakeholder meetings – one of the best I've ever been participating in. No matter what the outcome, at least we can't fault the process. The process has been excellent."); see also Procedural History and Statement of Facts (noting that DEP held 10 stakeholder meeting and five public hearings about the proposed EJ Rule).

unless the party asserting error satisfies its burden of demonstrating prejudice to its ability to meaningfully comment on the proposed rule.").[39]

CONCLUSION

For the reasons set forth above, Environmental Justice Amici urge the court to reject Appellants' arguments and uphold DEP's EJ Rule.

Dated: June 28, 2024

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[39] Amicus CCNJ complains that the EJ Rule lacks express deadlines for certain permitting actions, CCNJb12-13, but it does not explain why the deadlines of pre-existing permitting law would not continue to apply. See, e.g., 42 U.S.C. § 7661b(c) (requiring permitting authorities like DEP to "issue or deny" Title V major source air permits "within 18 months" of receipt of the permit application); 40 C.F.R. § 70.7(a)(2) (same); N.J.A.C. 7:27-22.13(a) (setting deadlines for DEP's final action on Title V permit applications between 90 days and 18 months, depending on type of application). At any rate, these arguments about deadlines were not raised by Appellants and therefore need not be considered by the court. See Fed. Pac. Elec. Co. v. DEP, 334 N.J. Super. 323, 345 (App. Div. 2000) (collecting cases) ("An *amicus curiae* may not interject new issues, but must accept the issues as framed and presented by the parties.").

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO: A-002959-22

IN THE MATTER OF ADOPTION OF N.J.A.C. 7:1C	:	CIVIL ACTION
	:	ON APPEAL FROM A RULEMAKING BY THE DEPARTMENT OF ENVIRONMENTAL PROTECTION

BRIEF ON BEHALF OF RESPONDENT NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION

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PRELIMINARY STATEMENT

In 2020, our Legislature took bold action to address a deeply-rooted form of inequality, finding that not all New Jersey residents are able to fully and equally enjoy their "right to live, work, and recreate in a clean and healthy environment." N.J.S.A. 13:1D-157. For too long, "low-income communities and communities of color" have borne the brunt of "pollution from numerous industrial, commercial, and governmental facilities located in those communities," and thus "have been subject to a disproportionately high number of environmental and public health stressors." Ibid. The result is that those "overburdened" communities experience a myriad of health conditions, from asthma to cancer to elevated blood toxin levels; developmental impacts; and "imped[iments to] the growth, stability, and long-term well-being" of individuals and families living in those communities. Ibid. The Legislature declared it was well "past time" "to correct this historical injustice." Ibid.

The Legislature passed the landmark Environmental Justice Law ("EJ Law" or "Law"), N.J.S.A. 13:1D-157 to -161, to right those historic wrongs. The EJ Law endeavored to ensure that all New Jerseyans have "a meaningful opportunity to participate" in the permitting of facilities which "by the nature of their activity, have the potential to increase environmental and public health stressors" affecting nearby residents, and to ensure "no community should bear

a disproportionate share of the adverse environmental and public health consequences that accompany the State's economic growth." Id. 13:1D-157. The Legislature reasoned that "it is in the public interest for the State, where appropriate, to limit the future placement and expansion of [polluting] facilities in overburdened communities." Ibid.

The EJ Law created a framework through which overburdened communities ("OBCs") can participate in the environmental permitting process for regulated facilities in their midst, and in which the localized impacts of pollution are a central consideration. The Law requires certain polluting facilities seeking permits under preexisting environmental laws to prepare an analysis of the facility's localized environmental and public health impacts for the local OBC and the New Jersey Department of Environmental Protection ("DEP") to review. If DEP finds the facility would contribute to a disproportionate impact on the OBC, it must either deny the permit or grant it subject to specific conditions. But, as this review is complex and technical, the Legislature required regulations to fully implement the Law. So, in addition to establishing that framework, the EJ Law commands DEP to develop regulations implementing the Law and authorizes DEP to issue technical guidance.

DEP carefully performed its assigned task, undertaking an extensive stakeholder and public-engagement process before issuing a rule proposal. The

final rules ("EJ Rules"), codified at N.J.A.C. 7:1C-1.1 to -10.3, flow from the EJ Law's plain text and reasonably advance its broad remedial and preventive purposes. Though a few regulated entities have a potpourri of challenges to the EJ Rules, their arguments lack merit. Far from ultra vires, the EJ Rules are anchored in the text, structure, and purpose of the EJ Law itself. DEP grounded, and reasonably explained, its decisions in the record, including responding to hundreds of comments, and it adequately addressed all of the EJ Rules' potential impacts. The EJ Rules provide fair notice. And in addition to developing comprehensive regulations via formal rulemaking, DEP issued publicly available guidance to aid the regulated community.

The EJ Rules are faithful to and firmly grounded in the EJ Law, and hew carefully to the statutory language and design. This court should allow DEP to implement the Legislature's will and affirm.

PROCEDURAL HISTORY AND STATEMENT OF FACTS[1]

A. Environmental Justice.

The EJ Law and the EJ Rules address a longstanding problem that heavy concentration of polluting facilities in OBCs have meaningful consequences for the health of those residents. Research around environmental injustices gained

[1] Because they are closely related, the procedural history and statement of facts are combined for efficiency and the court's convenience.

momentum in the late 1970s and 1980s, as communities and researchers shined a light on how certain communities were facing greater challenges from both legacy pollution and the siting of new industrial, waste storage, and other kinds of polluting facilities. See, e.g., EPA, Environmental Justice, https://www.epa.gov/environmentaljustice (last visited June 5, 2024).[2] These efforts demonstrated how facilities that produce noxious pollutants are more frequently located in or around certain types of communities. For example, studies show that hazardous waste sites are disproportionately concentrated near communities of color. (DEPa330[3]). Likewise, nearly four out of every five municipal solid waste incinerators are located in underserved communities. (DEPa425). Uneven facility siting, in the past and present alike, contributes to and compounds the disproportionate share of environmental stressors and related health effects that underserved communities shoulder. Indeed, as the record reflects, race, economic status, and English-language proficiency are the three primary social determinants of an individual's health, followed by their

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[2] In 1994, federal agencies made "achieving environmental justice part of [their] mission" by considering the "disproportionately high and adverse human health or environmental effects of [their] programs" on minority and low income populations. Executive Order 12898, 59 FR 7629 (1994).

[3] "DEPa" refers to DEP's appendix; "ISRIb" refers to ISRI's merits brief; "ISRIa" refers to ISRI's appendix; "ELECb" refers to ELEC's merits brief; and "ELECa" refers to ELEC's appendix. Because the pagination in CCNJ's brief filed in each appeal is identical, DEP refers to both as "CCNJb."

unemployment status and their education. (DEPa337, 581–83). Environmental injustices are part of this problem.

Proximity to polluting facilities, even the remnants of those that have closed, can expose residents to numerous environmental and health hazards. For example, soil contamination left over from historical industrial sites may be ingested or inhaled, or can lead to contaminant migration into groundwater and thus drinking water supplies, which can lead to neurological disorders and reproductive problems, among other conditions. (DEPa116, 136, 208–09, 274–76). Relatedly, proximity to combined sewer overflow ("CSO") outfalls, which occur when a combination of wastewater and stormwater exceeds the combined sewer system's capacity and overflows into surface water, can mean exposure to a variety of contaminants and toxins, from infectious microbes in untreated human waste to chemical contaminants. (DEPa126–27, 201–02, 467). Due in part to CSO events, other pollution-generating facilities, and traffic, the drinking water systems in OBCs are closely associated with higher levels of nitrate and arsenic. (DEPa128–29, 274–76).

Concentrated and localized air pollution similarly has grave effects. Even at low levels, air pollutants such as ground-level ozone, fine particulate matter, volatile organic compounds, and federally-regulated hazardous air pollutants can cause cancer and have other adverse impacts on the respiratory,

cardiovascular, and nervous systems. (DEPa101–02, 106–08, 530–53, 566–80). Moreover, as Newark's Ironbound neighborhood illustrates, emissions from industrial facilities located in OBCs are often compounded by additional air pollution generated by traffic, trucks, and railways associated with those industrial facilities. (DEPa139, 174, 301–02, 344–45, 390).

The built and natural environments near OBCs present still other challenges. Residents in Camden's Waterfront South neighborhood, for instance, often avoid spending time outdoors due to sewage treatment plant odors. (DEPa289). Lack of recreational open space also impacts quality of life and contributes to population-level health disparities. (DEPa150, 335, 339, 428–30, 524–25). Access to recreational open space and parks has many health benefits, including improved cognitive development and functioning, reduced obesity, positive mental health impacts, reduced risk of heart disease, stroke, diabetes, depression, and cancer, and overall longevity. (DEPa132, 150, 339, 363). And OBCs often have fewer trees—which can reduce peak temperatures and air pollution and enhance property values, (DEPa133, 199, 429),—and more impervious surfaces like roadways, which trap heat, exacerbate flooding, and transport surface pollutants. (DEPa379–82, 465).

While the many significant environmental laws enacted over the past half-century have, in many respects, effectively reduced air, water, and hazardous

waste pollution for most individuals, their benefits have not been distributed evenly across all communities. That is partly because underserved communities tend to lack the resources necessary to alter siting and permitting decisions. Alice Kaswan, Env't. Justice: Bridging the Gap Between Env't Laws & "Justice", 47 Am. U. L. Rev. 221, 273 (1997); (DEPa249, 591).

But environmental injustice also persists due to blind spots in the traditional environmental laws themselves. As one commentator highlighted, generally, environmental laws that do not focus on environmental justice can make it more difficult to site "a facility in a wetland or in a navigable waterway" than "in the middle of a city." Michael B. Gerrard, The Role of Existing Env't Laws in the Env't Justice Movement, 9 St. John's J. Legal Comment. 555, 556 (1994). Such laws tend to focus on particular pollutants or resources, but generally do not "consider [the] distributional consequences" of siting and permitting decisions. Kaswan, at 268; see also Richard L. Revesz, Regulation and Distribution, 93 N.Y.U.L. Rev. 1489, 1526 (2018) (noting the "limited" results of efforts to use existing tools to increase environmental justice).

More specifically, preexisting statutory programs—including those in New Jersey—do not adequately consider the cumulative or overlapping impacts of many different environmental stressors in a small geographic area. And existing laws afford local communities limited or insufficient tools to challenge

local permitting decisions on disparate impact grounds. See, e.g., S. Camden Citizens in Action v. N.J. Dep't of Env't Prot., 274 F.3d 771, 774–75, 787–90 (3d Cir. 2001) (plaintiffs lacked private right of action to enforce disparate impact regulations concerning air permits). One way to tackle environmental injustices head-on is thus to address the gaps in environmental law.

B. New Jersey's Environmental Justice Law.

In September 2020, the groundbreaking EJ Law was passed to focus the experiences of OBCs in the permitting processes and account for the cumulative environmental stressors those communities face. The EJ Law provides community members an opportunity to participate in certain DEP permitting decisions and directs DEP to consider public-health issues that are beyond the scope of other regulatory programs.

By creating an overlay on other environmental laws, the EJ Law adds environmental justice considerations to the permitting processes for a variety of already-regulated facilities. Under the Law, DEP "shall not consider complete for review any [permit] application" for designated "facilities" located in an OBC "unless the permit applicant" satisfies certain requirements. N.J.S.A. 13:1D-160(a). OBC is defined 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." Id. 13:1D-158. DEP must publish an online list of OBCs and update it "at least once every two years." Id. 13:1D-159.

To be clear, the EJ Law does not create a new, independent requirement to obtain a permit; instead, it adds a new process to existing permitting obligations. The statute defines "permit" to mean "any individual permit, registration, or license issued . . . to a facility" under more than a dozen different, preexisting state programs—from the Air Pollution Control Act ("APCA") to the Solid Waste Management Act and others. N.J.S.A. 13:1D-158 (defining "facility"). The EJ Law is triggered when a permit is sought for (1) "a new facility," (2) "the expansion of an existing facility," or (3) "the renewal of an existing facility's major source permit," in an OBC. Id. 13:1D-160(a); see id. 13:1D-158 (incorporating the definition of "major source" from the federal Clean Air Act ("CAA") and the APCA).

If a permit application is subject to the EJ Law, the applicant must submit to DEP an environmental justice impact statement ("EJIS") after a process that includes meaningful public participation. An applicant first prepares an EJIS that "assesses the potential environmental and public health stressors associated with" its facility, including an assessment of "any adverse environmental or

public health stressors that cannot be avoided if the permit is granted, and the environmental or public health stressors already borne by the [OBC] as a result of existing conditions located in or affecting the [OBC.]" N.J.S.A. 13:1D-160(a)(1). The EJ Law provides a capacious and non-exhaustive definition of "environmental or public health stressor." Id. 13:1D-158.[4]

After transmitting the EJIS to both DEP and the relevant municipality, the applicant publicizes and conducts a public hearing in the OBC that "provide[s] an opportunity for meaningful public participation." Id. 13:1D-160(a)(2) to (3). A hearing transcript must be sent to DEP along with the EJIS "and any other relevant information" to render a permitting decision, which may not issue until at least forty-five days after the hearing. Id. 13:1D-160(a)(3)-(b).

The Legislature established clear guardrails for permit proceedings while also empowering DEP to advance the EJ Law's broad aims. For new facility permits, the EJ Law provides that "[n]otwithstanding the provisions of any other law, or rule or regulation . . . to the contrary, [DEP] shall . . . deny a permit . . .

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[4] The phrase environmental or public health stressor refers to any "sources of environmental pollution, including, but not limited to, concentrated areas of air pollution, mobile sources of air pollution, contaminated sites, transfer stations or other solid waste facilities, recycling facilities, scrap yards, and point-sources of water pollution including, but not limited to, water pollution from facilities or combined sewer overflows; or conditions that may cause potential public health impacts, including, but not limited to, asthma, cancer, elevated blood lead levels, cardiovascular disease, and developmental problems in the overburdened community." N.J.S.A. 13:1D-158 (emphasis added).

upon a finding that approval of the permit, as proposed, would, together with other environmental or public health stressors affecting the [OBC], cause or contribute to adverse cumulative environmental or public health stressors in the [OBC] that are higher than those borne by other communities within the State, county, or other geographic unit of analysis as determined by [DEP]." Id. 13:1D-160(c). However, if DEP also "determines that [the] new facility will serve a compelling public interest in the community," DEP "may grant a permit that imposes conditions on the construction and operation of the facility to protect public health." Ibid. For existing facility expansion permits, the Law says that "[n]otwithstanding . . . any other law," if DEP makes a finding of disproportionate impact, DEP may "apply conditions" as to "the construction and operation of the facility to protect public health." Id. 13:1D-160(d).

Finally, the Legislature directed DEP to adopt regulations implementing the EJ Law, which took immediate effect in September 2020. Pub. L. 2020 c.92. It added that DEP may issue technical compliance guidance too. Id. 13:1D-161.

C. The EJ Rules and The Instant Challenges.

DEP began by educating the public and soliciting stakeholder input before proposing any rules. First, per N.J.S.A. 13:1D-159, on January 16, 2021, DEP posted a list of OBCs and created a geographic information system ("GIS") online map to provide a visual representation of OBCs throughout the State.

N.J.A.C. 7:1C-2.1(d); Department of Environmental Protection, What are Overburdened Communities?, https://www.nj.gov/dep/ej/communities.html (last updated Jan. 30, 2024). Next, DEP conducted ten public engagement sessions to seek input from various stakeholders, including industry groups, environmental and professional organizations, and citizens. 54 N.J.R. 971(a) at 972 (June 6, 2022) (ELECa2).[5] Meanwhile, DEP researched approaches to EJ taken by the federal government and other states. Id. at 974 (ELECa4).

DEP's proposed rules were published on June 6, 2022, with an extended 90-day public comment period. Id. at 972 (ELECa2). The proposed rules included an Appendix identifying and explaining twenty-six items that qualify as "environmental and public health stressors" under the EJ Law. Id. at 1000–1001 (ELECa30–31). DEP also released an online test version of the Environmental Justice Mapping, Assessment, and Protection Map ("EJMAP") tool, a GIS tool, and—consistent with N.J.S.A. 13:1D-161(b)—draft Technical Guidance. (DEPa219). The test EJMAP depicted the OBC locations as well as existing facilities subject to the EJ Law. The Technical Guidance elaborated on the scientific rationale for each stressor and the methodologies for calculating stressor values. Ibid. After receiving 497 written and oral comments and

[5] Both Appellants participated extensively in the pre-proposal process as well as in notice-and-comment. (DEPa470–90; ELECa32–39, 40–43).

conducting five public hearings, on March 9, 2023, DEP adopted the final EJ Rules and an extensive response to comments, and released the final version of EJMAP and Technical Guidance. 55 N.J.R. 661(b) (April 17, 2023); (DEPa84).

The EJ Rules provide an overview of their scope, N.J.A.C. 7:1C-2.1 to -2.3, comprehensively address the EJIS process, and define many of the key terms that the Legislature left undefined, N.J.A.C. 7:1C-1.5. Notably, DEP provided that a permit applicant unsure about whether they are subject to the EJ Rules "may request a [written] determination" from DEP. Id. 7:1C-2.1(g). The Rules then address each stage of the regulatory process and particular classes of regulated entities, including the EJIS requirements (subchapter 3); the meaningful public participation process (subchapter 4); permit applications for new facilities (subchapter 5); expansion of existing facilities (subchapter 6); major source facilities, some of which are subject to a new air emissions-control standard (subchapter 7); renewal of major source facilities (subchapter 8); and the DEP decision-making process (subchapter 9). Additional details on particular provisions at issue here are addressed below.

On June 1, 2023, the New Jersey Chapter of the Institute of Scrap Recycling Industries, Inc. ("ISRI") and the Engineers Labor Employer Cooperative of the International Union of Operating Engineers Local 825 ("ELEC") filed separate Notices of Appeal, see Nos. A-2936-22 and A-2959-

22, challenging the EJ Rules. On October 3, 2023, this court granted in part DEP's motion for consolidation and permitted DEP to submit a joint brief responding to the Appellants. On March 28, 2024, the court permitted the Chemistry Council of New Jersey ("CCNJ") to participate as amicus curiae in support of the Appellants and accepted CCNJ's proposed amicus brief. On June 17, 2024, the court granted DEP permission to file a 70-page overlength brief.

ARGUMENT

The EJ Rules are subject to a deferential and "highly circumscribed" standard of review. N.J. State League of Muns. v. Dep't of Cmty. Affs., 158 N.J. 211, 222 (1999). Regulations promulgated by agencies with relevant expertise, including DEP, "are accorded presumptions of validity and reasonableness," Bergen Pines Cnty. Hosp. v. N.J. Dep't of Hum. Servs., 96 N.J. 456, 477 (1984), and "[t]he party challenging their validity bears the burden of pro[of]," League, 158 N.J. at 222. Appellants' myriad challenges fall far short of that standard. Appellants' arguments that the Rules exceed the authorized scope of the EJ Law misunderstand the EJ Law and the deferential standard of review. See Point I, infra. Their challenges to stressors and the comparison of the environmental health of different communities likewise fails to overcome DEP's expertise and well-founded reasoning. See Point II, infra. So too with the challenge to permit conditions and localized impact control technology

(LICT). See Point III, infra. The argument concerning the Administrative Procedure Act ("APA")'s procedural requirements is unfounded. See Point IV, infra. And the CCNJ's additional arguments, not raised by Appellants, are both procedurally improper and substantively incorrect. See Point V, infra. This court should affirm DEP's Rules implementing the groundbreaking EJ Law.

POINT I

DEP REASONABLY INTERPRETED THE SCOPE OF THE NEW EJ LAW.

To argue that DEP's Rules are inconsistent with the EJ Law, Appellants face a high bar: they must show that the regulation is outside "the fair contemplation of the delegation of the enabling statute." League, 158 N.J. at 222. An agency is owed "[s]ubstantial deference" regarding the scope of a law that it implements, In re Adopted Amend. to N.J.A.C., 365 N.J. Super. 255, 264 (App. Div. 2003), "stem[ming] from [our courts'] recognition that agencies have [] specialized expertise necessary to enact regulations dealing with technical matters." League, 158 N.J. at 222; see also, e.g., In re Election L. Enf't Comm'n Advisory Op. No. 01-2008, 201 N.J. 254, 262 (2010) (agencies bring "experience and specialized knowledge" to the task of administering and regulating legislation within its field of expertise); Pugliese v. State-Operated Sch. Dist. of City of Newark, 440 N.J. Super. 501, 512 (App. Div. 2015) (promulgating administrative regulations in technical and specialized domains,

pursuant to broad grants of statutory authority, "lies at the very heart of the administrative process"). That principle applies particularly well here given DEP's specialized expertise on environmental matters and the highly technical nature of the EJ Rules. See In re Adoption of N.J.A.C. 7:26B, 128 N.J. 442, 450 (1992) (courts are "solicitous of the latitude delegated to DEP in devising remedies to combat pollution"); In re N.J.A.C. 7:1B-1.1, 431 N.J. Super. 100, 114–15 (App. Div. 2013) ("Great deference" is given to "an agency's 'interpretation of statutes within its scope of authority and its adoption of rules implementing the laws for which it is responsible.'" (citation omitted)).

Appellants' demand for less deference because DEP's interpretation of the EJ Law is not "time tested" contradicts hornbook administrative law. (ELECb10) (quoting In re N.J.A.C. 17:2-6.5, 468 N.J. Super. 229, 233–34 (App. Div. 2021)). The primary case on which Appellants rely refers to unprecedented agency interpretations of longstanding statutes. Where, as here, the agency is engaging in a first-of-its-kind rulemaking pursuant to new and novel legislation, deference is particularly appropriate, and the agency is likely to have firsthand knowledge of legislative intent. See In re N.J.A.C. 7:26B, 128 N.J. at 451 ("judicial deference appropriate 'when the case involves the construction of a new statute by its implementing agency'" (citation omitted)); Newark Firemen's Mut. Benev. Ass'n, Loc. No. 4 v. City of Newark, 90 N.J. 44, 55 (1982)

("[D]eference . . . is particularly appropriate where . . . new and innovative legislation is being put into practice."). Nor is it significant that addressing environmental injustice entails some "important policy questions." (ELECb10). The EJ Law provides the expert agency, DEP, with authority to implement its provisions.[6] Unique here, the EJ Law did not apply until after DEP adopted regulations, further emphasizing DEP's critical interpretive role. N.J.S.A. 13:1D-160(a). Given the "circumstances and objectives" of the EJ Law, In re N.J.A.C. 7:26B, 128 N.J. at 450, and the Legislature's decision to imbue DEP with this express authority, courts should—as always—"liberally construe" the new law "to enable the agency to accomplish its statutory responsibilities," and "readily imply such incidental powers as are necessary to effectuate fully the legislative intent," League, 158 N.J. at 223 (citation omitted).

DEP's EJ Law interpretation is well within the "fair contemplation" of the statutory scope, but Appellants offer four arguments to the contrary concerning: "new" facilities; "expansions" of existing facilities; the need for a "compelling public interest"; and the coverage of adjacent blocks. These arguments are

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[6] The case on which Appellants rely, In re Centex Homes, LLC, 411 N.J. Super. 244 (App. Div. 2009), is far afield. Centex Homes involved Board of Public Utilities rules that "constitute[d] an extreme departure from the purpose" of the enabling law and followed the "intent . . . underlying a different statute"—and thus "drastically change[d] the function of the [enabling] statute from a regulation of public utilities to the regulation of urban and suburban sprawl." Id. at 261, 265. Appellants do not argue that DEP has done that here.

inconsistent with the text, structure, and purpose of the EJ Law—which expressly endeavors to remedy historic injustice—and the considerable deference owed to DEP in implementing this innovative law.

A. "New" Facilities (Responding to ISRI's Point III.C.1; ELEC's Point II.A; CCNJ's Point IV.3)

The Legislature instructs how DEP should handle new facility permits but never defines the term "new." See N.J.S.A. 13:1D-160(c) (mandating new facility permit denials if DEP determines the facility would cause or contribute to a disproportionate impact on OBC, absent finding that facility will serve a compelling public interest). DEP was entrusted to clarify that term. Id. 13:1D-161(a). Accordingly, DEP defined new facility as: (1) "any facility that has not commenced operation" as of the Rules' effective date, (2) "a change in use of an existing facility," or (3) "an existing facility that has operated without a valid approved registration or permit required by the Department prior to" the Rules' effective date. N.J.A.C. 7:1C-1.5. And an "existing facility" is defined as the inverse of "new" facility—"a facility, or any portion thereof, which, as of [the Rules' effective date], possesses a valid approved registration or permit from the Department for its operation or construction and is in operation." Ibid.

This court should reject Appellants' claims that DEP exceeded the EJ Law by interpreting "new" to include (a) previously existing facilities that undergo a qualifying "change in use" [the second definition] and (b) those facilities that

lacked legal approvals to operate before the Rules' effective date [the third]. As to the former, a "change in use" sufficient to make a facility "new" is a "change in the type of operation of an existing facility that increases the facility's contribution to any environmental and public health stressor in an OBC, such as a change to waste processed or stored." Ibid. The "change in use" provision contemplates a "fundamental change in the[] type of operation" that increases stressors; any change would not suffice. 55 N.J.R. at 689 (DEPa29).

A "fundamental change" in the facility's operations falls well within one traditional meaning of the word "new." Appellants argue that "new" only refers to a facility that has "recently come into existence" or was "not existing before," (ISRIb16; ELECb17) (citing dictionary definitions), but "new" can apply to something "starting afresh, resurgent" and as "[a]dditional to that which was present before." Oxford English Dictionary, https://tinyurl.com/4ffec396 (last visited June 5, 2024). A location that previously sold sporting goods but decides to sell pet supplies instead could be referred to as a "new" pet-supply business. And a coal-fired power plant that ceases operations and reopens as a natural gas plant can be referred to as a "new" gas plant. The Legislature did not define "new" but left the ultimate determinations to DEP, and Appellants cite nothing foreclosing the agency's view.

The background principles on which the Legislature operates likewise support DEP. The EJ Law imposes no new permitting regimes, but instead attaches additional process and requirements to permit applications. And a fundamental change in a facility's operations likely requires a new DEP permit to authorize the new activities, just as converting an industrial warehouse to residential apartments would require new local approvals. See Nouhan v. Bd. of Adjustment of City of Clifton, 392 N.J. Super. 283, 292 (App. Div. 2007) (change in use from restaurant to nightclub required a new zoning ordinance or use variance). For example, a landfill regulated under DEP's Solid Waste regulations, N.J.A.C. 7:26-1.1 to -17.26, converting to a recycling facility would need a new permit under DEP's recycling rules, N.J.A.C. 7:26A-1.1 to -13.12. Since the EJ Law is built on those prior statutes, it makes sense that the Rules' approach to "new" facilities would track that basic insight. Moreover, the Law's manifest intent confirms DEP reasonably concluded that a facility that undergoes a complete transformation—and generates different impacts on the local community—should be subject to the stricter new facility standard. See N.J.S.A. 13:1D-160(c).

ELEC and CCNJ's argument, that the definition is ultra vires because it does not exempt situations in which the fundamental changes in use would only increase a facility's contribution to stressors by a de minimis amount, are

incorrect and inconsistent with the great deference owed to DEP. (ELECb14; CCNJb24). As a matter of statutory interpretation, the size of the change's impact has little to do with whether the operations are "new." A coal-powered plant that converts to gas is a "new" gas plant whether its subsequent operations have a minor or significant impact on the local environment. ELEC and CCNJ really object to the Legislature's policy decision not to exempt de minimis changes. 55 N.J.R. at 689 (DEPa29) (DEP determining, in light of legislative silence and the EJ Law's "focus of reducing . . . stressor increases in [OBCs]," that the "de minimis threshold is [neither] appropriate [n]or warranted").

Nor is a system imposing additional obligations on fundamental changes in use somehow "impermissibly vague." (ELECb14). ELEC makes no effort to satisfy the void-for-vagueness standard. Economic laws are impermissibly vague only if people "of common intelligence must necessarily guess at their meaning." Tanurb v. N.J. Dep't of Env't Prot., 363 N.J. Super. 492, 499 (App. Div. 2003). The question is not whether the measure is ambiguous, but whether it provides "no rule or standard at all." FTC v. Wyndham Worldwide Corp., 799 F.3d 236, 250 (3d Cir. 2015).[7] DEP's inclusion of a "change in use" in the

[7] While ELEC does not specify whether its vagueness argument is based on the New Jersey or the U.S. Constitution, New Jersey courts regularly address both vagueness doctrines together. See, e.g., State v. Cameron, 100 N.J. 586, 591 (1985) ("the reasons that both the Federal and State Constitutions render vague laws unenforceable" are the same).

"new" definition is far from "no rule or standard at all." ELEC's complaint that the definition is overly burdensome belies its claim that the standard is unintelligible. There is no statutory or regulatory defect here and certainly not a constitutional one.

DEP likewise reasonably interpreted "new" facilities to include facilities that lacked legal approvals to operate prior to the Rules' effective date. This advances the EJ law's legislative intent. The Legislature tasked DEP to "correct th[e] historical injustice" OBCs experienced and ensure that "no community bears a disproportionate share of the adverse environmental and public health consequences [of] . . . economic growth," making clear its far-reaching remedial and preventative aims. N.J.S.A. 13:1D-157. As DEP explained, "rewarding facilities that have avoided regulatory review of their operations" and "agency oversight" would contradict the legislative intent to protect public health and increase community participation in the permitting process. 55 N.J.R. at 688 (DEPa28). Facilities operating without a permit may cause public health and environmental problems that are more difficult for DEP to measure, track, and analyze for aggregate environmental quality standards. See, e.g. N.J.A.C. 7:27-13.2 (since "air is vital to life" and any contamination "is a condition to be endured reluctantly," DEP set aggregate air quality totals). Only when such facilities obtain the relevant approvals can DEP better account for their impacts,

which are effectively "new" at that time. All of this matches the dictionary definition of "new" as "different from one of the same category that has existed before." See Merriam-Webster, https://www.merriam-webster.com/dictionary/new (last updated May 7, 2024). Here, unpermitted facilities with unaccounted-for pollutants would move into a different—or new—category upon becoming regulatorily compliant. Appellants offer no logical basis to believe that the Legislature intended to give preferential treatment to facilities that avoided regulatory review while operating in OBCs.

DEP's interpretation is also consistent with the legal backdrop of the EJ Law. The Solid Waste Management Act, for instance, does not define "new" and "existing" facilities, see N.J.S.A. 13:1E-3, but DEP's regulations provide definitions comparable to those in the EJ Rules, see N.J.A.C. 7:26-1.4 (defining "existing solid waste facility" as a facility that "possesses a valid approved registration" from DEP, and "new solid waste facility" as one that is not an "existing" facility); see also, e.g., N.J.A.C. 7:7-2.2(b)(1)(iii) (defining certain "[e]xisting developments" under Coastal Area Facility Review Act as those that "received all necessary" approvals). As the EJ Law is linked to those preexisting regimes, the Legislature could not have been surprised that DEP repeated that key distinction. DEP's definition is thus neither ultra vires nor unreasonable.

Appellants' counterarguments are unavailing. For one, while Appellants

emphasize that the Legislature intended to differentiate between "new" facilities and "existing" ones—and amended prior versions of the EJ Law that had treated permit applications from new and existing facilities the same—that does not say anything regarding what the particular distinctions between "new" and "existing" were intended to be. (ISRIb17; ELECb17-18). The Legislature left that silence for DEP to fill, and DEP continues to treat these two categories as entirely distinct, even if it does not draw the line Appellants would.

ELEC's reliance on Port Hamilton Refining & Transportation, LLP v. U.S. Env't Prot. Agency, 75 F.4th 166 (3d Cir.), on reh'g, 87 F.4th 188 (3d Cir. 2023), is misplaced. (ELECb16). There, the Third Circuit rejected EPA's interpretation of a new or modified facility subject to certain CAA provisions to include a shutdown facility reactivation. Port Hamilton, 87 F.4th at 190. Unlike here, that case addressed a distinct statutory scheme whose "unambiguous . . . plain text" "directly sp[oke]" to the facilities subject to permitting requirements which included only newly constructed or modified facilities. Id. at 194.

Finally, ISRI's remaining complaints are flawed. ISRI complains that the link between a facility's status as "new" or "existing" and its status under other applicable permitting programs is too "subjective" because DEP has allegedly taken a "novel interpretation" of applying "existing air permitting requirements" to certain scrap metal facility operations. (ISRIb18–19). ISRI cannot bootstrap

a challenge to those regulations in this appeal. Moreover, determining "whether or not a facility is lawfully existing . . . is based on the NJDEP permit and registration requirements" in place as of the Rules' effective date, "preventing facilities from being unduly impacted by future regulatory changes and affording notice[.]" 55 N.J.R. at 688 (DEPa28).

Nor do the EJ Rules "circumvent the . . . compliance process" under other permitting laws. (ISRIb19). The Rules do not eliminate a facility's ability to comply with other laws, but simply direct that a facility whose approvals were never obtained be regarded as a new facility for EJ process purposes, consistent both with the EJ Law's mandate that DEP shall render permitting decisions "[n]otwithstanding . . . any other law," N.J.S.A. 13:1D-160(c); see infra at 40-41 (discussing significance of "notwithstanding" clauses), and the EJ Law's goals of protecting the rights of "all New Jersey residents" and ensuring "no community" disproportionately suffers localized pollution impacts. N.J.S.A. 13:1D-157.

B. "Expansion" of Existing Facility (Responding to ISRI's Point III.C.2; ELEC's Point II.B; CCNJ's Point IV.2)

Appellants erroneously challenge DEP's "expansion" definition. The Legislature required applicants seeking a DEP permit for the "expansion of an existing facility" to undertake the EJIS process, but never defined "expansion," leaving the issue to DEP and its expertise. Id. 13:1D-160(a), (b), (d). DEP

defined "expansion" to mean "a modification or expansion of existing operations or footprint of development that has the potential to result in an increase . . . to any . . . stressor[] in an [OBC], but shall not include any such activity that decreases or does not otherwise result in an increase in stressor contributions." N.J.A.C. 7:1C-1.5.

DEP reasonably construed "expansion" with the Law's text and purpose and that interpretation is entitled to great deference. ISRI emphasizes that "expansion" refers only to changes that involve growth or enlargement, (ISRIb21), but that sidesteps the central question: whether "expansion of an existing facility" can only mean expanding the physical premises of an existing facility or whether the term also covers expanding the operations or impact. The Legislature's intent supplies the answer: the EJ Law addresses changes "caus[ing] or contribut[ing] to" adverse stressors. N.J.S.A. 13:1D-160(c). Because the EJ Law focused on stressors, not only physical construction, "expansion" most sensibly covers expansions of both the facility's operations and its predicted impacts. As this provision focuses on improving public health, DEP deserves deference. See, e.g., In re N.J.A.C. 7:26B, 128 N.J. at 451 (deference owed to agency regulations under public-health statute).

Appellants overlook the "expansion" definition's guardrails. Even if an existing facility seeks a permit to change its operation or physical footprint, it

only becomes subject to the Rules if it will also potentially "increase . . . any . . . stressor[]" in the OBC. An applicant is subject to the EJ Law's requirements only if the change or "modification" they wish to make already requires a permit under a separate law. See N.J.S.A. 13:1D-158 ("permit" definition); 55 N.J.R. at 687 (DEPa27). A "modification" that does not trigger a separate permitting requirement falls outside the EJ Rules, and any concern about the breadth of "modification"-related requirements under other preexisting laws, (ISRIb21), is of no moment. And the Legislature exempted "any authorization or approval necessary to perform a" certain statutorily-designated "remediation" or one "required for a minor modification of a facility's major source permit … that do[es] not increase emissions." N.J.S.A. 13:1D-158. DEP's definition is reasonable and should be upheld.

C. "Compelling Public Interest" (Responding to ISRI's Point III.C.3; ELEC's Point II.D; CCNJ's Point IV.1)

DEP also adopted a reasonable approach to "compelling public interest." The EJ Law recognizes there will be times "where [DEP] determines that a new facility will serve a compelling public interest in the community" and the application justifies approval. Id. 13:1D-160(c). By declining to define that key term, the Legislature authorized DEP to clarify its scope. N.J.S.A. 13:1D-161(a). DEP explained that to satisfy the standard, an applicant "must demonstrate" that (1) the new facility "will primarily serve an essential

environmental, health, or safety need[] of the individuals in an [OBC]," (2) the new facility "is necessary to serve" those needs, and (3) "[t]here are no reasonable alternatives that can be sited outside the [OBC]." N.J.A.C. 7:1C-5.3. DEP clarified that "the economic benefits of the . . . new facility shall not be considered.". Id. 7:1C-1.5.

Substantial deference is especially applicable to DEP's interpretation of the discretionary and flexible term "public interest." Our courts recognize the Legislature may have good reason to direct an agency to carry out a particular task with no more guidance than to do so in the "public interest," Elizabeth Fed. Sav. & Loan Ass'n v. Howell, 30 N.J. 190, 194 (1959), and courts defer to agency determinations under such circumstances since the term will have different meanings, and focus on different considerations, depending on the statutory context, see, e.g., Montgomery Nat. Bank v. Clarke, 882 F.2d 87, 91–92 (3d Cir. 1989) (agency had "greater expertise in discerning what factors come to bear in" interpreting a statutory public-interest standard).

DEP's definition tracks the EJ Law. The Legislature recognized that environmental injustice stymies the "economic success" of OBCs, in addition to harming their health and welfare. N.J.S.A. 13:1D-157. So the Law focused on the public health consequences of environmental injustice and the "limit[ations]" on children's "potential for future success" and "imped[iments]

[to] the growth . . . of individuals and families" in OBCs. Ibid. The statutory remedy is not to perpetuate the status quo, but a regulatory system to mitigate environmental harms and promote long-term health and welfare, see Nat'l Ass'n for Advancement of Colored People v. Fed. Power Comm'n, 425 U.S. 662, 669 (1976) ("[T]he words 'public interest' in a regulatory statute . . . take meaning from the purposes of the regulatory legislation.").

DEP's interpretation effectuates, not frustrates, the Legislature's choice. See Alfieri Co., Inc. v. State Dep't of Env't Prot. and Energy, 269 N.J. Super. 545, 554 (App. Div. 1994) ("Exemptions from statutes are strictly construed."). Under the Rules, a range of projects can satisfy the "compelling public interest" standard, including "appropriately scaled food waste facilities, public water infrastructure, renewable energy facilities, and projects designed to reduce the effects of [CSO events]," so long as they serve an essential environmental, health, or safety need in the OBC. 55 N.J.R. at 671–72 (DEPa11–12). Such facilities could bring economic benefits in the form of jobs. See id. at 671 (DEPa11). All DEP determined was that whether a facility promises economic benefits is neither relevant to, nor appropriate for, ascertaining whether a new facility will serve such essential community needs. That is within the EJ Law's "fair contemplation," League, 158 N.J. at 222, and in DEP's authority.

Technical realities point the same way. As DEP explained, the compelling public interest exception requires that benefits be localized to the community and address its specific needs. 55 N.J.R. at 666 (DEPa6). But potential economic benefits, such as employment opportunities, do not always benefit the OBC where the new facility proposes to locate. And DEP lacks reasonable means to effectively condition or enforce economic benefits for that OBC. Ibid. After all, DEP cannot require that the facility provide employment opportunities to just the OBC residents, and Appellants do not argue otherwise. If the facility impacts are felt in the OBC and the economic benefits are distributed outside the OBC, that will perpetuate, rather than resolve, environmental injustices. Including economic benefits in the public-interest calculus would undermine the EJ Law.

Appellants' arguments fail out of the gate. They protest that precluding economic benefits is contrary to community members' own preferences. (ISRIb24; ELECb25). That is a policy gripe; nothing in the EJ Law empowers individuals to determine the legal standards to which permit applicants are subject. Nor do the rules undermine public participation. To the contrary, DEP specified that it "may consider" community members' views on whether a facility serves a compelling public interest, and "may seek [additional] input from the public" to aid that analysis. N.J.A.C. 7:1C-5.3(d). And many public

commenters expressed strong support for excluding economic considerations. See 55 N.J.R. at 664–67, 674–75 (DEPa4-7, 14-15).

Appellants' contention that other environmental laws require balancing environmental or public-health interests with economic development is self-defeating. See (ISRIb25–26; ELECb25–26). The Legislature's choice not to require balancing here is telling. See Maia v. IEW Constr. Grp., 257 N.J. 330, 353 n.3 (2024) ("It is the Legislature's prerogative to impose a requirement in one context but not another; it is our duty to treat that distinction as meaningful."). Appellants fare no better by invoking N.J.A.C. 7:1-1.1(a), which merely states "it is crucial to . . . recognize the interconnection of the health of New Jersey's environment and its economy." There is no tension between this statement and the EJ Rules, because environmental justice can improve economic opportunities and outcomes for OBC residents and the EJ Rules provide that they "shall supersede" conflicting regulations. N.J.A.C. 7:1C-1.4(b); see also State v. Robinson, 217 N.J. 594, 609 (2014) ("a specific [law] generally overrides a general [law]").

D. Adjacency Provision (Responding to ISRI's Point III.B; ELEC's Point V; CCNJ's Point V)

To fulfill the Legislature's directive, the EJ Rules address the reality that "pollution does not defer to property boundaries." In re Adoption of N.J.A.C. 7:26B, 250 N.J. Super. 189, 243 (App. Div. 1991), rev'd in part on other

grounds, 128 N.J. 442 (1992). For example, a facility directly bordering an OBC, yet sited in an adjacent census block zoned for industrial use, may have ongoing adverse impacts on the OBC. DEP ensured the Rules cover a narrow but significant group of facilities: those that directly border OBCs and are located in census block groups without any residential population. This "adjacency provision" is consistent with the Law's text and purpose and advances its broad remedial and preventative aims.

The EJIS process applies to a facility located in an OBC—defined as a census block group whose population meets certain demographic criteria—provided the other criteria regarding pre-existing cumulative stressors are met too. Ibid.; N.J.S.A. 13:1D-158. DEP hewed to the Legislature's OBC definition, see N.J.A.C. 7:1C-1.5, while also explaining that "[w]here an existing or proposed facility in a block group that has zero population is located immediately adjacent to an [OBC]," it "shall be subject to the Rules," id. 7:1C-2.1(e) (emphasis added). Immediate adjacency means a facility itself must be "directly abutting" an OBC, ibid.—it "shares a border with the OBC," 55 N.J.R. at 703 (DEPa43). By contrast, if a "facility [is] located in the far corner of a zero-population block group, removed and buffered from an adjacent residential community," it is not subject to the Rules. Ibid. Facilities that fall in this narrow category "shall utilize the highest combined stressor total of any immediately

adjacent OBC," N.J.A.C. 7:1C-2.1(e), and afford public participation to the adjacent OBC as provided in the Rules, (contra ELECb29–40).

A concrete example illustrates the need for the adjacency provision. Port Newark has no residents, is immediately surrounded by OBCs, and also houses major sources of air pollution which directly or nearly overlap the census block group boundary lines. (DEPa620); See also Environmental Justice Mapping, Assessment and Protection Tool, https://tinyurl.com/njdepejmap (last visited June 1, 2024) ("Facilities" tab). Absent the adjacency provision, the localized cumulative impacts of certain facilities within Port Newark on the immediately adjacent OBCs would escape EJ regulation because the Census Bureau happens to locate them within a separate block group.

Census regulations explaining how block-group boundaries are drawn further confirm the adjacency provision need. Boundaries may be drawn where residences end and a polluting facility begins, regardless of the distance between them, because the determining factors differ from the EJ Law. Dep't of Commerce, Bureau of the Census, Block Groups for the 2020 Census—Final Criteria, 83 FR 56293, 562943 (2018). For instance, boundaries generally "follow significant, visible, easily identifiable features," like "highways," "railroad tracks," "above-ground pipelines," or "fence lines." Id. at 56295. So a polluting facility surrounded by fencing may be placed inside a zero-

population block group even if it borders a residential community. The adjacency provision accounts for these census process distinctions. See 55 N.J.R. at 703 (DEPa43) (the "census process" is not focused on the EJ Law).

The adjacency provision advances legislative intent to protect all New Jerseyans while maintaining the statutory OBC definition as the Legislature intended. The EJ Law declares that all state residents "have a right to live, work, and recreate in a clean and healthy environment," and directs DEP to craft the means necessary to "correct th[e] historical injustice" of environmental inequality. N.J.S.A. 13:1D-157; see N.J.S.A. 13:1D-161. The Rules are consistent with that manifest intent and advance the mission assigned to DEP. See League, 158 N.J. at 223 (focusing on implied statutory authority to "advance the policies and findings that served as the driving force for the enactment of the legislation" (citation omitted)); Adoption of N.J.A.C. 7:26B, 128 N.J. at 450 (courts may "look beyond the language of the statute to the circumstances and objectives surrounding its enactment" to discern legislative intent). The adjacency provision is narrow, covering only regulated facilities sharing a border with an OBC, not one removed or buffered from the adjacent OBC. N.J.A.C. 7:1C-2.1(e); 55 N.J.R. at 703 (DEPa43). See also Environmental Justice Mapping, Assessment and Protection Tool, https://tinyurl.com/njdepejmap (last visited June 5, 2024) ("Facilities" tab).

Substantial deference applies here. The EJ Law applies to facilities located "in whole or in part" in an OBC and which will impact "the environmental and public health stressors already borne by the [OBC] as a result of existing conditions located in or affecting [that OBC]." N.J.S.A. 13:1D-160(a)(1). The Rules follow those statutory directives. (Contra ISRIb10; ELECb38–39). The Rules simply treat a facility located in a census block without any residents, that immediately and directly borders the OBC, and which may therefore emit pollution directly into the OBC, as "in" the OBC itself. Far from redefining "in whole or in part," (contra ISRIb9-10; ELECb39), the Rules clarify what that term means in this particular context.

Other existing environmental laws form the background against which the Legislature operated and confirm DEP's reasonable approach. It is not unusual in environmental law for a statutorily-designated unit of analysis to include what lies immediately adjacent. See, e.g., Last Chance Dev. P'ship v. Kean, 119 N.J. 425, 430, 435 (1990) ("waterfront" in Waterfront Development Act included land "immediately contiguous to" and "immediately adjacent to, if not on, [a] waterfront itself"); In Re Stormwater Mgmt. Rules, 384 N.J. Super. 461, 464 (DEP has authority to create buffers around protected waters); see N.J.A.C. 7:27-16.1 ("facility" in APCA includes "the combination of all structures, buildings[] . . . and other operations located on one or more contiguous or

adjacent properties owned or operated by the same person"). The adjacency provision applies a similar intuition to the EJ Law given the Legislature's intent and DEP's environmental expertise.[8]

Appellants' cited cases do not help them, as they dealt with the Freshwater Wetlands Protection Act (FWPA), N.J.S.A. 13:9B-1 to -30, a statutory program with a much different Legislative intent. (ISRIb11; ELECb40; CCNJ29). The Legislature sought to strike fine balances in the FWPA amongst competing interests in assuming federal wetlands permitting authority. See N.J.S.A. 13:9B-2 (addressing natural resource protection, private property values, and development impacts). To be sure, In re Freshwater Wetlands Protection Act Rules, 180 N.J. 478 (2004), held that DEP "exceeded [its] statutory authority" to regulate some statutorily-designated "'transition areas' surrounding certain categories of freshwater wetlands" by "expand[ing]" the size of some areas, and mandating transition areas for wetlands without that protection. Id. at 482, 485, 490. The logic applicable there is inapposite here: the Supreme Court held the regulation directly conflicted with the "delicate compromise" reflected in the FWPA's "express[]" statutory language. Id. at 490–91. Similarly, in In Re Freshwater Wetlands Prot. Act Rules, N.J.A.C. 7:7A-1.1 et seq., 238 N.J. Super.

[8] If a permit applicant is uncertain about whether the adjacency provision applies, they may seek an applicability determination from DEP. N.J.A.C. 7:1C-2.1(g).

516 (App. Div. 1989), DEP imposed a five-year limitation on statutory exemptions, despite the Legislature's contrary intent. Id. at 527–29. Here, the Rules neither override an express statutory command nor establish a burden the Legislature deliberately omitted. Instead, the Rules clarify the marginal ambiguity in the statutory phrase "located in," and they do so reasonably.

* * *

This court should reject Appellants' efforts to narrow the Legislature's sweeping and innovative EJ Law. The Law applies protections to "new" facilities and facility "expansions", but does not limit the scope of those terms, and instead gives DEP authority to construe them. So too the Law incorporates, but does not define, the "compelling public interest" provision and the language discussing facilities "in" OBCs. Each time, the Legislature gave DEP—the expert agency, and its EJ Law partner—the power and duty to implement the sweeping and innovative EJ Law. The Rules implement the broad legislative intent to remedy extensive and historic environmental injustices.[9]

[9] ELEC's claim that the Rules "defer" to local environmental justice requirements, (ELECb40-42), misunderstands N.J.A.C. 7:1C-3.2(a)(5), which requires applicants to include "evidence of satisfaction of any local environmental justice or cumulative impact analysis ordinances with which the applicant is required to comply" in the EJIS. This informs DEP of the facility's local rule compliance to "avoid unnecessary delays or conflicts." 55 N.J.R. at 695 (DEPa35). The requirement is informational, does not sub-delegate decision-making authority or incorporate local laws, and is not ultra vires.

POINT II

DEP REASONABLY INTERPRETED THE EJ LAW'S PROVISIONS FOR ASSESSING LOCALIZED POLLUTION AND PUBLIC HEALTH IMPACTS ON OBCs.

The EJ Law requires DEP to determine when an OBC would suffer disproportionate stressors compared to other communities. DEP devised a reasonable standard for conducting geographic comparisons. And while the Law defines "stressor," it does not do so exhaustively and empowers DEP to create a more complete definition.

A. Definition of "Geographic Point of Comparison." (Responding to ISRI's Point III.C.4; ELEC's Point II.C)

The Legislature sought greater parity in the environmental health of communities across the State and entrusted DEP to accomplish that goal. The EJ Law requires DEP to deny a permit application for a new facility (absent a compelling public interest) and impose conditions on an existing facility's expansion permit, upon a particular trigger—a finding that the permit would "cause or contribute to . . . adverse stressors in the [OBC] that are higher than those borne by other communities within the State, county, or other geographic unit of analysis, as determined by [DEP]." N.J.S.A. 13:1D-160(c), (d) (emphasis added). The Rules address how that geographic analysis is conducted. Each permit application is reviewed against a "[g]eographic point of comparison," which "means the comparison area and value used to determine whether an

overburdened community is subject to one or more adverse . . . stressors, and is determined by selecting the lower value of the State or county's 50th percentile, calculated excluding the values of other [OBCs]." N.J.A.C. 7:1C-1.5.

The challengers raise three objections to the "geographic point of comparison" (GPOC) definition, but none are tenable. The first ultra vires argument, that DEP impermissibly declined to adopt a one-size-fits-all approach and employ either a state-wide or county-wide comparator in all cases, fails outright. (ISRIb27–29; ELECb21–23). The Legislature empowered DEP to determine the proper methodology rather than prescribe it itself. See N.J.S.A. 13:1D-160(c), (d). Any argument that DEP's choice was arbitrary and capricious is a nonstarter too. DEP explained why adopting a "'one-size-fits-all' approach would not provide the most equitable protection to [OBCs] intended by the Act." 55 N.J.R. at 700 (DEPa40). For instance, a county-based comparison "would threaten to perpetuate the historic siting inequities the Legislature sought to remedy by providing less consistent protection in the State's comparatively more industrialized counties." Ibid. (emphasis added). And "a strict Statewide comparison would provide less protection to overburdened communities in comparatively less industrialized counties, particularly in the State's southern regions." Ibid. (emphasis added). Rather than adopt a definition providing greater protection to some OBCs and less to

others, DEP adopted a flexible, case-specific approach. Appellants do not and cannot show that DEP's determination did not "rest on a reasonable factual basis." In re Att'y Gen. L. Enf't Directive Nos. 2020-5 & 2020-6, 246 N.J. 462, 491 (2021). Concerns that toggling between county- and state-wide comparison values results in too much public-health protection ignores the EJ Law's very purpose. See Bergen Pines, 96 N.J. at 477.

Second, ELEC erroneously claims that the GPOC definition conflicts with the Solid Waste Management Act, N.J.S.A. 13:1E-1 to -230. That law requires counties "to site [solid waste] facilities within their geographic jurisdiction," and—ELEC argues—affords them "no authority to go beyond their . . . boundaries." (ELECb23). The statute says otherwise, allowing a county "lack[ing] sufficient suitable internal sites" to arrange for waste disposal in another county. In re Long-Term Out-of-State Waste Disposal Agreement Between Cnty. of Hunterdon & Glendon Energy Co. of Glendon, Pa., 237 N.J. Super. 516, 520 (App. Div. 1990). And even if tension existed between the two statutes, the EJ Law instructed DEP to determine the GPOC "[n]otwithstanding . . . any other law." N.J.S.A. 13:1D-160(c), (d). See Jersey City v. State Dep't of Env't Prot., 227 N.J. Super. 5, 20 (App. Div. 1988) ("notwithstanding" clause part of "clear evidence of legislative intent to give DEP discretion"); see also Kennedy v. Weichert Co., No. 087975, 2024 WL 2118262, at *11 (N.J. May 13,

2024) (DEPa511) ("[A] 'notwithstanding' clause clearly signals the drafter's intention that the . . . 'notwithstanding' section override conflicting provisions of any other section.").

Finally, Appellants argue that excluding other OBCs from the geographic comparison is invalid but find no support in statutory text. ELEC insists the Legislature intended DEP to compare OBCs to "'average' communities in New Jersey," (ELECb23), while ISRI presses that the geographic comparison values are not premised on "an existing geographic unit of analysis," (ISRIb28). The EJ Law, however, mandates a comparison to "other communities," not "average" or even all other communities, and told DEP to determine which communities should be considered in the "geographic unit of analysis." See N.J.S.A. 13:1D-160(c), (d). Cf. Pub. Int. Rsch. Grp. of N.J., Inc. v. N.J. Dep't of Env't Prot., 152 N.J. Super. 191, 212 (App. Div. 1977) (regulatory authority grant to agency with expertise "should be liberally construed so as to enable it to discharge its statutory responsibilities"); Detroit Edison Co. v. U. S. Nuclear Regul. Comm'n, 630 F.2d 450, 453 (6th Cir. 1980) (phrase "as determined by [an agency]" indicated "delegat[ion] [of] broad authority"). And the Rules' "geographic point

of comparison" is geographic in nature; it omits other OBCs' data from the comparison value to effectuate the EJ Law's remedial and preventative aims.[10]

Moreover, comparing an OBC to non-OBCs is reasonable. Appellants protest that this methodology is arbitrary and capricious because it results in making "urban" parts of the State, where they say OBCs are predominantly concentrated, more like "rural" ones, where they claim OBCs are absent. (ISRIb27–29; ELECb21–22). That contention has two fatal flaws. First, the Legislature intended to achieve greater parity, not to perpetuate a public-health divide between the State's regions or to keep polluting facilities out of the State's less-populated areas. See supra at 1–2, 8-11. Second, "as shown on EJMAP, [OBCs] are found in urban, rural, and suburban areas all across New Jersey." 55 N.J.R. at 729 (DEPa69). EJMAP confirms that a number of OBCs are dispersed outside the State's urban centers and are located in municipalities

[10] Some data illustrates how Appellants' position would leave some OBCs with less protection. For example, the EJMAP stressor data shows the combined stressor totals for some OBCs in and around Newark's Ironbound District range from 19 to 24. See, e.g., https://tinyurl.com/njdepejmap (last visited June 5, 2024) ("Stressor Summary" tab) (Blocks 340130079002, 340130073002, 340130068002) (DEPa615–617). The Essex County combined stressor total without OBCs is 15. The statewide figure is 13 and is the geographic point of comparison. But whether the statewide or county figure was the reference point, if other OBCs' totals were included, the fiftieth percentile would be greater, and some OBCs—such as Block 340130041003 in Newark, which currently has a combined stressor total of 16—could lose protection. (DEPa618).

ranging from Sussex Borough in Sussex County to Woodbine Borough in Cape May. See generally EJMAP, "Overburdened Communities" tab, https://tinyurl.com/njdepejmap.[11] And DEP received public support for its adopted approach. See, e.g., DEPa494 (pre-rule proposal stakeholder meeting). DEP's application of its "experience and specialized knowledge" here was valid. See Advisory Opinion No. 01-2008, 201 N.J. at 262; N.J.A.C. 7:1B-1.1, 431 N.J. Super. at 114–15.

B. Stressors. (Responding to ISRI's Point III.E; ELEC's Point VIII)

The Legislature gave an open-ended definition of "environmental or public health stressors" and authorized DEP to devise regulations to implement that standard. The Legislature explained the phrase "means sources of environmental pollution, including, but not limited to, concentrated areas of air pollution, mobile sources of air pollution, contaminated sites, transfer stations or other solid waste facilities, recycling facilities, scrap yards, and point-sources of water pollution . . . or conditions that may cause potential public health impacts, including, but not limited to, asthma, cancer, elevated blood lead levels,

[11] To illustrate how the comparison would work in practice, take Block Group #340373712002 in Sussex Borough. DEPa619. That OBC has a combined stressor total of 17, which is higher than both the statewide (13) and county-wide (10) non-OBC 50th percentiles, so it is subject to "adverse cumulative stressors." Ibid.

cardiovascular disease, and developmental problems in the overburdened community." N.J.S.A. 13:1D-158 (emphasis added).

After "a comprehensive stakeholder process and internal in-depth analysis," 55 N.J.R. at 709 (DEPa49); see, e.g., 54 N.J.R. at 974 (ELECa4), followed by notice and comment, DEP identified twenty-six stressors "supported by robust, high-quality, Statewide, publicly available datasets that [are] meaningful on a block group level." 55 N.J.R. at 704 (DEPa44); see N.J.A.C. 7:1C Appendix (Rule Appendix) (listing stressors and data sources). DEP selected "the appropriate and minimum number of stressors necessary to provide a complete and accurate view of the stresses placed on [OBCs] . . . geared toward reducing disproportionate impacts on the environment and health of members of these communities." 55 N.J.R. at 705 (DEPa45). DEP had to account for "conditions that may cause potential public health impacts" and thus included the "[c]ount of community drinking water violations or exceedances," potential lead exposure, lack of tree canopy, and lack of recreational open space. Rule Appendix. Two "social determinants of health"—the percentage of unemployment and the percentage of residents without a high school diploma—were also included. Ibid.; see 55 N.J.R. at 713 (DEPa53).

Appellants claim DEP lacks statutory authority to consider stressors that concern so-called "quality of life" issues but the EJ Law says otherwise. See

(ISRIb38–40; ELECb46–47). The "stressor" definition identifies two broad categories: "sources of environmental pollution" and "conditions that may cause potential public health impacts." N.J.S.A. 13:1D-158. The Law provides an illustrative but non-exhaustive list for the former. For the latter, the Legislature did not give any "conditions" examples, providing only potential "public health impacts" examples. See id. The Legislature wanted DEP's public health expertise to identify appropriate conditions.[12] Although Appellants claim the above stressors do not qualify as "conditions that may cause potential public health impacts," they provide no support. (ISRIb38–40; ELECb46–47). Appellants' quarrel is with the statute itself.

To the extent Appellants challenge the factual bases for DEP's "conditions" and "social determinants of health" stressors, their unsubstantiated claims fall short and the evidence cuts strongly the other way. (Compare ISRIb38–40; ELECb46–47, with (DEPa581)(social determinants of health are environmental conditions that affect a "wide range of health, functioning, and quality-of-life outcomes and risks.")(DEPa428-430)(communities of color disproportionately live in "nature-deprived areas," citing evidence of correlation

[12] Appellants err in claiming that DEP lacks the expertise to perform the task it was assigned. (ISRIb40 n.11; ELECb47). The Legislature has recognized DEP's expertise in public health as it relates to the environment. See, e.g., Adoption of N.J.A.C. 7:26B, 128 N.J. at 448; N.J.S.A. 13:1D-129. Flooding, another challenged stressor, also falls within DEP's statutory expertise. See, e.g., N.J.S.A. 58:16A-55.2.

between time spent outdoors and children's cognitive function and academic performance); 54 N.J.R. at 988 (ELECa18) (access to green space in urban areas has considerable health benefits, including improved cognitive development, reduced obesity, and positive mental health impacts); DEPa458 (impervious surfaces exacerbate heat impacts, which can compound other public-health impacts and transport surface water pollutants); 54 N.J.R. at 980–81 (ELECa10–11) (similar); 54 N.J.R. at 979–80 (ELECa9–10) (correlation between race and blood lead levels and impact of lead exposure); DEPa399 (similar). These stressors can strain "a community's resources and make future environmental and public health threats more difficult to prevent or manage." 55 N.J.R. 707 (DEPa47). Their inclusion is reasonable.

Appellants fare no better claiming the "quality of life" stressors, as they concern local planning, infringe on municipal power. (ISRIb40; ELECb47–48) (invoking Municipal Land Use Law ("MLUL"), N.J.S.A. 40:55D-1 et seq.). Because DEP identified these stressors pursuant to a direct legislative command, see supra at 43, Appellants' argument is essentially that the EJ Law itself is in tension with the MLUL. (ISRIb41). That is incorrect. Unlike the common-law and statutory authorities DEP relied on in Borough of Avalon v. N.J. Dep't of Env 't Prot., 403 N.J. Super. 590, 600-01 (App. Div. 2008), the EJ Law governs "notwithstanding" any other law, see supra at 40-41. Additionally, because the

EJ Law overlays a regulatory process on top of preexisting permitting programs, Appellants' argument implies that all the relevant statutes infringe on municipal authority. That is untenable.

Appellants' remaining objections fail. ISRI argues that including the "mere existence" of solid waste and scrap metal facilities as a stressor is invalid and results in impermissible "double-counting." (ISRIb41–43). But the EJ Law specifies that such facilities themselves are stressors. N.J.S.A. 13:1D-158; see also 55 N.J.R. at 705 (DEPa45) (the Legislature recognized these facilities' mere presence, "particularly when located in abundance due to historic siting inequities, constitutes a source of environmental stress on a community"). By specifying particular facilities as examples of "sources of environmental pollution" alongside other categories, such as "concentrated areas of air pollution" and "point-sources of water pollution," the Legislature intended the facility's impacts to be considered separate from, and additional to, its presence. Cf. State v. Nicholson, 451 N.J. Super. 534, 551 (App. Div. 2017) ("[A legislature] may choose a belt-and-suspenders approach to promote its policy objectives.") (quoting McEvoy v. IEI Barge Servs., Inc., 622 F.3d 671, 677 (7th Cir. 2010)); see also 55 N.J.R. at 706 (DEPa46) ("[T]he selected stressors complement each other and present a more accurate and complete picture of the comparative environmental and public health conditions in [OBCs].") At the

very least, the Legislature did not restrain DEP's discretion to do so. Similarly, CCNJ's challenge to the Rules' "heavy reliance on air quality stressors" lacks any basis. The stressors have no infirmity.

POINT III

DEP'S CONDITIONS PROVISIONS AND LOCALIZED IMPACT CONTROL TECHNOLOGY ("LICT") STANDARD ARE REASONABLE.

A. Permit Conditions (Responding to ISRI's Point III.D; ELEC's Point VII; CCNJ's Point III.2)

Conditions play a key role in the EJ Law. For a new facility that serves a compelling public interest, an existing facility expansion, and certain renewals, DEP may grant a permit with conditions—specifically, those "on" or "concerning" "the construction and operation of the facility to protect public health." N.J.S.A. 13:1D-160(c), (d) (emphasis added). To implement this, DEP requires permit applicants themselves to "propose" various "feasible" "control measures." N.J.A.C. 7:1C-5.4(b), -6.3(b).[13] Ibid. "Feasible" measures "are reasonably capable of being accomplished by considering economic and technological factors." Id. 7:1C-1.5. Applicants must propose, in the following order, (1) "all feasible measures to avoid facility contributions to . . . stressors," (2) "all feasible onsite measures to minimize facility contributions," (3) "[a]ll

[13] Facilities seeking a major source permit for air pollution are subject to a specific performance standard, discussed infra at 54. N.J.A.C. 7:1C-5.4(a), -6.3(a).

feasible offsite measures within the [OBC] to reduce" facility contributions, (4) "[a]ll feasible offsite measures within the [OBC] to reduce adverse . . . stressors to which the facility will not contribute," and (5) "[a]ll feasible offsite measures within the [OBC] to provide a net environmental benefit in the [OBC]." Id. 7:1C-5.4(b), -6.3(b). DEP will then set necessary permit conditions "to avoid or minimize contributions to . . . stressors, reduce adverse . . . stressors, and/or provide a net environmental benefit in the [OBC]." Id. 7:1C-9.2(b)(1)(ii), (2).

Appellants' statutory and constitutional challenges to these provisions lack merit.

1. The Conditions Provisions Are Consistent with the EJ Law.

Appellants' ultra vires claim is premised on a cramped statutory reading. They argue that the control measures applicants must propose, and the conditions DEP may impose, exceed DEP's authority because they bear an insufficient nexus to "the construction and operation of [a] facility." N.J.S.A. 13:1D-160(c), (d). (ISRIb31–32; ELECb 42–44). However, "operation" is capacious—particularly in this context—and the EJ Law contemplates that some conditions may be on "operations" only, not both "construction and operation."

Begin by separating construction from operations. Expansion may not necessarily involve construction, see supra at 25 (discussing "expansion"), and moreover, the Legislature did not intend that regulated facilities, whether newly

constructed or expanded, would escape regulation entirely once constructed. Pine Belt Chevrolet v. Jersey Cent. Power & Light Co., 132 N.J. 564, 579 (1993) (the term "and" can be disjunctive depending on legislative intent). So DEP has broad power to impose conditions on a facility's "operations." The term encompasses not just work performed under a facility's roof or within its fence line, but also a facility's "exertion of . . . influence" on its surroundings and the "result[s] of operating." Merriam-Webster, Operation, https://www.merriam-webster.com/dictionary/operations (last updated June 5, 2024). Imposing conditions on "operation[s]" thus includes a facility's "influence" or effects on its surroundings, or on the circumstances that "result" from the facility's activities. Minimally, that includes both on- and off-site measures to mitigate a facility's stressor contributions.

DEP's conditioning power is unquestionable as the EJ Law authorizes DEP to impose "conditions … to protect public health." N.J.S.A. 13:1D-160(c), (d). As discussed, the EJ Law evinces a comprehensive understanding of public health. See supra at 43 ("stressor" definition); see N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541, 570 (2017) (statutory provision must be construed "in context with related provisions" "to give sense to the legislation as a whole"). And in N.J.S.A. 13:1D-160(c) and (d), the Legislature said that "protect[ing] public health" extends to counteracting a facility's contributions

to an OBC's stressors and protecting an OBC from "adverse cumulative . . . stressors." Ibid. (emphasis added). The Law's text contemplates conditions aimed at stressors in an OBC even if a facility does not cause or contribute to those stressors, so long as the facility's operations may worsen the "cumulative" public-health situation. See League of Municipalities, 158 N.J. at 222. DEP's interpretation is entitled to substantial deference. See, e.g., ibid.

2. The Conditions Provisions Comport with Due Process.

The vagueness doctrine is especially permissive as to economic laws, like this one, that involve only civil penalties rather than criminal. See supra at 21 (vagueness requirements for civil laws are "less strict" than penal laws, Tanurb, 363 N.J. Super. at 499, and are impermissibly vague only if the law amounts to "no rule or standard at all," Wyndham, 799 F.3d at 250). To defeat a vagueness challenge, a civil law need only be "comprehensible." Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971). That makes sense: "businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant [rules] in advance of action." Tanurb, 363 N.J. Super. at 499 (citations omitted). So where, as here, businesses challenge a law as vague whose "objectives involve … fairness and equity," courts often uphold statutory or regulatory language that may have less than "specific draftsmanship." In re Revocation of Access of Block No. 1901, Lot No. 1, Borough of Paramus,

Bergen Cnty. Parkway 17 Assocs., 324 N.J. Super. 322, 332 (App. Div.), certif. denied, 162 N.J. 664, (1999). This means "certain marginal situations may present close questions for determination," but that "does not indicate that the statutory language is [so] uncertain" it violates due process. Grand Union Co. v. Sills, 43 N.J. 390, 409 (1964). Courts assess the relevant language for any interpretation "against the contextual background" of the law "and with a firm understanding of its purpose." Cameron, 100 N.J. at 591.

The EJ Rules provide permit applicants with more than sufficient notice to satisfy this standard. First, applicants themselves propose control measures, which DEP later considers when determining conditions. See supra at 48-49. While DEP is not bound to accept applicants' proposals, N.J.A.C. 7:1C-9.2(b), as a practical matter, the EJIS process will likely allow applicants to anticipate the kinds of conditions they might ultimately receive since the applicants themselves first propose them and may then engage with DEP as needed before DEP's permit decision. N.J.A.C. 7:1C-7.1(c).

Even setting that aside, the Rules' conditions provisions do not amount to "no rule or standard at all" and easily survive this challenge. Conditions must pertain to "construction and operation"; may be any of the five categories of "control measures" in N.J.A.C. 7:1C-5.4 and -6.3; and are prioritized according to a hierarchical criteria, so those that "avoid" contributions are prioritized first,

on-site measures are next, etc., id. 7:1C-5.4(b), -6.3(b). Moreover, conditions must be "feasible" for both cost and technology, supra at 48-49, and have a nexus to the twenty-six stressors. N.J.A.C. 7:1C-5.4, -6.3, 9.2; N.J.S.A. 13:1D-160(c), (d). Even conditions that aim for a "net environmental benefit" must relate to the "stressors . . . or public health conditions" actually present "in an [OBC]," N.J.A.C. 7:1C-1.5 (defining "net environmental benefit); id. 7:1C-5.4, -6.3, 9.2. (Contra CCNJb 25–26). The Rules provide fair notice while retaining the necessary "flexib[ility]" the program requires. In re Health Care Admin. Bd., 83 N.J. 67, 73 (1980. Questions about how DEP may apply the Rules to a particular scenario cannot sustain a void-for-vagueness claim.[14]

Appellants' cases are inapposite. Some are not even vagueness cases. See Crema v. N.J. Dep't Env't Prot., 94 N.J. 286, 302 (1983) (DEP permitting decision "not specifically provided by the statute or any regulation"); N.J. Dep't Env't Prot. v. Stavola, 103 N.J. 425, 435-36 (1986) (similar). Others have no bearing here. N.J. Society for Prevention of Cruelty to Animals v. N.J. Department of Agriculture, 196 N.J. 366 (2008) addressed notice in animal-cruelty regulations in an administrative law challenge and determined that undefined terms such as "minimize pain"—whose meaning is affected by one's

[14] Contrary to Appellants' argument, regulations often do not limit the number of permit conditions. See, e.g., N.J.A.C. 7:7-27.2 (coastal zone permits); id. 7:27-8.13 (air emissions).

"philosophical" views, and had no "objective criteria" to aid compliance—were overly vague. Id. at 406, 409–12. The EJ Rules' conditions provisions, by contrast, are in a comprehensive statutory and regulatory program that contains detailed definitions and identifiable standards to guide regulated entities. Appellants' remaining case is distinguishable for similar reasons. See Borough of Avalon, 403 N.J. Super. at 608 (regulation mandated "parking sufficient to accommodate public demand," but DEP "acknowledge[d]" there was "no formula" to assess compliance). There is no vagueness infirmity.[15]

B. Localized Impact Control Technology (Responding to ELEC's Point IV; CCNJ's Point III.1)

1. Statutory and Regulatory Provisions

Just as the EJ Law creates an overlay on numerous environmental permitting programs under other statutes, it applies to applicants seeking certain APCA air pollution permits. N.J.S.A. 13:1D-158. The EJ Law "facility" definition includes a "major source of air pollution." Id. 13:1D-158. The "major source" definition incorporates the federal CAA and the State's APCA

[15] ISRI's argument that conditions could exceed DEP's authority under the statutory permitting programs incorporated into the EJ Law fails, given the Legislature's intent to impose new regulatory requirements "notwithstanding" other law. See (ISRIb36–37); supra at 40-41. And while ISRI muses that any "requirements imposed via permit action" on "mobile sources" would be "inconsistent with the" CAA, it provides no substantiation and any hypothetical concerns about a particular permit have no place in this facial challenge. (ISRIb37).

definition, supra at 9, and includes a facility that "directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant, or other applicable criteria [pollutant] set forth in the [CAA]," N.J.S.A. 13:1D-158.

The Rules establish the LICT standard, N.J.A.C. 7:1C-7.1 ("Section 7.1"), a detailed process for some new major sources and existing major source expansions that addresses air-specific control measures and conditions. See N.J.A.C. 7:1C-5.4(a) (certain new major source permit applicants must "propose control measures in accordance with [the LICT standard]"); see also id. 7:1C-6.3(a) (same for "expanded major source facility" permit applicants). Section 7.1 does not apply to all applications, but only to (1) "a new major source facility that serves a compelling public interest," and (2) "an expansion of an existing major source facility" that involves "a significant source operation" as defined in separate DEP APCA regulations, if (3) the major source's potential emissions of particular pollutants exceed certain thresholds specified in the regulations. Id. 7:1C-7.1(a), (b). A covered applicant must propose control measures by "document[ing]" how it will comply "with the LICT standard." Id. 7:1C-7.1(b).

To propose control measures and identify the LICT standard, an applicant undertakes the following analysis. First, the applicant "identif[ies] and evaluat[es] a list of air pollution control technologies or measures that may be applied to the source to reduce each contaminant" potentially emitted at rates

higher than levels described in 7.1(a). Id. 7:1C-7.1(c)(1). These measures are "intended to minimize" air quality degradation from new sources, "improve air quality when existing sources are replaced or reconstructed, and promote enhanced pollution prevention." 55 N.J.R. at 721 (DEPa61). Next, the applicant "[a]rrange[s] the measures . . . in descending order of air pollution control effectiveness." N.J.A.C. 7:1C-7.1(c)(2). Generally, the first or "'top' measure [in the list] shall constitute LICT for the source." Ibid. But if the top measure (1) is "technically infeasible," (2) has adverse "environmental impacts . . . when compared with its air contaminant emission reduction benefits" making its use "unreasonable," or (3) has similar "energy" usage-related tradeoffs, the applicant proceeds to the next measure in the list, until it reaches one that is not eliminated. Id. 7:1C-7.1(c)(2), (3).

The LICT standard "is based on" the pre-existing major source standard—"the State of the Art (SOTA) standard," in APCA regulations—but is tailored to the EJ Law. 55 N.J.R. at 720 (DEPa60). Unlike some APCA performance standards, LICT "does not include consideration of economic feasibility." Ibid. That said, as Section 7.1 demonstrates, LICT has important built-in limitations: "[i]f a particular measure will require a fundamental change and result in only minimal reductions," for instance, "the measure is likely not" LICT. Ibid.

2. The LICT Standard Is Valid.

ELEC argues Section 7.1 is inconsistent with the EJ Law and the APCA, and is also arbitrary and capricious. (ELECb34-38). Both claims lack merit.

Fashioning the LICT standard is within DEP's EJ Law authority. The Law does not require a new performance standard for particular major source permits. But it did not need to. Viewed against the EJ program, see N. Jersey Media Grp., 229 N.J. at 570, Section 7.1 details one type of statutorily-authorized condition, or control measure, applicable to a type of regulated facility. N.J.A.C. 7:1C-5.4(a), -6.3(a). That is not the kind of "major policy question" courts occasionally reserve for the Legislature. (Contra ELECb34); see supra 51-54. The Law nowhere suggests that DEP lacks discretion to identify a particular standard for control measures on certain permit categories. Devising regulations to "reduce [air] emissions from new and expanding [major source] facilities as much as possible," 55 N.J.R. at 720 (DEPa60), matches the EJ Law's remedial and preventative goals. See supra at 1–2, 8-11. DEP's interpretation of this new and novel public-health legislation that leverages DEP's air pollution expertise is owed substantial deference. See supra at 14-18.

LICT does not conflict with other laws either. In enacting the EJ Law, the Legislature created a gap-filling regime to "correct" the "historical injustice" of environmental inequality that persisted despite the successes of other

environmental laws. N.J.S.A. 13:1D-157; see supra 1–2, 8-11; 55 N.J.R. at 720 (DEPa60) ("[T]he Legislature recognized that the existing way of [doing] business" insufficiently "protect[ed] . . . [OBCs]"). The Legislature required DEP to fill in the gaps, including what permit conditions to impose, "[n]otwithstanding the provision of any other law." N.J.S.A. 13:1D-160(d); see supra at 40-41 (discussing "notwithstanding" clauses). The EJ Law text shows that the Law and its Rules may add compliance requirements for regulated entities—particularly given the principle that when "construing statutes relating to the same subject matter," courts "must strive to harmonize them." Burt v. W. Jersey Health Sys., 339 N.J. Super. 296, 304 (App. Div. 2001). The APCA and its regulations, including those governing other technology-driven emission reduction standards, do not create a regulatory ceiling that the EJ Rules cannot exceed.[16]

While ELEC asserts that LICT is arbitrary and capricious because it is "indefinite" and "vague," ELEC's complaints show it understands what LICT entails. (Compare ELECb35, with (ELECb37 (LICT "imposes the strictest reduction criteria . . . without any consideration of economic factors")). No

[16] Those performance standards include Best Available Control Technology ("BACT"), N.J.A.C. 7:27-34.3 (BACT for PM and NOx emissions); Reasonably Available Control Technology ("RACT"), N.J.A.C. 7:27-22.35(b)(1); and the Lowest Achievable Emission Rate ("LAER"), N.J.A.C. 7:27-18.3.

other arbitrariness claim holds water, either. DEP explained its reasons for the new standard. By adding to existing processes, the Legislature "recogni[zed] that while [DEP's] standards for the control of air pollution are protective based on the effect pollution has upon general populations spread over a wide geographic area, [they] may fail to fully consider localized impacts." 54 N.J.R. at 986 (ELECa16). The Legislature wanted to fill that gap. And contrary to CCNJ's claim, (CCNJb17–18), DEP explained economic considerations would detract from effectuating the Law's aims and formulating LICT to "reduce [air] emissions from new and expanding [major source] facilities[.]" 55 N.J.R. at 720 (DEPa60). DEP's conclusion "reasonably . . . made [] a showing of the relevant factors." In re Carter, 191 N.J. 474, 482 (2007).

POINT IV

DEP COMPLIED WITH THE APA.

A. EJMAP And the Technical Guidance Do Not Require Rulemaking. (Responds to ISRI's Point III.F.1; ELEC's Point III; CCNJ's Point I)

Appellants challenge whether the APA required DEP to issue EJMAP and the Technical Guidance through formal rulemaking procedures, N.J.S.A. 52:14B-1 to -27, rather than release them as guidance documents. In assessing claims that a particular action must go through notice-and-comment rulemaking, this court asks two questions: (1) whether any of the APA's statutory rulemaking exceptions apply, and (2) if no exception applies, whether the Metromedia v.

Division of Taxation, 97 N.J. 313 (1984), factors require rulemaking. Appellants skip that initial inquiry and proceed to the Metromedia factors. (ISRIb44–47; ELECb27–31). Their claim both fails because these documents fall within an exception and fails under Metromedia.

1. The Statutory Exemption for Regulatory Guidance Applies.

If an APA rulemaking exception applies, the inquiry ends. Woodland Private Study Group v. State, 109 N.J. 62, 66, 68, 69 (1987); N.J. Builders Assoc. v. N.J. Dep't of Env't Prot., 306 N.J. Super. 93, 100 (App. Div. 1997) ("even if an administrative order satisfies all the Metromedia criteria, it need not go through the rule-making process if it qualifies" under any APA exemption). So, if an express APA exception applies, Metromedia does not.

The APA exempts "regulatory guidance documents" from formal rulemaking if certain conditions are met. N.J.S.A. 52:14B-3a(c). A "regulatory guidance document" is a document a State agency uses "to provide technical or regulatory assistance . . . to the regulated community to facilitate compliance with a State or federal law or a rule adopted pursuant to" formal rulemaking. Id. 52:14B-3a(d); see also, e.g., E.B. v. Div. of Med. Assistance & Health Servs., 431 N.J. Super. 183, 206 (App. Div. 2013) (noting statutory standard). A document meeting that definition need not undergo rulemaking so long as (1) the agency makes the document "readily available to the regulated community .

. . including . . . posting . . . on the [agency's] website," (2) the document does not "impose any new or additional requirements" that are not in the "law or rule that the regulatory guidance document is intended to clarify or explain," and (3) the agency does not use it "as a substitute for the . . . law or rule for enforcement purposes." N.J.S.A. 52:14B-3a(b), (c)(1)-(2).

EJMAP and the Technical Guidance meet this exemption. Both resources were (and remain) publicly available online. These documents assist the regulated community "to facilitate" and aid compliance, but do not themselves impose any "requirements" or standards regulated entities must follow. N.J.S.A. 52:14B-3a(d). The Rules alone take that role. See supra at 11-14. Additionally, the EJ Law defines OBC, N.J.S.A. 13:1D-158, and DEP maintains an OBC list on its website, https://dep.nj.gov/ej/communities/ ("List of [OBCs]"), see also NJSA 13:1D-159, separate from EJMAP and the Technical Guidance. Appellants challenge obligations from the EJ Law and Rules, not EJMAP and the Technical Guidance.

EJMAP and the Technical Guidance perform informational functions. EJMAP "provide[s] a publicly available, user-friendly, visual representation of the underlying data" the EJ Law and the Rules require to be used, which affords applicants "easy access to the [relevant] information" and a convenient way analyze it, without having to gather the data and resort to arduous modes of

analysis. 55 N.J.R. at 729 (DEPa69); see id. at 714 (DEPa54) (similar function of Technical Guidance); see generally DEPa84 (providing additional context why each stressor was selected and how it is measured). Because these sources offer only guidance and information, neither resource must be used, despite ELEC's misunderstanding. (ELECb31). If an applicant wishes to access a geographic OBC or covered facilities presentation, or to access stressor totals data, or to better understand the relevant concept, they can consult EJMAP and the Technical Guidance. But if an applicant would rather conduct the analyses themselves, they can obtain relevant data from DEP in a separate format. N.J.A.C. 7:1C-2.3(a). The EJ Law and the Rules already identify the legally-binding standards for that undertaking. See 55 N.J.R. at 710, 729 (DEPa50, 69). Formal rulemaking was not required.

The EJ Law language and context confirms that formal rulemaking was not required. The EJ Law authorized DEP to "issue a technical guidance" immediately after instructing it to engage in rulemaking, unequivocal evidence the Legislature understood guidance does not need notice-and-comment. See N.J.S.A. 13:1D-161(a), (b). In fact, when the EJ bill was first introduced in 2020, DEP was to adopt the OBC list pursuant to the APA, but that requirement was deleted before the Law was adopted. (ELECa261; ISRIa5–6); N.J.S.A. 13:1D-158. N.J.S.A. 13:1D-159 instead requires the OBC list publication, but

does not mention adoption via formal rulemaking, recognizing that these resources are simply informational aids, not new regulatory requirements.

2. *Metromedia* Did Not Require Rulemaking.

Even if an APA exception did not apply, Metromedia would still not require EJMAP and the Technical Guidance to undergo formal rulemaking. Under Metromedia, courts assess whether the agency action:

> (1) is intended to have wide coverage encompassing a large segment of the regulated or general public …; (2) is intended to be applied generally and uniformly to all similarly situated persons; (3) is designed to operate only in future cases …; (4) prescribes a legal standard or directive that is not otherwise expressly provided by or clearly and obviously inferable from the enabling statutory authorization; (5) reflects an administrative policy that (i) was not previously expressed in any official and explicit agency determination, adjudication or rule, or (ii) constitutes a material and significant change from a clear, past agency position on the identical subject matter; and (6) reflects a decision on administrative regulatory policy in the nature of the interpretation of law or general policy.
>
> [97 N.J. at 331–32.]

The six factors "need not be given the same weight, and some factors will clearly be more relevant . . . than others." Doe v. Poritz, 142 N.J. 1, 97 (1995).

Although the first three factors are present here, the remaining three cut in the other direction. The fourth factor weighs strongly against rulemaking because EJMAP and the Technical Guidance do not prescribe "a legal standard" additive to or independent of anything in the Law or Rules. See, e.g., Poritz,

142 N.J. at 98 (giving the fourth factor the greatest weight). EJMAP and the Technical Guidance prescribe no new standards at all. See supra at 60-63. That disposes of the fifth factor too; any policy statements in these documents merely reinforce and do not change the EJ Law and the Rules. Nor do EJMAP or the Technical Guidance embody any regulatory "decisions"; they are merely tools for applying regulatory standards to facilitate such decisions.

Abundant precedent compels this conclusion. The fact-specific Metromedia analysis means that informal agency action—including technical tools and guidance—need not undergo formal rulemaking. See, e.g., Am. Cyanamid Co. v. State, Dep't of Env't Prot., 231 N.J. Super. 292, 297 (App. Div. 1989) ("methodology and computer model utilized in delineating or charting flood hazard areas"); Deborah Heart & Lung Ctr. v. Howard, 404 N.J. Super. 491, 507 (App. Div. 2009) (change to "manner in which [agency]" classifies and "reports its collected data to the public"). Appellants' cases, by contrast, are inapposite. See In re Authorization for Freshwater Wetlands Statewide Gen. Permit 6, Special Activity Transition Area Waiver, 433 N.J. Super. 385, 410-15 (App. Div. 2013) (DEP created spreadsheet formula to assess stormwater performance standard compliance even though an existing regulation provided that compliance could not be reduced to a formula); Toll Bros., Inc. v. State, N.J. Dept. of Env't Prot., 242 N.J. Super. 519, 527 (App.

Div. 1990) (DEP areawide plans de-facto "govern[ed] sewer service").

Appellants' remaining arguments are irrelevant to rulemaking and also lack merit. ISRI challenges DEP's decision to use data from the American Community Survey ("ACS") generated by the Census Bureau, rather than decennial census data, claiming the former is "less accurate and more variable." (ISRIb 48 n. 14). Not so. The ACS, unlike the decennial census, "provide[s] consistent data for all three statutory OBC criteria (minority, poverty, and linguistic isolation)" and is updated twice as often. 55 N.J.R. 701-702 (DEPa41-42). Using more frequently updated data accords with the Law's requirement to update the OBC list "at least once every two years." N.J.S.A. 13:1D-159. Additionally, the Legislature knows how to mandate using "decennial census" data, see, e.g., N.J.S.A. 11:9-2.1; N.J.S.A. 48:12-57; N.J.S.A. 52:27H-66.1, but opted not to here. DEP also addressed commenters' concerns about EJMAP's accuracy—emphasizing that it need not be used, and reiterating that others could use publicly available data and GIS tools to conduct their own analysis. See 55 N.J.R. at 710, 729 (DEPa50, 69). Finally, while ELEC argues EJMAP data updates may require applicants to "undergo further analysis and public comment" in the EJIS process, (ELECb28, n.4), DEP notifies the public before scheduled data updates occur, see DEPa376 (updates on January 31 and July 31), and in any event, DEP reviews permit applications with the available data

at the time of the application, 55 N.J.R. at 710 (DEPa50).

B. DEP's Economic Impact and Jobs Analysis Is Adequate. (Responding to ISRI's Point III.F.2; ELEC's Point III.)

The APA requires a rule proposal to provide "a description of the expected socio-economic impact of the rule" and "a jobs impact statement" including "an assessment of the number of jobs to be generated or lost if the proposed rule takes effect." N.J.S.A. 52:14B-4(a)(2). This "provide[s] interested parties with notice of the [anticipated] impacts" and thus affords "opportunity to participate meaningfully in the rule-making process." In re Adoption of N.J.A.C. 5:96 and 5:97, 416 N.J. Super. 462, 506–07 (App. Div. 2010). The agency is not required to calculate the precise costs for proposed rules, especially where the costs "will vary" among the affected facilities based on their unique circumstances and the way a facility chooses to comply with the new rules. Id. at 507 (statement complied with APA even though it did not include specific costs).

The EJ Rules satisfy this test. DEP's Economic Impact Statement explained that reducing environmental and public health stressors in OBCs "will reduce health care costs throughout the State" and "spur economic revitalization" in OBCs. 54 N.J.R. at 988 (ELECa18). DEP provided details for expected human health improvements and increased property values and incomes. Id. at 988–89 (ELECa18-19). As to anticipated regulatory compliance costs, DEP explained that any "additional capital, operating, and/or regulatory

expenses" facilities incur to comply with the new rules "will be offset by increased economic health of the host [OBC]." Id. at 988 (ELECa18). DEP acknowledged that it "cannot fully estimate" the costs each facility will incur due to numerous facility-specific details, but noted that no such estimate was required. Id. at 989 (ELECa19).

The Jobs Impact Statement stated that DEP expected the new rules would "have little or no impact on job retention in the State and in [OBCs]," but reducing environmental and public health stressors "is likely to improve economic activity" and "improve employment outcomes" in OBCs. 54 N.J.R. at 989 (ELECa19). DEP acknowledged that facilities may "offset compliance costs by hiring fewer workers or limiting expansion" but "in the long run, continuing improvements in technology will drive down mitigation costs at these facilities." Ibid. Due to facility-specific variables, no more was required.

ISRI challenges both the socio-economic and jobs impact statements and claims that DEP failed to "complete a jobs impact" and "perform a cost-benefit analysis of the Rules." (ISRIb48–50). But DEP conducted the required analyses and acknowledged the Rules could increase compliance costs.[17] See Adoption of N.J.A.C. 5:96 and 5:97, 416 N.J. Super. at 507; see also In re Coastal Permit

[17] While affected parties could "offer specific, concrete information regarding potential costs" commenters provided "little to no specific information" for their concerns. 55 N.J.R. at 667 (DEPa7).

Program Rules, 354 N.J. Super. 293, 365 (App. Div. 2002) (similar socio-economic impact statement adequate). The public comments confirm that the regulated community knew anticipated compliance costs. See 55 N.J.R. at 668-69 (DEPa8-9) (Comments 52, 55, 58). DEP's statements informed the public of anticipated impacts and satisfied the APA.

POINT V

CCNJ's ADDITIONAL ARGUMENTS NEED NOT BE ADDRESSED AND LACK MERIT. (Responding to CCNJ's Point II.1-3)

CCNJ unsuccessfully repeats Appellants' arguments and raises three new challenges. This court need not address these separate arguments, as amici cannot inject new issues into a case. See, e.g., In re Request to Modify Prison Sentences, 242 N.J. 357, 396 (2020). Even so, they each lack merit.

First, CCNJ erroneously argues the EJIS process is invalid because DEP did not include specific deadlines. (CCNJb12-13). The Legislature declined to require DEP decision timeframes, see 55 N.J.R. at 696 (DEPa36), which it has done elsewhere, compare, e.g., N.J.S.A. 13:1D-31, -32 (90-day permit review deadline). DEP explained it did not impose new deadlines because the "novelty of the issues likely to be presented as the State embarks on this first-of-its-kind regulatory effort" and the legislative requirement "to fully assess facility impacts," made such a promise impractical. 55 N.J.R. at 696 (DEPa36). Other

permitting regimes lack decision deadlines, see, e.g., N.J.A.C. 7:14a-7.1 to -7.15 (groundwater discharge); N.J.A.C. 7:14a-11.1 to -13 (surface water discharge), and DEP "is committed to working through each application it receives to a final agency decision as expeditiously as possible." 55 N.J.R. at 699 (DEPa39).

Second, CCNJ's claim that the evaluation methodology for the "creation or contribution of adverse cumulative stressors" is vague lacks merit. (CCNJb13-14). CCNJ argues DEP should have included a "de minimis threshold" for assessing stressors (ibid.), but DEP explained why it did not and the EJ Law did not require it to do so. See supra at 20-21. CCNJ challenges the standard's burden, but a standard's breadth and vagueness are different points.

Finally, the Rules' expert retention provision is valid, and any challenge is premature. (CCNJb14–15). CCNJ dislikes that DEP can "engage one or more experts" if "necessary . . . to evaluate any information submitted by the applicant" and require applicants cover the costs. N.J.A.C. 7:1C-9.1(c). There is nothing unlawful about that approach. DEP "has sufficient and deep expertise" to conduct the EJIS review. 55 N.J.R. at 696 (DEPa36). However, as the EJIS process is new, DEP may require assistance in "rare and limited circumstances." Ibid. Authorizing experts if necessary ensures DEP has the resources it needs to make permitting decisions. And in the unusual case where experts are necessary, it makes sense that the applicant should pay the expert

costs. See N.J.S.A. 13:1D-160(g) (DEP can assess a reasonable fee to cover EJIS process costs); 55 N.J.R. at 696 (DEPa36) (a system where applicants pay their own, atypical expert costs is more appropriate than requiring costs "be shared across all applicants through higher overall fees"). If an applicant believes an expert's costs are unreasonable for their application, they can make that argument then. CCNJ has no basis to demand certainty regarding the "timeline" or costs associated with an expert now, (CCNJb15) given the deference owed to DEP in making those highly technical as-applied determinations. See League, 158 N.J. at 222 (emphasizing "highly circumscribed" standard of review).

CONCLUSION

This court should uphold the Rules in their entirety.

Respectfully submitted,

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FILED, Clerk of the Appellate Division, July 01, 2024, **A-002959-22**, **AMENDED**

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

Docket No. A-002959-22

IN THE MATTER OF THE ADOPTION OF N.J.A.C. 7:1C

CIVIL ACTION

Submitted: July 1, 2024

BRIEF ON BEHALF OF *AMICI CURIAE* CLEAN WATER ACTION AND EMPOWERNJ IN SUPPORT OF RESPONDENT NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION

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INTEREST OF AMICI CURIAE

Amicus Curiae Clean Water Action's mission includes working with community-based groups and coalition partners to achieve clean, safe, and affordable solutions to water, public health waste, toxins and energy issues that address public health, environmental, consumer and community problems with an eye towards environmental, social, civic, and economic justice. For over 40 years, Clean Water Action has conducted innovative community-based and statewide campaigns that have yielded long term protections in New Jersey. Since 1982, Clean Water Action has staffed and operated offices throughout New Jersey with 1 million nationwide and 150,000 New Jersey members, and 75,000 email subscribers.

Amicus Curiae EmpowerNJ is a coalition of more than 140 New Jersey environmental, civic, faith, and community organizations that advocates for reducing greenhouse gas emissions and environmental justice in New Jersey. EmpowerNJ regularly participates in judicial, administrative, and legislative proceedings in New Jersey.

Clean Water Action and EmpowerNJ members were actively engaged in the rulemaking proceeding that is the subject of this appeal: the rules adopted by the New Jersey Department of Environmental Protection ("NJDEP") to

implement the Environmental Justice Law ("EJ Law" or "Act"), N.J.S.A. 13:1D-157 to -161.

PRELIMINARY STATEMENT

The ground-breaking EJ Law recognizes that "Overburdened Communities" have been disproportionately harmed by pollution and public health stressors ("Stressors") and empowers NJDEP to deny permits for facilities that create new Stressors in Overburdened Communities except where the NJDEP determines that the facility will serve a "compelling public interest" in the community.

Appellants New Jersey Chapter of the Institute of Scrap Recycling Industries, Inc. ("ISRI") and Engineers Labor Employer Cooperative of the International Union of Operating Engineers Local 825 ("ELEC") raise a panoply of meritless objections to the rules adopted by NJDEP to implement the EJ Law (the "Rules") Rules. This brief addresses four of their contentions.

Appellants argue that the Rules improperly exclude consideration of economic benefits in determining what constitutes a "compelling public interest." Even though the Act empowers NJDEP to determine what constitutes a compelling public interest, Appellants argue that NJDEP's definition is ultra vires because **other statutes** required NJDEP to consider economic factors. They are wrong. The Act specifically states that its requirements and

conditions apply notwithstanding the provisions of other laws or rules. Further, while other statutes direct NJDEP to consider economic benefits, the EJ Law provides no such direction.

NJDEP also had multiple sound and well-supported reasons for excluding the consideration of economic benefits: 1) the purpose of the EJ Law is to stop forcing Overburdened Communities to choose between jobs and a healthy environment; 2) economic benefits are inherently speculative; 3) NJDEP does not have the ability to ensure that promised economic benefits are realized; and 4) any purported economic benefit created by a specific facility would be offset by the economic harm to the larger community.

Appellants seek to limit the ability of NJDEP to regulate existing facilities when they create new or increased Stressors, arguing that NJDEP can only impose permitting conditions on existing facilities if there is an "expansion" of a facility, which they myopically define as only meaning an increase in the physical size.

"Expansion" is not defined in the Act and NJDEP reasonably defined that term consistently with the purpose of the EJ law and the dictionary definition of expansion. Basing the right to regulate on a change in square footage, as opposed to a change in operations directly conflicts with the Act's purpose to reduce or eliminate new Stressors.

Appellants also wrongly contend that NJDEP cannot consider an existing plant that changes the nature of its operation the same way as a new facility. This determination is reasonable and consistent with the purpose of the EJ Law. New sources of Stressors need to be considered the same regardless of whether they come from a new location or within the property line of an existing facility.

Appellants argue that the Rules cannot include lack of recreational open space and tree canopy, flooding risks, and unemployment and education as Stressors, arguing that Stressors are limited to the type of Stressors specifically enumerated in the Act. This argument flies in the face of the express wording of the Act, which states that Stressors **include but are not limited** to those identified in the Act.

Finally, Appellants present fanciful, apocryphal visions of economic ruination if the Rules are adopted without presenting a single example of a business that would be unfairly affected. The Legislature and NJDEP rejected this fearmongering, which this Court should do as well. The EJ Law and the Rules recognize that the health and well-being of our most vulnerable residents takes precedence over polluters' profits, and that eliminating new pollution sources fosters economic growth and increased property values in Overburdened Communities.

PROCEDURAL HISTORY AND STATEMENT OF FACTS[1]

Amici incorporate by reference the Procedural History and Statement of Facts set forth in NJDEP's Brief. DEPb4-15.[2]

ARGUMENT

I. NJDEP PROPERLY REJECTED CONSIDERING ECONOMIC BENEFITS IN DETERMINING WHAT CONSTITUTES A COMPELLING PUBLIC INTEREST.

The EJ Law requires NJDEP to deny a permit for a new facility that increases Stressors in an Overburdened Community "that are higher than those borne by other communities." N.J.S.A. 13:1D-160(c). The sole exception to this mandatory denial is if NJDEP determines that a new facility will serve a "compelling public interest in the community where it is to be located." Ibid.

The EJ Law does not define a "compelling public interest" and left that for NJDEP to determine through rulemaking. N.J.S.A. 13:1D-161 (directing NJDEP to adopt rules and regulations to implement the provisions of the Act). After a thorough and exhaustive administrative process, NJDEP determined that "the economic benefits of the proposed new facility shall not be

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[1] Because of they are inextricably related, Amici has combined the Statement of Facts and Procedural History for the court's convenience and clarity.

[2] "ISRIb" refers to ISRI's brief and "ISRIa" refers to ISRI's appendix; "ELECb" refers to ELEC's brief and "ELECa" refers to ELEC's appendix; "DEPb" refers to NJDEP's brief (as filed June 10, 2024) and "DEPa" refers to NJDEP's appendix; "CWAa" refers to Amici's appendix.

considered in determining whether it serves a compelling public interest in an overburdened community." N.J.A.C. 7:1C-1.5.

Appellants argue that excluding consideration of the economic benefits is "ultra vires," ISRIb23; ELECb24-27, ignoring the standards and principles courts use in making such a determination. "[T]he grant of authority to an administrative agency is to be liberally construed in order to enable the agency to accomplish its statutory responsibilities and that the courts should readily imply such incidental powers as are necessary to effectuate fully the legislative intent." N.J. Guild of Hearing Aid Dispensers v. Long, 75 N.J. 544, 562 (1978). Where, as here, the task of an agency is to protect the health and welfare of members of the public, "the grant of implied powers is particularly important." Ibid. Courts "strongly disfavor" finding that an agency action is ultra vires and such a finding is made "only in exceptional circumstances." Gonzalez v. N.J. Prop. Liab. Ins. Guar. Ass'n, 412 N.J. Super. 406, 417 (App. Div. 2010) (quoting In re Route 206 at New Amwell Rd., 322 N.J. Super. 345, 352 (App. Div. 1999)).

In looking at whether a regulation exceeds an agency's delegated authority, courts will look beyond the specific statutory language and examine the intended purpose of the legislation:

> When considering a claim that a regulation exceeds delegated authority, a court may look beyond the specific terms of the

> enabling act to the statutory policy sought to be achieved by examining the entire statute in light of its surroundings and objectives. And when a regulation consistent with the enabling act is challenged on the ground that it is in conflict with a related statute, courts read both statutes and the relevant regulations together to give them their intended effect when they can be harmonized. Finally, where the meaning of a statute or regulation is at issue, we give the language its plain meaning on the assumption that the terms reflect what the Legislature intended.

New Jersey Ass'n of Sch. Adm'rs v. Cerf, 428 N.J. Super. 588, 596 (App. Div. 2012) (citing N.J. Guild of Hearing Aid Dispensers, 75 N.J. at 562) (internal quotations omitted).

The Act empowered NJDEP to decide what factors should be considered, or not considered, in determining what constitutes a compelling public interest; the term is not defined in the Act and NJDEP was granted rulemaking authority to implement the Act. Appellants nonetheless argue that the exclusion of economic factors was ultra vires because it purportedly conflicts with other statutes where NJDEP is required to "balance economic growth with conservation." ELECb26; see also ISRIb25-26. Appellants cite the Freshwater Wetlands Protection Act ("FWPA"), N.J.S.A. 13:9B-11(a), (f), where NJDEP was required to consider property owners' interests in reasonable economic development and the economic value of the proposed regulated activity to the general area in determining if proposed regulations are in the public interest. ELECb26; ISRIb26. This argument ignores the fact that

the EJ Law specifically states that its provisions apply "[n]otwithstanding the provisions of any other law, or rule or regulation adopted pursuant thereto, to the contrary." N.J.S.A. 13:1D-160(c) to (d). The EJ Law could not be clearer that its provisions supersede and take precedence over "any other law." Ibid.

Further, a comparison of the FWPA and the EJ Law only undermines Appellants' argument. In the FWPA, the Legislature directed NJDEP to consider economic benefits. There is no such direction in the EJ Law. Indeed, the Act's findings and declarations state "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, demonstrating the Legislature's intention to stop the practice of using promises of economic growth as a reason to continue dumping polluting facilities in Overburdened Communities. The exclusion of economic benefits in determining what constitutes a compelling public interest did not violate any Legislative policies; it implemented them.

Appellants fare no better in arguing that NJDEP acted arbitrarily and capriciously. To show that an agency's action was arbitrary and capricious, there must be a "clear showing" that it was "unreasonable" or "lacks fair support in the record." In re Herrmann, 192 N.J. 19, 27-28 (2007). As the New Jersey Supreme Court has held:

> Three channels of inquiry inform the appellate review function: (1) whether the agency's action violates express or implied legislative policies, that is, did the agency follow the law; (2) whether the record contains substantial evidence to support the findings on which the agency based its action; and (3) whether in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors. When an agency's decision meets those criteria, then a court owes substantial deference to the agency's expertise and superior knowledge of a particular field.

Ibid. (citations omitted).

The Rules meet the Supreme Court's test for deferring to NJDEP's expertise. There are four sound reasons, fully set forth in the record, to support NJDEP's decision to exclude economic benefits. First, it effectuates one of the purposes of the EJ Law: to stop the practice of forcing Overburdened Communities to choose between jobs and a healthy environment. 55 N.J.R. 661(b), 670-71 (Apr. 17, 2023) (DEPa10-11). A prime sponsor of a prior version of the EJ Law testified that the Legislature "specifically wrote [the compelling public interest language] for environmental health or safety," and that to "expand the definition" to cover economic and corporate interests would create a "giant loophole" at odds with the legislative intent. See CWAa41.

Second, economic benefits are speculative. As one commenter put it, promised economic benefits are "easy to exploit and hard to measure." CWAa61. Promises are often exaggerated, rarely kept and not enforced. Too

often, promises of jobs have been dangled and no economic development has resulted. CWAa61-62.

Third, NJDEP does not have the tools to ensure that promised benefits are realized. Hiring commitments or other promises of economic benefit would be difficult, if not impossible, for NJDEP to effectively determine and meaningfully enforce. 55 N.J.R. at 670-71 (DEPa10-11). NJDEP found that the "inability to strictly enforce economic benefit conditions would threaten to undermine the statutory intent by allowing construction of facilities without certainty that the predicate requirements will continue to be met." 55 N.J.R. at 671 (DEPa11). Even agencies specializing in economic incentive programs and agreements have difficulty doing this. The Rules recognize that there is no practical way to hold owners of polluting facilities accountable if the promised benefits do not materialize. Tellingly, Appellants do not address this issue in their briefs.

Fourth, whatever purported economic benefits come from a new source of pollution could be offset by the economic harm to the larger community. Decreased "environmental quality bring[s] about lower property values in areas surrounding facilities producing pollution." 54 N.J.R. 971(a), 988-89 (June 6, 2022) (ELECa18-19). Two of the Act's specific findings and declarations are that "adverse [environmental and public health stressors]

impede the **growth**, stability, and long-term well-being of individuals and families living in overburdened communities[,]" and "the legacy of siting sources of pollution in overburdened communities continues to pose a threat to the health, well-being, and **economic success** of the State's most vulnerable residents[.]" N.J.S.A. 13:1D-157 (emphasis added). For example, the U.S. Census Bureau has found that "early life PM2.5 exposure is one of the top five predictors of [economic] mobility in the United States." CWAa106-07 (cited in CWAa1). NJDEP itself stated that "[n]umerous studies link air pollution with reduced productivity and a stalling local economy[.]" 55 N.J.R. at 669 (DEPa9).

Conversely, "reducing emissions and/or cleaning up polluted areas increases property values in the previously impacted communities." 54 N.J.R. at 988-89 (ELECa18-19). Furthermore, "improving conditions in overburdened communities … may incentivize and create opportunities for development of affordable housing, retail, and commercial enterprises[.]" Ibid. In fact, the U.S. Census Bureau's study found that even a 1µg/m3 decrease in PM2.5 exposure could result in an increase in earnings of over $1,000 annually. CWAa107. The EJ Law and the Rules will be a catalyst for economic growth in Overburdened Communities by reducing pollution and Stressors there.

In sum, NJDEP rationally concluded that any hypothetical jobs generated by a new polluting source would not outweigh the economic, health and environmental harm the facility would cause the larger community and that not considering economic benefits is necessary to meet the Legislature's statutory mandate to prioritize and improve the overall environmental, health, and economic well-being of Overburdened Communities.

II. THE RULES RATIONALLY AND PROPERLY REGULATE MODIFICATIONS OF EXISTING FACILITIES THAT INCREASE STRESSORS.

The EJ Law recognizes in its findings and declarations that **siting** sources of pollution in Overburdened Communities continues to pose a threat to the health, well-being, and economic success of the State's most vulnerable residents; and that it is in the public interest "to limit the future **placement and expansion** of [facilities which potentially increase stressors] in overburdened communities." N.J.S.A. 13:1D-157 (emphasis added). The Act empowers NJDEP to apply conditions "to a permit for the expansion of an existing facility, or the renewal of an existing facility's major source permit, concerning the construction and operation of the facility to protect public health, upon a finding that approval of a permit" would increase environmental or public health stressors in the Overburdened Community. Id. 13:1D-160(d).

Appellants raise the following two meritless objections to the Rules that would limit the ability of NJDEP to regulate existing facilities when there will be new, potential increases in Stressors through a change or modification of a facility's operations.

A. The Rules Properly Define Expansion to Include a Modification of a Facility that Increases Stressors.

The Rules define expansion to mean

> a modification or expansion of existing operations or footprint of development that has the potential to result in an increase of an existing facility's contribution to any environmental and public health stressor in an overburdened community, but shall not include any such activity that decreases or does not otherwise result in an increase in stressor contributions.

N.J.A.C. 7:1C-1.5. Appellants argue that "expansion" of an existing facility only means an increase in the physical footprint of a facility. Thus, they argue that the Rules are "ultra vires" in applying permitting conditions to modifications of facilities even if they increase Stressors. ISRIb20-21; ELECb19-20.[3]

This argument fails for multiple reasons. First, it misstates the dictionary definitions of expansion. Expansion, according to the Cambridge Dictionary, means "the increase of **something** in size, number, or importance." Expansion,

[3] Appellants also inexplicably and falsely argue that the Rules would subject them to regulation even if the modification of a facility would not increase pollution or Stressors. ISRIb21-22. The plain language of the Rule, which tracks the EJ Law, defines "permit" to exclude "activities or improvements that do not increase actual or potential emissions." N.J.A.C. 7:1C-1.5.

Cambridge Dictionary, https://dictionary.cambridge.org/us/dictionary/english/expansion (last accessed June 13, 2024) (emphasis added). The "something" being increased here is the very thing that the EJ law was enacted to prevent, pollution in Overburdened Communities.

Second, "expansion" is not one of the defined terms in the EJ Law and thus NJDEP was empowered to define the term in any way that was reasonable. It was more than reasonable to define expansion in a way that was consistent with the purpose of the EJ law, to prohibit or at least limit new sources of Stressors in Overburdened Communities. In contrast, Appellants' argument that the right to regulate should be based on a change in square footage, as opposed to a change in emissions, is irrational and directly conflicts with the intent and purpose of the Act.

Third, as noted above, in determining whether an agency action is ultra vires, courts look beyond the specific language of the delegating statute to the objective of the statute and "examin[e] the entire statute in light of its surroundings and objectives" to ascertain whether authority is implicitly granted. N.J. Guild of Hearing Aid Dispensers, 75 N.J. at 562. Agency action is not precluded where it "can be said to promote or advance the policies and findings that served as the driving force for the enactment of the

legislation." A. A. Mastrangelo, Inc. v. Comm'r of Dep't of Env't Prot., 90 N.J. 666, 684 (1982). The delegated authority should be construed to permit the fullest realization of legislative intent. Cammarata v. Essex Cty. Park Comm'n, 26 N.J. 404, 411 (1958). A court may readily imply any incidental powers necessary to implement such legislative intent. Hillman/Kohan Eyeglasses, Inc. v. New Jersey State Bd. of Optometrists, 169 N.J. Super. 259, 266 (App. Div. 1979).

By applying permitting conditions to existing facilities which increase Stressors through the modification of their operations, NJDEP is effectuating the intent and purpose of the EJ Law. On the other hand, Appellants cannot cite to any evidence that suggests that the Legislature intended to allow existing facilities to spew new sources of pollution into Overburdened Communities through the modification of a facility as long as they did not "enlarge the footprint" of the facility. ELECb20; ISRIb21. Tellingly, Appellants do not even attempt to argue that there was anything "arbitrary and capricious" in NJDEP determining that increased Stressors produced by an existing facility should be subject to permitting conditions based on changes in the manner of operation and not building size. It is Appellants who are, in effect, arguing for completely irrational rulemaking.

B. NJDEP Properly Determined to Treat an Existing Facility as a New Facility When there is a Change in Use and the Facility is Operating Without a Permit.

The Rules define "New facility" as "1) any facility that has not commenced operation as of April 17, 2023; or 2) **a change in use** of an existing facility. For the purposes of this chapter, an existing facility that has operated without a valid approved registration or permit required by the Department prior to April 17, 2023 shall be considered a new facility." N.J.A.C. 7:1C-1.5 (emphasis added). The Rules define "change in use" as a "change in the type of operation of an existing facility that increases the facility's contribution to any environmental and public health stressor in an overburdened community, such as a change to waste processed or stored." Ibid.

Appellants complain that it was ultra vires for NJDEP to consider an existing facility like a new facility even when there is a fundamental change in the type of its operation that increases environmental and health Stressors. Once again, Appellants ignore both the standards for determining whether an agency action is ultra vires and the intent and purpose of the Act.

The term "new facility" is not defined in the EJ Law. Thus, as previously discussed, NJDEP is empowered to define that term in any way it wishes so long as that definition is rational and consistent with the intent and

purpose of the Act. NJDEP's definition of new facility meets this test. It was reasonable to treat existing facilities that will fundamentally transform their operations and increase Stressors in Overburdened Communities in the same way as an entirely new facility. The purpose of the Act is to protect the residents of Overburdened Communities from new sources of pollution, and it is irrelevant whether that comes from a completely new facility or one that changes the way it operates.

This determination is also consistent with why the Act distinguished new and existing facilities. The Legislature intended to allow existing facilities to continue to operate when NJDEP had already granted a permit based upon that facility's existing operation. But that rationale vanishes when there is a fundamental change in how a facility is being used, such as if a facility becomes a waste processor. There is no rational reason to treat a facility that changes its operations and creates new sources of pollution differently from a new facility.

It is easy to see the mischief that would be caused without this rule. A facility could completely change its operations and increase toxic emissions yet avoid the protections of the EJ Law. That would not only flout the purpose of the EJ Law and harm Overburdened Communities but also provide the owner of a polluting facility with an unfair competitive advantage.

Appellants also wrongly complain that it was ultra vires for NJDEP to treat an existing facility that never received a valid permit as a new facility. ELECb15-17. But once again, NJDEP was empowered to do this and acted consistently with the Act's intent and purpose. The Legislature did not intend to allow non-compliant facilities to be treated the same as existing facilities, which played by the rules and obtained the required permits for their existing operations.

Notably, NJDEP provided non-compliant facilities with ample notice and opportunity to apply for and obtain the permits they needed, and thereby not be considered a new facility under the Rules. The Rules were first proposed on June 6, 2022, 54 N.J.R. 971(a) (June 6, 2022), and gave facilities until April 17, 2023, the effective date of the Rules, to complete their permit applications. N.J.A.C. 7:1C-2.1(c).

But if a facility never obtained required permits, did not even complete applications for them after getting fair notice that they would otherwise be treated as a new facility under the Rules, and is degrading the environment and health of our most vulnerable communities, there is good reason to treat that rogue facility as a new facility. No owner or facility should benefit from not complying with the law and obtain an advantage from flouting their legal duty.

III. NJDEP PROPERLY DETERMINED THAT OPEN SPACE, TREE CANOPY, FLOODING, UNEMPLOYMENT, AND EDUCATION ARE STRESSORS.

N.J.S.A. 13:1D-158 defines environmental or health stressors as:

> sources of environmental pollution, including, but not limited to, concentrated areas of air pollution, mobile sources of air pollution, contaminated sites, transfer stations or other solid waste facilities, recycling facilities, scrap yards, and point-sources of water pollution including, but not limited to, water pollution from facilities or combined sewer overflows; or conditions that may cause potential public health impacts, **including, but not limited to**, asthma, cancer, elevated blood lead levels, cardiovascular disease, and developmental problems in the overburdened community.

N.J.S.A. 13:1D-158 (emphasis added). Appellants argue that it was ultra vires and arbitrary and capricious for NJDEP to identify in the Appendix to the Rules lack of recreational open space, tree canopy, flooding risks, unemployment, and education as Stressors, contending that Stressors are limited to the "type" of impacts specifically listed in the Act, "asthma, cancer, elevated blood lead levels, cardiovascular disease, and developmental problems." ISRIb38-41; ELECb46-48 (quoting N.J.S.A. 13:1D-158).

This argument flies in the face of the express wording of the Act, which states that Stressors **include but are not limited** to the specific stressors identified in the Act. See N.J.S.A. 13:1D-157. This open-ended definition of Stressors empowered NJDEP to identify any Stressor that would affect the

environment and health of Overburdened Communities. Parks v. Pep Boys, 282 N.J. Super 1, 13 (App. Div. 1995) ("Defendants assert that because the list of chemicals does not include freon, it is therefore excluded. The list, however, is preceded by the words 'including but not limited to.' This clearly means any number of chemicals can be included although not specifically on the list.")

Conversely, if the Legislature wanted to limit Stressors to the "type" of Stressors referenced in the Act, it would have used limiting language like "such as." A Westlaw search reveals that "such as" has been used **2,278 times** in New Jersey statutes and court rules.[4]

ELEC next illogically argues that NJDEP lacks the expertise to determine the impacts of the Stressors it objects to. ELECb47-48. Further, NJDEP has the expertise to determine the harm caused by lack of open space, tree canopy and flooding risks; this is directly in NJDEP's wheelhouse.[5] And

[4] Among countless examples is the recently passed plastic bag law that defines "Carryout bag" as not including: "(2) a bag used solely to package loose items **such as** fruits, vegetables, nuts, coffee, grains, baked goods, candy, greeting cards, flowers, or small hardware items; (3) a bag used solely to contain live animals, **such as** fish or insects sold in a pet store." N.J.S.A. 13:1E-99.127 (emphasis added).

[5] NJDEP is a public health agency explicitly tasked with designating and evaluating stressors based on their impacts on public health. N.J.S.A. 13:1D-7(a) (designating NJDEP as a public health agency); id. 13:1D-160 (granting DEP authority to evaluate and make permit decisions on the basis of a facility's impacts on the stressors a community faces).

no one has to have special "expertise" to know that unemployment and poor access to quality education affect the health and well-being of Overburdened Communities. ELECb47-48; ISRIb40.

There was overwhelming record evidence for NJDEP to find that each of the Stressors listed in the Rules directly affect the public health of communities.

Open space has proven and frankly obvious public health benefits. Open space created by parks provide "safe havens where children can play and connect" and residents of all ages can exercise. 54 N.J.R. at 980 (ELECa10); see also ISRIa416; DEPa259. "[C]ommunities of color experience 'nature deprivation' at three times the rate of white Americans" with "74 percent of communities of color liv[ing] in nature-deprived areas, with black communities experiencing the highest levels of deprivation." 54 N.J.R. at 980 (ELECa10); see also DEPa522-28; DEPa428.

A growing body of evidence shows that increased "access to green space in urban areas brings considerable benefits to the health and well-being" of urban residents, including "improved cognitive development and functioning, reduced severity of attention deficit/hyperactivity disorder (ADHD), reduced obesity, and positive impacts on mental health." 54 N.J.R. at 980 (ELECa10); see also DEPa522-28; ISRIa416-17 / DEPa259-60. Moreover,

> children living in inner city neighborhoods with higher "greenness" experienced lower weight gains compared to those in areas with less green space . . . This is critical, as childhood obesity can lead to Type 2 diabetes, asthma, hypertension, sleep apnea, and emotional distress. Obese children are likely to become obese adults, experiencing more cardiovascular disease, high blood pressure, and stroke and incurring higher healthcare costs.

54 N.J.R at 980 (ELECa10) (citations omitted).

Similarly, the lack of tree canopy is an environmental and health Stressor. "Trees filter the air and provide shade on hot days," ibid., thereby ameliorating the growing problem of climate change-caused heat stress. DEPa465. Increased tree canopy and green space are "associated with reductions in childhood obesity rates, decreasing cognitive fatigue, improved worker attitudes on the job, and reduced stress, as well as feelings of anger, depression, or anxiety." 54 N.J.R. at 980 (ELECa10); see also CWAa3-6, CWAa16.

On the flip side, just as increased access to green spaces and tree canopy will improve public health outcomes, disparities in open space and tree canopy result in poorer health outcomes for minority urban residents as compared to more affluent white communities. 54 N.J.R. at 980 (ELECa10); see also DEPa428. People with lower access to green spaces are most likely to suffer from the very type of chronic diseases referenced in the EJ Law and which the Act seeks to ameliorate.

Impervious surfaces are also clearly a health and environmental Stressor. They "create several environmental and public health threats, including exacerbating heat impacts, worsening flooding, transporting surface pollutants into water sources, and deteriorating water quality." 54 N.J.R. at 980 (ELECa10); see also DEPa461-62; DEPa379-81; CWAa13.

The health impact of flooding caused by impervious surfaces "range from the immediate risk of injury and death to diverse symptoms associated with the proximity of flood water and living in damp accommodations, such as exacerbation of asthma, skin rashes, gastroenteritis . . . to longer term psychological problems including panic attacks, agoraphobia, depression, tiredness, stress, and anxiety." 54 N.J.R. at 981 (ELECa11); see also ISRIa422-23 / DEPa265-66. Additionally, "[g]arbage, sewage, and other contaminants may be present in flood waters, raising the risk of waterborne diseases. Flood water can also seep into buildings, affect sewer pipes, and contribute to indoor mold growth." 54 N.J.R at 981 (ELECa11).

Unemployment and under employment are also Stressors.

> In addition to providing income, employment can offer other benefits, such as health insurance, paid sick leave, and parental leave, all of which affect the health of employed individuals. Health insurance provides access to affordable medical care and financial protection from unexpected health care costs, while paid sick leave allows employees to seek medical care for themselves or dependent family members without losing wages . . . Unemployment can also result in negative health consequences. Those who are unemployed

> can suffer from depression, anxiety, low self-esteem, demoralization, and physical pain. Unemployed individuals also have more stress-related illnesses, such as high blood pressure, stroke, heart attack, heart disease, and arthritis. In addition, experiences, such as perceived job insecurity, downsizing, or workplace closure, and underemployment, also have implications for physical and mental health.

Id. at 982 (ELECa12) (citing DEPa581-84).

Appellants argue that NJDEP acted inconsistently in not considering employment in determining what constitutes a compelling public interest exception to placing polluting plants in Overburdened Communities and considering unemployment a Stressor. ELECb25. This ignores the different purposes the two sections of the Rules have. As explained above, allowing economic considerations to serve as the basis for approving the construction of a new facility would be inconsistent with the spirit, intent, and legislative findings underpinning the Act and would ignore the health and environmental costs to the community at large. That is not inconsistent with recognizing that unemployment is a baseline stressor that harms Overburdened Communities.

Educational attainment directly affects employment and therefore the health of residents in Overburdened Communities. "Individuals with less education have fewer employment choices, driving them into positions with low levels of control, job insecurity, low wages, and limited or no additional benefits." 54 N.J.R. at 982 (ELECa12) (citing DEPa581-84). Students who do

not graduate high school are "more likely to suffer from at least one chronic health condition, such as asthma, diabetes, heart disease, high blood pressure, stroke, hepatitis, or stomach ulcers. Ultimately, finishing more years of high school, and especially earning a high school diploma, decreases the risk of premature death." Ibid.; see also DEPa581-83.

Finally, Appellants ignore that the Rules treat unemployment and education as "baseline," but not "affected" Stressors. N.J.A.C. 7:1C Appendix. Unlike Affected Stressors, Permit applicants will not be required to analyze whether their facilities would cause a change to these "baseline" stressors like education as opposed to, for example, a change in impervious surface area, something they could reasonably control. Id. 7:1C-3.2(a)(7).

CONCLUSION

For the reasons set forth above, amici curiae respectfully urge the Court to dismiss Appellants' appeal and affirm NJDEP's Rules.

Dated: July 1, 2024

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IN THE MATTER OF THE ADOPTION OF N.J.A.C. 7:1C	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-002959-22 CIVIL ACTION

BRIEF AND APPENDIX OF AMICI CURIAE NAACP NEW JERSEY STATE CONFERENCE, NAACP NEWARK BRANCH, SALVATION AND SOCIAL JUSTICE, FAITH IN NEW JERSEY, MAKE THE ROAD NEW JERSEY, AND NATURAL RESOURCES DEFENSE COUNCIL IN SUPPORT OF RESPONDENT

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Corrected Brief Submitted: July 1, 2024

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STATEMENT OF THE INTERESTS OF AMICI CURIAE

The NAACP New Jersey State Conference, NAACP Newark Branch, Salvation and Social Justice, Faith in New Jersey, Make the Road New Jersey, and Natural Resources Defense Council (Allied Amici) are nonprofit social justice, faith-based, immigrants' rights, and environmental groups that seek to reduce disproportionate environmental and public health burdens that fall on communities of color and others who face social or economic inequities. Allied Amici respectfully refer the court to the Certification of CJ Griffin in support of their motion to participate as amici curiae for a more detailed recitation of their interests.

PRELIMINARY STATEMENT

New Jersey's 2020 Environmental Justice Law (EJ Law) is a landmark achievement: innovative legislation aimed at curbing disproportionate pollution burdens and health risks in low-income communities and communities of color by incorporating a meaningful assessment of cumulative public health impacts into the industrial permitting process. The Environmental Justice Rule (EJ Rule) at issue in these cases reflects the New Jersey Department of Environmental Protection (DEP)'s reasoned and expert implementation of the EJ Law.

The EJ Rule has no shortage of proponents. In addition to DEP itself, Allied Amici know of three other amici coalitions filing briefs defending the

Rule. To best aid the court, Allied Amici therefore focus this brief on three aspects of the Rule that directly advance social and racial justice:

1. The types of stressors that count in the disproportionate impact analysis. See N.J.A.C. 7:1C App'x. The Rule's approach ensures that the DEP considers an array of public health stressors that more fully reflect the cumulative impacts communities face;

2. The standard for whether an impact is disproportionate. See id. 7:1C-1.5. The Rule prioritizes the protection of overburdened communities by comparing their cumulative stressor levels to the levels from non-overburdened communities county- and State-wide; and

3. The Rule's application to facilities in census block groups with no residents. See id. 7:1C-2.1(e). The Rule's approach—regulating the subset of those facilities that are immediately adjacent to an overburdened community—closes a perceived loophole in the EJ Law.

Appellants New Jersey Chapter of the Institute of Scrap Recycling Industries (ISRI) and Engineers Labor Employer Cooperative of the International Union of Operating Engineers Local 825 (ELEC) seek to undo these important, well-considered provisions in the EJ Rule. Their arguments, however, lack any basis in the record, the EJ Law, or the purposes underlying the Law. The court should affirm the EJ Rule.

PROCEDURAL HISTORY & STATEMENT OF FACTS

Allied Amici adopt DEP's recitation of the procedural history and facts. See DEPb4–15.[2]

ARGUMENT

I. DEP's selection of public health stressors was reasonable, consistent with the EJ Law, and necessary to further environmental justice

"Stressors" play a key role in the EJ Law. Cumulative stressor levels are the standard unit for comparing an overburdened community to the geographic point of comparison. Infra pt. II. And how a permit, if granted, would affect cumulative stressor levels determines DEP's authority to deny or condition the permit. N.J.S.A. 13:1D-160(c), (d). Given their central role in the EJ Law, DEP's selection of stressors was critical to ensuring that the Law's purposes were fulfilled.

The Legislature wisely defined stressors to include not only pollution from regulated sources, but also "conditions that may cause potential public health impacts, including, but not limited to, asthma, cancer, elevated blood lead levels, cardiovascular disease, and developmental problems in the overburdened community." N.J.S.A. 13:1D-158. This broad conception of "public health

[2] "DEPb" refers to DEP's merits brief; "DEPa" refers to DEP's appendix; "ISRIb" refers to ISRI's merits brief; "ELECb" refers to ELEC's merits brief; "ELECa" refers to ELEC's appendix; "CCNJb" refers to Chemistry Council of New Jersey's amicus brief; and "ALLa" refers to Allied Amici's appendix.

stressors" reflects a central tenet of environmental justice: that industrial pollution is one of many factors that contribute to the total public health burden a community carries. To understand this total burden, also known as cumulative impacts, one must account for the combination of multiple pollutants occurring at the same time as other sociodemographic conditions that further amplify the negative health impacts of those pollutants.

The EJ Law's use of public health stressors as part of its disproportionate impact analysis is an important step toward incorporating a cumulative impacts framework into industrial permitting. It allows DEP to properly recognize the incremental and total effects of disproportionate and dangerous pollution from industrial facilities in New Jersey's overburdened communities. And it empowers DEP to start to reverse those effects. History shows that, without this type of cumulative impacts framework, industrial activities will continue to funnel ever more pollution into these communities that already suffer the most.

DEP's selection of public health stressors in the EJ Rule followed the EJ Law and the core principles of environmental justice undergirding it. Appellants challenge those public health stressors on several grounds. ELECb46–48; ISRIb38–44. As explained below, and by DEP in its brief, DEPb49–54, all of those challenges fail.

A. Appellants misread the EJ Law's definition of public health stressors

Appellants' claim that the Rule's list of public health stressors is unlawful because some of those stressors "do not necessarily result in the identified negative health impacts" listed in the EJ Law, see ISRIb39, misreads the Law.

First, the Legislature did not limit public health stressors to those that cause specific types of health impacts. The EJ Law lists examples of "public health impacts" that a stressor might cause: "asthma, cancer, elevated blood lead levels, cardiovascular disease, and developmental problems." N.J.S.A. 13:1D-158. But Appellants' insistence that DEP could not consider other types of health impacts, see ISRIb39, ignores the key phrase before that list: "including, but not limited to," N.J.S.A. 13:1D-158. This phrase shows that the Legislature intended the list to be "illustrative rather than exhaustive." Sanchez v. Fitness Factory Edgewater, LLC, 242 N.J. 252, 265 (2020). DEP thus had authority to include stressors associated with all types of "public health impacts." N.J.S.A. 13:1D-158.

Second, the Legislature did not require certainty that a specific stressor would "necessarily result" in a specific public health harm. Contra ISRIb39. The EJ Law instead defines a public health stressor as any "condition[] that may cause potential public health impacts." N.J.S.A. 13:1D-158 (emphasis added). The "may cause" standard reflects a precautionary approach—one that favors

protections for overburdened communities even in the face of some uncertainty as to the nature, extent, or frequency of related harms.

B. The record supports the DEP's selection of public health stressors

Weighed against the EJ Law's actual standard, the record overwhelmingly supports DEP's selection of public health stressors: drinking water quality; potential lead exposure; lack of recreational open space; lack of tree canopy; impervious surfaces; flooding risk; unemployment; and education. N.J.A.C. 7:1C App'x. Appellants' claim that these stressors are mere "quality of life" factors ignores the substantial record evidence showing these stressors "may cause potential public health impacts." N.J.S.A. 13:1D-158. Indeed, Appellants do not contest that evidence at all. That alone should end the matter. See In re Adoption of Uniform Housing Affordability Controls, 390 N.J. Super. 89, 101 (App. Div. 2007) (explaining it is appellants' "burden" to show that facts do not support a regulation).

From a social justice perspective, DEP's inclusion of public health stressors as part of the Rule's disproportionate impact analysis is critical. These stressors reflect the background conditions and injustices already present in a community that contribute to the cumulative health burdens that community faces. As DEP recognized, these stressors "make future environmental and public health threats more difficult to prevent or manage." 55 N.J.R. 661(b), 707

(Apr. 17, 2023) (DEPa47). Not accounting for them would risk reinforcing and further ingraining existing environmental injustices by ignoring factors that contribute to persistent health inequities in overburdened communities.

Given the importance of this issue to Allied Amici, we address DEP's record findings supporting each public health stressor[3]:

1. Lack of recreational open space. DEP included lack of recreational open space as a public health stressor because of the "considerable benefits to the health and well-being" of residents that access to open green space provides. 54 N.J.R. at 980 (ELECa10). These benefits include "improved cognitive development and functioning, reduced severity of attention deficit/hyperactivity disorder (ADHD), reduced obesity, and positive impacts on mental health." Ibid.; see also ELECa380 (citing studies). And they are particularly important for children: less access to open green space is associated with increased childhood obesity, which can lead to the development of Type 2 diabetes, asthma, and hypertension. 54 N.J.R. at 980 (ELECa10); see also DEPa363–64. Finally, open green space is not equitably distributed. Study after study shows

[3] Allied Amici do not address in detail the drinking water quality or potential lead exposure stressors. While undoubtedly important, the connections between unsafe drinking water or lead exposure and public health harms are self-evident. 54 N.J.R. 971(a), 980 (June 6, 2022) (ELECa09–10). And, reflecting that fact, it appears that Appellants do not challenge DEP's selection of those stressors. See ELECb46–48 (not mentioning either stressor); ISRIb38–41 (same).

that communities of color, especially Black communities, have substantially less access to open, natural settings than white communities. 54 N.J.R. at 980 (ELECa10); ELECa380; DEPa432–34.

2. Lack of tree canopy. The "broad environmental purposes" of tree cover are uncontroversial. See N.J. Shore Builders Ass'n v. Twp. of Jackson, 199 N.J. 38, 58 (2009). As DEP explained, tree canopy cover "is widely regarded as an environmental good or amenity" with various "benefits, or ecosystem services, to people and neighborhoods where" tree cover is present. 54 N.J.R. at 980 (ELECa10). Among other benefits, tree canopy cover "reduc[es] summer peak temperatures and air pollution," ELECa381—decreasing the risks of health harms related to heat and dirty air. And, like access to open space, tree canopy cover is not equitably distributed, with high-income and white neighborhoods more likely to have high canopy cover than low-income communities and communities of color. 54 N.J.R. at 980 (ELECa10); DEPa458.

3. Impervious surfaces. DEP also concluded that the percentage of an area covered with impervious surfaces—that is, "materials that do not allow water to soak into soil, such as buildings, sidewalks, and roadways," ELECa382—is linked to "several environmental and public health threats," 54 N.J.R. at 980

(ELECa10).[4] These impacts range from intensified heat and drought conditions to worsened surface water quality from direct runoff and sewer overflows. Id. at 980–81 (ELECa10–11). Heat impacts are among the most pernicious. Ibid.; see also DEPa0458. "Heat islands" from impervious surfaces result in "higher daytime temperatures, reduced nighttime cooling, and higher air-pollution levels," contributing to heat-related deaths and other illnesses that disproportionately harm low-income people, children, and the elderly.[5]

4. Flooding. On top of property damage and inconvenience, flooding poses serious health risks to surrounding communities.[6] These range from the "immediate risk of injury and death" during a flood to the range of health harms "associated with the proximity of flood water and living in damp accommodations, such as exacerbation of asthma, skin rashes, and gastroenteritis," as well as longer-term mental health problems. 54 N.J.R. at 981 (ELECa11). While flooding is New Jersey's most common, and most dangerous,

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[4] DEP has decades of experience regulating impervious surface coverage to reduce health and environmental impacts. See, e.g., In re Protest of Coastal Permit Program Rules, 354 N.J. Super. 293, 347–50 (App. Div. 2002).

[5] See U.S. Envtl. Prot. Agency, Heat Island Impacts, https://tinyurl.com/4j9h6dtv (last updated Aug. 28, 2023).

[6] As with impervious surfaces, DEP has a long history of regulating flood zones to protect public health and the environment. See, e.g., N.J.S.A. 58:16A-52(a) (originally enacted in 1962).

natural hazard, the risks from flooding—including health risks—are not evenly distributed. ELECa383–85. Floods tend to harm poor and marginalized communities more severely, in part because flood conditions exacerbate existing health problems, which also tend to be worse in low-income communities and communities of color. Ibid.

5. Unemployment. DEP also included two "social determinants of health"—public health stressors that reflect the population's "social vulnerability and the capacity to anticipate, confront, repair, and recover[]" from health harms. 54 N.J.R. at 982 (ELECa12).[7] The first—unemployment rate—correlates to community income levels as well as the availability of other employment benefits, "such as health insurance, paid sick leave, and parental leave, all of which affect the health of employed individuals." Ibid. People with steady incomes and access to health-care benefits have better access to preventative care and early interventions that can reduce the baseline health risks they face. See ibid. High unemployment rates, on the other hand, can reflect existing health barriers in the population, including disabilities preventing people from working. And unemployment can cause negative health consequences, including stress-related ailments like high-blood pressure,

[7] The EJ Law already accounted for three other key social determinants of health—race, income, and English proficiency—in its definition of "overburdened communit[ies]." 54 N.J.R. at 982 (ELECa12).

strokes, and heart attacks. Ibid. Communities of color, moreover, have higher unemployment rates than white communities. See ELECa390–91. Because of this established connection between employment and public health, the U.S. Department of Health and Human Services defines unemployment as a key social determinant of health,[8] and the U.S. Environmental Protection Agency considers unemployment as one of the "general indicators of a community's potential susceptibility" to harms from pollution.[9]

6. Education. DEP also included education, defined based on the percentage of people without a high school diploma, as a social determinant of health. DEP's decision again matches the conclusions of federal regulators.[10] As DEP recognized, "[e]ducation is not only linked to differences in employment type, but also working conditions, income amount, and benefits." 54 N.J.R. at 982 (ELECa12). People with less education generally have fewer job choices,

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[8] See U.S. Dep't of Health & Human Servs., Social Determinants of Health, https://tinyurl.com/4a7acw6c (last visited June 13, 2024); see also U.S. Dep't of Health & Human Servs., Social Determinants of Health Literature Summaries – Employment, https://tinyurl.com/2da2ja8r (last visited June 13, 2024).

[9] U.S. Envtl. Prot. Agency, Overview of Socioeconomic Indicators in EJScreen, https://tinyurl.com/ytr7pcnc (last updated Jan. 9, 2024).

[10] See U.S. Dep't of Health & Human Servs., Social Determinants of Health Literature Summaries – High School Graduation, https://tinyurl.com/5behsfpb (last visited June 13, 2024); U.S. Envtl. Prot. Agency, supra note 9 (listing "[l]ess than high school education" as a socioeconomic indicator).

more job insecurity, and fewer benefits, and disproportionately work in jobs "that are physically demanding or include exposure to toxins." Ibid. And studies show that people who do not finish high school are more likely to report poor health, to suffer from chronic ailments, and ultimately to die early. Ibid.[11] In short, lower education levels generally indicate a higher community susceptibility to health harms from pollution.

As shown above, each of the EJ Rule's public health stressors easily meets the EJ Law's requirements. Each stressor reflects a "condition[]" within communities "that may cause potential public health impacts." N.J.S.A. 13:1D-158. And, although not required by the EJ Law, the record also shows that low-income communities and communities of color disproportionately suffer from those stressors. Far from "causally tenuous," see ELECb47, "a considerable volume of scientific evidence" supports DEP's selection of these public health stressors. See In re Adoption of Amends. & New Regs. at N.J.A.C. 7:27-27.1, 392 N.J. Super. 117, 137 (App. Div. 2007). As DEP explained, "[n]ot including these stressors would underrepresent the stresses placed on [overburdened] communities" and frustrate the EJ Law's goal "to ensure that these communities are not further burdened by additional pollution sources." ELECa183.

[11] See also U.S. Dep't of Health & Human Servs., supra note 10.

C. The public health stressors do not intrude on municipal authority

Appellants' insistence that the Rule unlawfully "usurps municipal authority," see ISRIb38, lacks any connection to how the Rule operates. It is true that several of the Rule's public health stressors reflect current land-use conditions, like open space or impervious surfaces, and that local governments have the authority to regulate those land-use conditions. See ISRIb40–41. But the Rule only requires that DEP account for those conditions as part of the permitting process. See, e.g., N.J.A.C. 7:1C-1.3. Understanding how existing land-use patterns affect a community's health does not intrude on the local government's power to maintain (or change) those patterns. See DEPb52–53.

The principal case that Appellants cite underscores their overreach. In Borough of Avalon v. DEP, this court struck down a rule that required municipalities to allow public access to waterways at all times. 403 N.J. Super. 590, 599–600 (App. Div. 2008). The EJ Rule's incorporation of public health stressors does no such thing. It does not require municipalities to give up control over their own property. It requires nothing from municipalities. Instead, the EJ Rule's inclusion of public health stressors ensures that permit applicants, DEP, and the public have "a complete picture of the environmental and public health burdens on a given community" before DEP decides whether and on what terms to approve a permit. ELECa183. This sensible approach is consistent with the

EJ Law's text, see, e.g., N.J.S.A. 13:1D-160(c), (d) , and is a necessary first step to realizing the Law's goal "that all New Jersey residents, regardless of income, race, ethnicity, color, or national origin, have a right to live, work, and recreate in a clean and healthy environment," id. 13:1D-157.

II. DEP's definition of "geographic point of comparison" is consistent with the EJ Law and furthers the Legislature's intent

The heart of the EJ Law is its disproportionate impact analysis, which asks whether an overburdened community's cumulative stressor levels "are higher than those borne by other communities within the State, county, or other geographic unit of analysis as determined by" DEP. N.J.S.A. 13:1D-160(c), (d). Through the EJ Rule's "geographic point of comparison" definition, DEP explained that overburdened communities should be compared to the median stressor level of non-overburdened communities either county- or State-wide, whichever is lower. See N.J.A.C. 7:1C-1.5. DEP's approach is consistent with the EJ Law's broad text and the Legislature's intent, "where appropriate, to limit the future placement and expansion" of facilities that "have the potential to increase environmental and public health stressors" in overburdened communities. N.J.S.A. 13:1D-157. Appellants' challenges to the Rule's definition of "geographic point of comparison" miscomprehend the Rule, inject spurious requirements found nowhere in the EJ Law, and run contrary to the Legislature's intent. The court should reject them.

A. DEP's definition of "geographic point of comparison" is consistent with the EJ Law

The EJ Law gave DEP broad discretion over how to define the communities for comparison in the disproportionate impact analysis. See N.J.S.A. 13:1D-160(c), (d). DEP's expert interpretation of the EJ Law's text is therefore entitled to "substantial deference." See TAC Assocs. v. DEP, 202 N.J. 533, 541 (2010).

As noted above, the EJ Law's disproportionate impact analysis requires DEP to determine whether the cumulative stressor level for an overburdened community is (1) "higher than those borne by" (2) "other communities" (3) "within the State, county, or other geographic unit of analysis as determined by" DEP. N.J.S.A. 13:1D-160(c), (d). For each element, the EJ Law uses general language. And for each element, DEP's "geographic point of comparison" definition provides a precise standard to facilitate a clear, replicable analysis.

First, DEP interpreted "higher than" as greater than the 50th percentile—or median—cumulative stressor level. See N.J.A.C. 7:1C-1.5. Second, DEP construed "other communities"—broad, unqualified language—to mean non-overburdened communities. N.J.S.A. 13:1D-160(c), (d). And third, DEP interpreted "State, county, or other geographic unit of analysis" to be either the State as a whole or the county in which the overburdened community is located. Ibid. Each of these interpretations fits comfortably within the EJ Law's plain

text and effectuates the Legislature's intent, clearly expressed in the statute, 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. Nothing more is required. See S.L.W. v. N.J. Div. of Pensions & Benefits, 238 N.J. 385, 394 (2019) (validity of agency regulations is "guided by [the court's] duty to determine and effectuate the Legislature's intent" (cleaned up)).

B. Appellants' arguments lack any basis in the EJ Law

Appellants attempt to muddy the waters by claiming the EJ Law requires comparison to a "contiguous, recognized geographic unit," ISRIb27–28, that reflects the "average" community therein, including both non-overburdened and overburdened communities, ELECb21–22. These arguments misconstrue the "geographic point of comparison" provision and effectively ask the court to amend the statute. The court should reject that request.

i. DEP reasonably defined "geographic unit of comparison"

ISRI's reference to "contiguous, recognized geographic units" is a red herring. ISRIb28. These "require[ment]s," ISRIb27, are found nowhere in the statute. Far from limiting DEP in this way, the EJ Law explicitly gives the agency discretion to "determine[]" the appropriate "geographic unit of

analysis." N.J.S.A. 13:1D-160(c), (d).[12] Regardless, DEP did specify geographic units of analysis that are "contiguous" and "recognized": the State as a whole and the county in which the overburdened community is located. See N.J.A.C. 7:1C-1.5. Indeed, ISRI acknowledges that the State and its counties are "contiguous," "recognized" geographic units. ISRIb27–28. More importantly, the EJ Law expressly lists "State" and "county" as possible geographic units of analysis, see N.J.S.A. 13:1D-160(c), (d), and DEP specifically chose not to designate novel "regional" geographic units because such an approach "lacked uniformity and a coherent basis for boundary determination," 55 N.J.R. at 700 (DEPa40).

DEP's choice to focus the disproportionate impact comparison on either the State or the county where the overburdened community is located fell within its discretion under the EJ Law. It also makes sense. Applying a county-only

[12] Nor does the word "geographic" inherently imply the qualifiers "contiguous" or "recognized." Many prominent geographic units lack contiguity, including the United States, with Alaska and Hawaii disconnected from the contiguous states, and individual states such as Michigan, part of which is separated from the famous "mitten" by the Great Lakes. It is also far from self-evident what it means for a geographic unit to be "recognized." Do only administrative or political units, such as counties, count? What about ecological, geological, economic, or cultural units? Appellants do not say. More to the point, the EJ Law does not either. Apparently unsatisfied with the Legislature's drafting pen, Appellants want this court to amend the statute. But courts "may not rewrite a statute or add language that the Legislature omitted." State v. Munafo, 222 N.J. 480, 488 (2015) (cleaned up).

comparison would perpetuate historic siting inequities by providing less protection to overburdened communities in more industrialized counties, while a Statewide-only comparison would harm overburdened communities in less industrialized counties. 55 N.J.R. at 700 (DEPa40). DEP's approach therefore promotes the Legislature's intent and deserves deference. TAC Assocs., 202 N.J. at 541.

ii. DEP reasonably interpreted "other communities"

Appellants and amici also attack DEP's interpretation of "other communities" as meaning non-overburdened communities within the State or the county at issue. These attacks fail too.

First, excluding overburdened communities from the calculation of median stressor levels does not define a new geographic unit of "communities that are not overburdened."[13] CCNJb10. Instead, it reflects DEP's reasonable construction of the statutory phrase "higher than [the cumulative stressor levels] borne by other communities," N.J.S.A. 13:1D-160(c), (d) (emphasis added), to mean greater than the median stressor levels of non-overburdened communities, N.J.A.C. 7:1C-1.5.

[13] For the reasons above, even if DEP had created such a geographic unit of analysis, nothing in the EJ Law would have prohibited that construction of the statute.

Unsatisfied with DEP's reasonable interpretation, Appellants again ask the court to rewrite the EJ Law. Appellants argue that the comparison must be to the "average" of all communities of the geographic unit, overburdened and not. ELECb22; ISRIb28; CCNJb10–11. But the statute does not mention "averages" or say "all communities." The statute says "higher than" the cumulative stressor levels "borne by other communities." N.J.S.A. 13:1D-160(c), (d). Though the Legislature could have required "higher than the average" cumulative stressor levels "borne by all other communities," it chose not to. Rather than "rewrite" the EJ law, Munafo, 222 N.J. at 488, this court should defer to DEP's reasonable interpretation of "other communities," see TAC Assocs., 202 N.J. at 541, which is not only consistent with the statutory language, but also the Legislature's intent to limit further disproportionate pollution in overburdened communities, N.J.S.A. 13:1D-157.

DEP's approach is also consistent with how other anti-discrimination laws work. Take wage discrimination under the Equal Pay Act or Title VII. A woman claiming she is being discriminated against based on her sex does not compare her wages to the "average" of all other employees. She compares her pay to that of men doing the same work. See Churchill v. Int'l Bus. Machs., Inc., Nat. Serv. Div., 759 F. Supp. 1089, 1095 (D.N.J. 1991) ("[A] plaintiff must show that an employer pays different wages to male and female employees for equal work.");

see also Aman v. Cort Furniture Rental Corp., 85 F.3d 1074, 1087 (3d Cir. 1996) (Black plaintiffs alleging race-based wage discrimination under Title VII must show "that they were performing work substantially equal to that of white employees who were compensated at higher rates than they were" (cleaned up)). This makes sense when the goal is ensuring men and women (or people of different races) receive equal pay. So too here: it makes sense to compare an overburdened community to non-overburdened communities when the goal is to correct the "historical injustice" of disproportionately "siting sources of pollution in overburdened communities"—an injustice that "continues to pose a threat to the health, well-being, and economic success of the State's most vulnerable residents." N.J.S.A. 13:1D-157.

Appellants' arguments, dressed up as statutory interpretation, ultimately boil down to policy disputes with DEP. Nowhere is this clearer than in Appellants' arguments that the "geographic point of comparison" definition is arbitrary because it "almost always results in comparisons of developed areas to rural areas of the State." ISRIb28; see also ELECb22–23. Even if true, but see DEPb48, Appellants fail to explain how or why a developed-rural comparison renders the provision unlawful. The EJ Law does not require DEP to compare overburdened communities to a "similarly-situated geographic unit," ISRIb28, or to "compare overburdened communities against other (overburdened) areas,"

CCNJb11, for the same reasons (explained above) that it does not require a comparison to "all other communities" in the State or county. Rather, the EJ Law's purpose is to remedy disproportionate pollution in overburdened communities, and DEP has explained why its approach furthers that intent. 55 N.J.R. at 700 (DEPa40).

Appellants' related gripe that the geographic point of comparison "will nearly always be" the State's 50th percentile "because that will include the rural areas in the State with few environmental or public health stressors," ISRIb29, again misses the point. The EJ Law specifically provides that the State can be the geographic point of comparison. N.J.S.A. 13:1D-160(c), (d). And even if the vast majority of the overburdened communities facing adverse cumulative stressors would exceed "the State's '50th percentile,'" ISRIb29, that just proves that the Rule is necessary.[14]

At the root of all of Appellants' arguments is the recognition that overburdened communities face more stressors than non-overburdened communities. But the fact that a substantial majority of overburdened communities are worse off than the median non-overburdened community in the State is the exact environmental justice problem the EJ Law is meant to

[14] ISRI also ignores that the 50th percentile cumulative stressor level in most (12 out of 21) counties is lower than the State's, meaning that the county, not the State, would be the point of comparison for overburdened communities in those counties. See ALLa001.

address. Appellants' approach would dilute the protections for overburdened communities and stymie progress toward the Legislature's vision for a more just New Jersey. The court should not entertain such a perverse interpretation of the EJ Law.

III. DEP's regulation of certain facilities within zero-population block groups is reasonable and furthers the Legislature's intent

The EJ Rule regulates facilities in zero-population census block groups if those facilities are immediately adjacent to an overburdened community. N.J.A.C. 7:1C-2.1(e). Appellants argue this exceeds the scope of the EJ Law because the Law applies to facilities "located . . . in an overburdened community," N.J.S.A. 13:1D-160(a), and zero-population census block groups by definition cannot be overburdened communities, ISRIb9–13; ELECb38–40. Appellants miss the forest for the trees. They advance an interpretation of the EJ Law that would create a loophole allowing disproportionate pollution by dirty facilities that lie just outside the census block group lines of an overburdened community, as long as those facilities are in a block group with no people. DEP recognized that this approach would frustrate the Legislature's intent "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. The EJ Law does not compel that outcome, and this court should affirm DEP's reasonable interpretation.

A. DEP reasonably applied the Rule's protections to adjacent facilities in zero-population block groups

Appellants assert that DEP has effectively treated some zero-population block groups as overburdened communities. E.g., ELECb39. That is not what DEP did. 55 N.J.R. at 703 (DEPa43). DEP instead applied the Rule's protections to a subset of facilities in zero-population block groups: those that are directly adjacent to overburdened communities and thus most likely to contribute to pollution in those communities. N.J.A.C. 7:1C-2.1(e). This approach is reasonable and furthers the Legislature's intent.

Zero-population block groups are not random occurrences. See DEPb38. The Census Bureau often delineates zero-population block groups specifically to group similar land uses and exclude nearby residents.[15] Sometimes a zero-population block group reflects that an area is government-owned land. But other times it reflects that an area is covered with industrial facilities—facilities which no doubt contribute to pollution and other public health stressors in the surrounding community. These zero-population block groups do not fit neatly into the EJ Law's scheme, which divides block groups into overburdened and

[15] The Census Bureau calls zero-population block groups "special use block groups," which it defines as "encompassing an employment center, large airport, public park, public forest, or large water body with no (or very little) population." 83 Fed. Reg. 56,293, 56,297 (Nov. 13, 2018).

non-overburdened communities based their populations' demographics—for example, the percentage of low-income households. N.J.S.A. 13:1D-158.

Indeed, as ISRI acknowledges, "[t]he term 'zero population' is found nowhere in the EJ Law." ISRIb9. This silence creates ambiguity as to how DEP should treat facilities in zero-population block groups, where there is no population to compare to the thresholds for overburdened status. In mathematical terms, the issue is that you cannot divide by zero. See Lee's Summit, MO v. Surface Transp. Bd., 231 F.3d 39, 41–42 (D.C. Cir. 2000). So you cannot calculate the percentages needed to determine whether a zero-population block group qualifies as an overburdened community. In other words, it is no more accurate to say that 50% of the population in such a block group is low-income, for example, than it is to say that 0% is low-income. Faced with this ambiguity about how to treat zero-population block groups, the question is one of "the Legislature's intent with respect to its enactment of the statute at issue." See In re Agric., Aquacultural, & Horticultural Water Usage Certification Rules, 410 N.J. Super. 209, 224 (App. Div. 2009). And because there is "no perfect solution" to the mathematical conundrum here, DEP's approach "is deserving of respect." See Lee's Summit, 231 F.3d at 42.

Appellants' interpretation once again undermines the Legislature's intent. By completely excluding facilities in zero-population block groups from the EJ

Law's permitting scheme, Appellants' interpretation would create magnets for pollution clusters in zero-population block groups surrounded by overburdened communities. Indeed, under Appellants' theory, the EJ Law could not apply to even the most concentrated collection of highly polluting facilities located next to an overburdened community, merely because those facilities inhabit a block group drawn specifically to exclude residents.[16] This is so even if those facilities are closer to vulnerable people in an adjacent, overburdened community than a facility that is technically within that adjacent block group.

This is not a hypothetical concern. Appellants' claims evince their desire to build or expand industrial facilities in zero-population block groups surrounded by overburdened communities. DEP's EJMAP tool shows many such circumstances. See, e.g., DEPa620. For example, consider the zero-population block groups (in yellow) surrounded by overburdened communities (green) near the Camden waterfront. See ALLa002. The zero-population block groups contain multiple facilities—indicated by black squares (scrap metal facilities), purple diamonds (incinerators), and blue circles (major sources of air pollution)—immediately adjacent to overburdened communities. Ibid. Yet under Appellants' theory, the EJ Law would give those facilities a free pass. The

[16] Census block group boundaries are also reconfigured often enough that, under Appellants' interpretation, a facility could evade the Rule's requirements one day and be subject to it the next. 55 N.J.R. at 703 (DEPa43).

New Jersey legislature cannot have intended such a loophole, and DEP was right to reject it.

Indeed, the EJ Rule's zero-population block group provision "harmonizes all of [the EJ Law's] parts so as to do justice to its overall meaning." Chasin v. Montclair State Univ., 159 N.J. 418, 427 (1999) (cleaned up). It ensures no facility avoids the EJ Law altogether simply because it is in a block group without any residents. At the same time, the zero-population block group provision only applies the EJ Rule's permitting requirements to those facilities immediately adjacent to—and thus most likely to disproportionately harm—overburdened communities.[17] Given the EJ Law's silence on how to treat facilities within zero-population block groups, DEP's approach "is certainly one permissible construction of the statute." TAC Assocs., 202 N.J. at 544.

B. Established caselaw regarding implied authority supports DEP's regulation of adjacent facilities in zero-population block groups

Appellants fail to address the line of cases explaining that courts "will imply powers to enable the agency to effectuate the intent of the statute." In re

[17] Although Appellants claim that DEP's policy will discourage buffer zones between industrial facilities and overburdened communities, ISRIb12 n.3, DEP designed its policy so that only facilities sited "immediately adjacent" to—"that is, shar[ing] a border with"—"residential areas of an overburdened community" are subject to the Rule, 55 N.J.R. at 703 (DEPa43). This should incentivize "the creation of protective buffers between facilities and neighboring communities." Ibid.

Adoption of N.J.A.C. 7:15-5.24(b), 420 N.J. Super. 552, 564 (App. Div. 2011). "In deciding whether a particular regulation is statutorily authorized" under such implied power, a "'court may look beyond the specific terms of the enabling act to the statutory policy sought to be achieved by examining the entire statute in light of its surroundings and objectives.'" In re Stormwater Mgmt. Rules, 384 N.J. Super. 451, 461 (App. Div. 2006) (quoting N.J. Guild of Hearing Aid Dispensers v. Long, 75 N.J. 544, 562 (1978)). Indeed, "courts should readily imply such incidental powers as are necessary to effectuate fully the legislative intent." Ibid. (quoting N.J. Guild, 75 N.J. at 562). Following such principles, the courts have repeatedly upheld environmental regulations based on the Legislature's broad grants of statutory authority and clear legislative goals to limit pollution. See id. at 461–65 (discussing multiple examples).

This court should do the same here. This is a straightforward case for finding implied authority. The EJ Law does not address zero-population block groups. Yet the Legislature's intent to prevent disproportionate pollution of overburdened communities is clear. The EJ Rule's zero-population block group provision is necessary to close a perceived loophole, which would undermine that intent. To the extent this court has any doubt about DEP's authority to regulate facilities in zero-population block groups that are immediately adjacent to overburdened communities, it "should readily imply [that] power[]" based on

the EJ Law's objectives. Id. at 461; see also Lourdes Med. Ctr. of Burlington Cnty. v. Bd. of Rev., 197 N.J. 339, 361 (2009) ("[W]e give considerable latitude when [an agency] construes the 'express and implied powers' of a statute for the purpose of carrying out legislative intent.").

C. Freshwater Wetlands is inapposite

Appellants' reliance on In re Freshwater Wetlands Protection Act Rules, 180 N.J. 478 (2004), to justify their loophole-generating interpretation is misplaced. ELECb40; ISRIb11–12. That case involved no statutory silence or ambiguity. Freshwater Wetlands instead addressed a statute that "expressly limited" the width of certain "transition areas" adjacent to wetlands. 180 N.J. at 490. These limits were specific: "no greater than 150 feet" for certain types of wetlands and "50 feet" for others. Id. at 485 (cleaned up). Despite the "delicate [legislative] compromise" behind these dimensions, the agency adopted rules expanding the limits by 20 feet. Id. at 490–91. The agency, in short, amended the statute by regulation. The Court struck down those regulations as exceeding the agency's statutory authority. Id. at 491.

In contrast to the cold mathematical clarity of the statute in Freshwater Wetlands, the EJ Law's text is anything but clear as to zero-population block groups. Zero-population block groups are not specifically addressed by the EJ Law, and they do not fit neatly into the Law's dichotomy between overburdened

and non-overburdened communities. Far from amending precise legislative instructions, as happened in Freshwater Wetlands, DEP's interpretation here fills a statutory gap in a way that furthers the Legislature's intent.

CONCLUSION

The EJ Rule is a faithful application of the text and purpose of New Jersey's landmark EJ Law. While much more is required to achieve environmental justice, the Rule is a necessary and welcome first step toward stemming the tide of the historical injustices in New Jersey's overburdened communities. The court should affirm the EJ Rule.

Dated: July 1, 2024

Respectfully submitted,

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

IN THE MATTER OF ADOPTION OF N.J.A.C. 7:1C	DOCKET NO: A-002959-22
	CIVIL ACTION
	ON APPEAL FROM A RULEMAKING BY THE DEPARTMENT OF ENVIRONMENTAL PROTECTION

BRIEF ON BEHALF OF RESPONDENT NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION RESPONDING TO AMICUS CURIAE

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PRELIMINARY STATEMENT

Respondent, New Jersey Department of Environmental Protection ("DEP"), files this brief in response to the amicus briefs filed on June 17, 2024, and particularly to that of the New Jersey Business and Industry Association ("NJBIA"), which supports Appellants' challenges to DEP's Environmental Justice ("EJ") Rules. NJBIA's arguments come up short – they are largely duplicative of Appellants' theories; are devoid of support in case law or in the administrative record; and fail to directly address, let alone rebut, DEP's defense of the EJ Rules. At bottom, the EJ Rules faithfully and reasonably implement the landmark EJ Law, N.J.S.A. 13:1D-157 to -161, are owed substantial deference, and should be affirmed.

PROCEDURAL HISTORY AND STATEMENT OF FACTS[1]

DEP incorporates the Procedural History and Counterstatement of Facts in its July 1, 2024 merits brief. (DEPb3-14).[2] On June 18, 2024, this court

[1] Because they are closely related, these sections are combined for efficiency and the court's convenience.

[2] Because the pagination in DEP's and the amici's briefs and appendices filed in each appeal are identical, DEP refers to them as the following: "DEPb" refers to DEP's amended merits brief; "DEPa" refers to DEP's appendix; "DEPsa" refers to DEP's supplemental appendix; "NJBIAb" refers to NJBIA's amicus brief; "ISRIb" and "ELECb" refer to Appellants' respective briefs; and "EJAb" refers to the brief of amici Ironbound Community Corporation, South Ward Environmental Alliance, and New Jersey Environmental Justice Alliance.

permitted NJBIA to participate as amicus curiae and accepted its proposed amicus brief. The court also permitted several community groups and advocacy organizations to file amicus briefs in support of the Rules.

ARGUMENT

NJBIA largely repeats the same erroneous arguments made by the New Jersey Institute of Scrap Recycling Industries, Inc. ("ISRI"), the Engineers Labor Employer of the International Union of Operating Engineers Local 825 ("ELEC") (collectively, "Appellants") and amicus Chemistry Council of New Jersey, and does not respond to the counterpoints DEP already raised in its merits brief. The two new arguments NJBIA raises – challenging the public process in which DEP engaged for developing an Environmental Justice Impact Statement ("EJIS") and challenging the Environmental Justice Mapping, Assessment, and Protection tool ("EJMAP") data updates – both fail because they are procedurally improper and substantively flawed.

The Rules – the fruits of an extensive and multi-stage administrative process, see (DEPb11-13) – are reasonable and entitled to substantial deference, see (DEPb14-17); see also, e.g., N.J. State League of Muns. v. Dep't of Cmty. Affs., 158 N.J. 211, 222 (1999) (agency rules receive deferential and "highly circumscribed" standard of review). NJBIA's demand for less deference fares no better than Appellants', see (DEPb17), and finds no support in either New

Jersey precedent or federal law, which does not control here, (NJBIAb8-9). The groundbreaking EJ Law should be "liberally construed . . . to enable the agency to accomplish its statutory responsibilities," particularly given the Law's preventive and remedial aims. N.J. State League of Muns., 15 N.J. at 223; see, e.g., In re Adopted Amend. to N.J.A.C., 365 N.J. Super. 255, 264 (App. Div. 2003). The Rules are well within the EJ Law's scope and should be affirmed.

POINT I

NJBIA'S DUPLICATIVE ARGUMENTS LACK MERIT. (Responding to NJBIA Points II-VI)

NJBIA rehashes a number of ultra vires and reasonableness challenges without countering the case law or the explanations DEP already provided. Specifically, NJBIA objects to the Rules' selection of environmental and public health stressors, and relatedly, the geographic point of comparison ("GPOC"); the adjacency provision; the regulatory definition of the "compelling public interest" exception; and the definitions of "new" and "expansion." Each of these attacks falls short. The EJ Rules reasonably balance competing interests consistent with both the record evidence and the EJ Law and are entitled to substantial deference.

Stressors and the GPOC. NJBIA's leadoff arguments regarding the "parameters" that affect whether an overburdened community ("OBC") qualifies as "disproportionately impacted" under the EJ Rules amount to little more than

policy gripes. (NJBIAb11-12, 15-18, 22-23). NJBIA asserts that the twenty-six identified stressors, in conjunction with the GPOC, "eviscerate[]" legislative intent by leading to a result in which allegedly too many OBCs are "deem[ed] . . . disproportionately impacted." (NJBIAb11). But NJBIA overlooks both the EJ Law's ambitious preventive and remedial aims, (DEPb4-6), and the broad statutory definition of "stressor" the Legislature chose, see N.J.S.A. 13:1D-158 (defining "stressors" as "sources of environmental pollution . . . or conditions that may cause public health impacts," and providing non-exhaustive examples); see also (DEPb43-48). Had the Legislature wanted a ceiling on the number of adversely impacted OBCs that could be impacted, the Legislature would have used one; instead, it assigned DEP to designate OBCs based on the law and the evidence, without a numerical floor or ceiling. And it employed a broad definition of stressor that reasonably advanced the Law's protective aims, see (DEPb43-48), which yields a higher number of disproportionately impacted OBCs – and thus greater public health and environmental protections – than NJBIA prefers. NJBIA's gripes lack any support in plain text; indeed, to take one example, while NJBIA complains that DEP relied on stressors other than air emissions, (NJBIAb17), the statutory definition in N.J.S.A. 13:1D-158 in no way limits stressors to air emissions.

Nor are the stressors selected or the GPOC at all arbitrary and capricious.

NJBIA fails to identify anything in the administrative record that undermines the adequacy of DEP's reasoned decision-making both in identifying stressors and in identifying the GPOC. To the contrary, each of the stressors to which NJBIA objects, including stressors concerning "quality of life," do affect "the health and welfare" of individuals in OBCs, both individually and cumulatively. Compare (NJBIAb17) with (DEPb5-6, 44-47) (citing extensive record evidence supporting stressor determinations); see also Animal Prot. League of N.J. v. N.J. Dep't of Envtl. Prot., 423 N.J. Super. 549, 554-60 (App. Div. 2011) ("[A]n agency's findings of fact 'are considered binding on appeal when supported by adequate, substantial and credible evidence.'") (internal citations omitted). In public hearings, residents testified that the presence of highly-polluting facilities in OBCs often mean children "can't play [or] learn" due to lack of green space, excessive impervious surfaces, and contaminated soils. (DEPsa50). And while NJBIA claims it is "manifestly unfair" to compare how stressors affect "urban" and "rural areas," (NJBIAb18), NJBIA ignores that OBCs exist across the State and that the Legislature expressly intended to achieve greater statewide parity, (DEPb42-43, 48). The Rules reasonably address precisely the kinds of environmental and public health injustices the Legislature sought to remedy.

NJBIA's next contention, that some stressors are duplicative, is incorrect. (NJBIAb19). Setting aside that the court should not consider this argument

because Appellants did not raise it, see, e.g., In re Request to Modify Prison Sentences, 242 N.J. 357, 396 (2020) (emphasizing that amici may not introduce new arguments a party fails to present), DEP extensively explained why it included each stressor, see N.J.A.C. 7:1C Appendix; (DEPa230-71). Contrary to NJBIA's claim, "deed notices" and "Classification Exception Areas" ("CEAs") account for contamination in different media – soil and ground water, respectively – and thus do not double-count the same data. See 55 N.J.R. at 706; (DEPa44, 46). And as the Technical Guidance explains, both of those address legacy contaminated sites that have undergone remediation but have residual contamination with lasting impacts, whereas the "known contaminated sites" stressor addresses sites where remediation has not occurred or is not complete. See (DEPa116-119).[3]

NJBIA's remaining claims are erroneous. For one, NJBIA contends that facilities have no recourse to challenge DEP's determination that an OBC is subject to adverse cumulative stressors or disproportionate impacts.

[3] As for NJBIA's passing suggestion that the lead exposure stressor should rely on a different data source – data reporting from the Department of Health, (NJBIAb19) – that argument is likewise new and should not be considered. See Prison Sentences, 242 N.J. at 396. Even if this Court does consider it, DEP reasonably selected housing age as a proxy for blood lead levels because the Department of Health data breaks down by municipality, not census block, as NJBIA itself indicates. See (DEPa44). NJBIA comes nowhere close to proving this stressor is unreasonable.

(NJBIAb17-18). But the Rules' Appendix and Technical Guidance directly explain the methodologies DEP used to calculate adverse impacts on an OBC, N.J.A.C. 7:1C Appendix; (DEPa96-99), and applicants can conduct their own analyses and bring them to DEP's attention, (DEPa48). For another, although NJBIA protests the lack of a "de minimis threshold" for stressors, (NJBIAb22), the EJ Law's text does not include any such threshold, and using one is contrary to the Law's protective and remedial intent. (DEPb20-21, 69).

Adjacency. Next, NJBIA echoes Appellants' various arguments against the Rules' adjacency provision, N.J.A.C. 7:1C-2.1(e); see (NJBIAb13-15), which DEP already explained is neither ultra vires nor unreasonable, (DEPb31-37). Consistent with the EJ Law's text and purpose, DEP reasonably determined that the Rules apply to facilities sited (or proposed to be sited) directly next to an OBC, though formally located in a separate census block group – but only if that census block group lacks residents. (DEPb31-34). This determination does not alter or expand the statutory definition of OBCs, see N.J.S.A. 13:1D-158; N.J.A.C. 7:1C-1.5, but rather, addresses an issue on which the EJ Law is silent, as NJBIA acknowledges, (NJBIAb14). The Legislature necessarily intended DEP to fill that silence by drawing on its specialized expertise to effectuate the Law's purposes, and DEP's selection of a particular means for doing so is entitled to substantial deference. See (DEPb15-16, 34-35); In re Adoption of

N.J.A.C. 7:26B, 128 N.J. 442, 450 (1992) (courts are "solicitous of the latitude delegated to DEP in devising remedies to combat pollution"); In re N.J.A.C. 7:1B-1.1, 431 N.J. Super. 100, 114–15 (App. Div. 2013) ("Great deference" is given to "an agency's 'interpretation of statutes within its scope of authority and its adoption of rules implementing the laws for which it is responsible.'" (citation omitted)).

Deference is particularly appropriate here given the clear public health problem the adjacency provision addresses, which falls well within DEP's expertise. DEP understands – and our courts have likewise recognized – that pollution is not confined by abstract boundaries. See Adoption of N.J.A.C. 7:26B, 250 N.J. Super. at 243. Pollution from facilities bordering an OBC can impact the OBC every bit as much as a facility located wholly within it, and the borders themselves are the products of the concerns and contingencies of the Census process, not public health policy. See (DEPb33). DEP walked a fine line between demands to decrease protection for OBCs by wholly ignoring impacts from neighboring facilities in zero population blocks, see 55 N.J.R. at 702-03; (DEPa42-43); see also (NJBIAb13-15; ISRIb9-13; ELECb38-40), and competing requests to regulate even facilities in low-population census block groups that do not qualify as an OBC but otherwise adjoin one, see 55 N.J.R. at 703; (DEPa43); see also (EJAb23) (suggesting DEP has authority to regulate

facilities located anywhere in an adjacent zero-population block group, even "many miles away" from an OBC). The Rules strike an appropriate balance and should be upheld. See Adopted Amend., 365 N.J. Super. at 260 (noting that where, as here, "proactive environmental measures are within DEP's enabling authority, they will be upheld").

Compelling Public Interest. NJBIA attacks the Rules' definition of "compelling public interest" as ultra vires and unreasonable because it does not include economic benefits, (NJBIAb19-22); see N.J.A.C. 7:1C-1.5, but that fails too, see (DEPb27-31). As to the ultra vires argument, although NJBIA suggests the EJ Law itself adopted the so-called "standard concept of 'compelling public interest,'" (NJBIAb19-20), it cites no statutory language supporting that point. To the contrary, the EJ Law's plain text is silent as to what compelling public interest means in this context, N.J.S.A. 13:1D-160(c), which is a marked contrast to other laws where the Legislature chose to require economic balancing, (DEPb31). Rather than either requiring or prohibiting economic benefits to be considered in the analysis, see, e.g., (EJAb6-7), the Legislature necessarily intended DEP to fill that silence and apply its expertise, see supra at 7-8. DEP did so reasonably and was consistent with the traditional concept that "[e]xemptions from statutes are strictly construed." Alfieri Co., Inc. v. State Dep't of Env't Prot. and Energy, 269 N.J. Super. 545, 554 (App. Div. 1994).

The EJ Rules' compelling public interest definition is further consistent with the undisputed fact that DEP lacks practical means to ensure that a facility's economic benefits are localized in an OBC, as required by the EJ Law. (DEPb30). Broadening this narrow exception to allow for economic benefits would defeat the exception's very purpose, likely resulting in more adverse impacts in OBCs, without any guarantee that economic gains would benefit residents of OBCs themselves rather than nearby communities. (DEPb30). For that reason, requiring DEP to consider such economic benefits would be sharply at odds with the very purpose and structure of the EJ Law itself.[4] See Adoption of N.J.A.C. 7:26B, 128 N.J. at 450; see also Mut. Benev. Ass'n, Loc. No. 4 v. City of Newark, 90 N.J. 44, 55 (1982) ("[D]eference . . . is particularly appropriate where . . . new and innovative legislation is being put into practice.").

"New" and "Expansion" Definitions. Finally, NJBIA's attacks on the Rules' definitions of "new" facilities and "expansion" are again duplicative and unavailing. (NJBIAb23-25); see (DEPb18-27). As to "new" facilities, NJBIA

[4] Finally, NJBIA's assertion that considering public input turns the analysis into a "popularity contest," (NJBIAb21), is at odds with the Law itself. The EJ Law's express purposes include ensuring that as part of the effort "to correct th[e] historical injustice" caused by the siting of highly-polluting facilities, all New Jerseyans should have "a meaningful opportunity to participate" in the permitting of such facilities. N.J.S.A. 13:1D-157.

claims that defining "new" to include a sufficiently significant "change in use" is overly broad. (NJBIAb23). But NJBIA ignores that DEP contemplates not just any change in a facility's "type of operation," but a "fundamental" change. 55 N.J.R. at 689. (DEPa29). And it similarly ignores that this circumscribed definition to cover fundamental changes is consistent with the plain meaning of "new," background principles of law, and other regulatory programs. (DEPb20-21). Rehashing either void-for-vagueness attacks or the policy objection to the lack of a de minimis exception to "change in use" gets NJBIA no further. See (NJBIAb24); (DEPb20-21). In addition, interpreting "new" to include facilities that previously lacked any legal approval to operate is likewise consistent with dictionary definitions, common permitting principles, and common sense. See (DEPb22-23). Moreover, although NJBIA worries about the impact on a facility that fails to stay current with the necessary permits by "letting [a permit] lapse," (NJBIAb24), this makes little sense: a facility that fails to even seek a permit renewal and continues operating anyway could create precisely the same contributions to environmental and public health stressors as facilities that never obtained the required approvals, the kinds of stressor contributions the EJ Law was adopted to redress, see (DEPb22-23). In any event, conjecture about hypotheticals has no place in this facial challenge.

NJBIA fares no better in arguing that the Rules' definition of "expansion"

is "overly broad and vague" and "extremely stringent." (NJBIAb24). True to the Law's text and purpose, and in keeping with its authority to regulate in light of statutory silence, see supra at 7-9, DEP defined "expansion" to mean "a modification or expansion of [a facility's] existing operations or footprint of development that has the potential to" increase "an existing facility's contribution to any environmental and public health stressor" in an OBC. N.J.A.C. 7:1C-1.5; see (DEPb25-27). This standard sensibly focuses on a facility's contribution to stressors – the EJ Law's focus – while including important guardrails: an "expansion" covers only operational changes that potentially increase any stressor in an OBC and that already would require a permit under a preexisting permitting regime. See (DEPb26-27). That, too, is consistent with the EJ Law and reasoned decision-making.[5]

POINT II

NJBIA'S NEW ARGUMENTS NEED NOT BE ADDRESSED AND LACK MERIT. (Responding to NJBIA's Point VII & VIII)

In Point VII and Point VIII, NJBIA raises new arguments – regarding the Rules' public participation procedures and EJMAP – that no party advanced and that the court therefore should not address. See, e.g., Prison Sentences, 242 N.J.

[5] Finally, NJBIA's brief reference to the conditions DEP can place on permits, (NJBIAb25), ignores all of DEP's contrary arguments, (DEPb48-54).

at 396. Even so, both new arguments lack merit.

Public Participation. NJBIA's quarrels regarding the Rules' public participation requirements do not withstand scrutiny. First, NJBIA argues that the EJIS and public participation process should be limited to comments from persons with "some connection to the [OBC] or municipality." (NJBIAb26). But limiting who may comment on "proceedings involving a permit decision" would run afoul of the Administrative Procedure Act, see N.J.S.A. 52:14B-3.1, and run contrary to the EJ Law's mandate to provide "meaningful opportunit[ies] to participate" in the process, N.J.S.A. 13:1D-157. Indeed, the Legislature mandated the EJIS process itself to encourage increased participation from underrepresented communities. N.J.S.A. 13:1D-160.

Second, NJBIA misreads the Rules' requirements concerning subsequent rounds of public participation. (NJBIAb27). The Rules expressly define what constitutes a "material change" to an EJIS that triggers additional public notice and hearing. See N.J.A.C. 7:1C-1.5, 7:1C-4.3(b). The additional round of public participation, when it is necessary, would not be a "never-ending 'redo loop,'" (NJBIAb27), but would instead be limited to the material change, much like in other permitting regimes, see, e.g., N.J.A.C. 7:7A-19.6 (wetlands); N.J.A.C. 7:14A-15.10, -15.11, -16.3(e) (water pollution). And contrary to NJBIA's claim, a "material change" that eliminates a facility's adverse impacts

on stressors altogether would of course not require an application to advance to needing a supplemental EJIS. See N.J.A.C. 7:1C-3.1(b) (indicating that in such circumstances, "only the information at N.J.A.C. 7:1C-3.2 [required in the initial EJIS] will be required").

Census And Stressor Data. Finally, NJBIA's view that the mandatory updates to the census and stressor data are too frequent and create compliance burdens is of no moment. (NJBIAb29-30). As an initial matter, the two-year update of the OBC list based on census data is statutorily mandated. N.J.S.A. 13:1D-159; (DEPb65-66). Moreover, NJBIA's argument lacks record support. Updating stressor data underlying EJMAP twice a year is reasonable to ensure transparency and predictability for community members and applicants alike, and to ensure the EJIS contains the most accurate data. See 55 N.J.R. at 702; (DEPa42); cf. State Dep't of Natural Res. & Envtl. Control v. U.S. Army Corps of Eng'rs, 685 F.3d 259, 270 (3d Cir. 2012) (indicating how updates to data and analysis underlying agency action is required under federal environmental law). Nor will updates arbitrarily interfere with the permitting process; DEP's disproportionate and adverse impact determinations are based on the data at the time of a permit application, and DEP notifies the public before scheduled data updates occur. (DEPb65-66). In any event, because the EJ program was designed to build upon preexisting environmental regimes, (DEPb8, 54), permit

applicants are already subject to separate and independent regulations that are responsive to evolving technical and scientific data. For instance, businesses seeking various land use permits are subject to the endangered and threatened species regulations that, in turn, incorporate current data and information, such that if a listed species permanently inhabits a site at any time, that business may need to modify their business plan appropriately. See, e.g., N.J.A.C. 7:7-9.36 (coastal zone management); N.J.A.C. 7:38-1.4 (Highlands planning). In other words, the requirements to which NJBIA objects are hardly unique, and the requisite data updates are facially sound.

CONCLUSION

This court should affirm the EJ Rules.

Respectfully submitted,

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Superior Court of New Jersey

Appellate Division

Docket No. A-002959-22

IN THE MATTER OF ADOPTION OF N.J.A.C. 7:1C.	:	CIVIL ACTION
	:	
	:	ON APPEAL FROM A
	:	FINAL AGENCY ACTION
	:	OF THE DEPARTMENT
	:	OF ENVIRONMENTAL
	:	PROTECTION OF NEW JERSEY
	:	
	:	AGENCY NO. 04-22-04
	:	

REPLY BRIEF ON BEHALF OF APPELLANT ENGINEERS LABOR EMPLOYER OF THE INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 825

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PRELIMINARY STATEMENT

Appellant Engineers Labor Employer Cooperative of the International Union of Operating Engineers Local 825 ("Appellant" or "ELEC") submits this reply brief in further support of its challenge to the New Jersey Department of Environmental Protection's ("NJDEP") adoption of N.J.A.C. 7:1C (the "Rules") implementing the Environmental Justice Law, N.J.S.A. 13:1D-157 to -161 (the "EJ Law").

The NJDEP is unable to support the Rules' unlawful overextension of the EJ Law's clear regulatory parameters. Instead, the NJDEP's response brief relies on post hoc, illusory fabrications to assert limitations of the Rules' scope that are not found anywhere in the Rules themselves. The NJDEP's drafting of such vague and overbroad rules provides for de facto permit denials of facilities in overburdened communities ("OBCs"), and even in non-OBCs, in violation of the EJ Law's scope and purpose. Appellant reasserts the arguments made in its initial brief and notes six arguments made by the NJDEP that are especially lacking in merit.

First, the NJDEP's position that the EJ Law is intended to permit the regulation of zero-population census blocks adjacent to OBCs is in direct contradiction to the express terms of the EJ Law. No ambiguity exists in the EJ

Law's express language to only regulate facilities "placed" or "located in" OBCs.

Second, the Rules' definitions of the terms "new facility," "existing facility," "expansion," and "change in use" are unconstitutionally vague, ultra vires, and arbitrary and capricious. The NJDEP has shown its hand that these terms were solely designed to provide for loopholes to deny permits to long-existing facilities despite the clear prohibition of doing so under the EJ Law. The NJDEP also oversteps its role by excluding economic considerations of new facilities in determining whether they provide a "compelling public interest." Remarkably, the NJDEP harps on the remedial purpose of the EJ Law and the great importance of considering an OBC's economic situation as a public health stressor, but then contradicts itself by asserting that the economic benefits of a new facility should be completely disregarded. The NJDEP is unable to square this contradiction with the EJ Law's corrective aspirations of environmental and economic parity among New Jersey's communities.

Third, the NJDEP attempts to assuage the Court and the regulated public by arguing that the Rules are simply a "framework" and "overlay" of existing permitting schemes, and do not create new permitting standards that are overly burdensome. Amusingly, the NJDEP then abandons this assurance by assuming the role of the Legislature to create a new, stricter air permitting standard known

as Localized Impact Control Technology ("LICT"). The NJDEP erroneously asserts that the EJ Law was intended to give the NJDEP complete authority to entirely disrupt New Jersey's existing permitting schemes and supplant long-standing air permitting standards expressly created by the Legislature.

Fourth, the NJDEP does not know how to explain the Rules' improper delegation of authority to local environmental justice requirements. The NJDEP asks the Court to turn a blind eye to the Rules' express provision stating that complying with local environmental justice requirements is a prerequisite to the state's environmental justice process. This is an unmistakable delegation of authority and is unlawful.

Fifth, the NJDEP fails to explain credibly how its designation of a "geographical point of comparison," excluding all other OBCs in a geographical area, is rationally within the parameters of the EJ Law. The NJDEP's comparison violates the EJ Law's purpose of creating a system where **all** communities in New Jersey equally share the burden of stressors that accompany the state's economic growth and is therefore arbitrary and capricious.

Finally, one of the Rules' most critical components, the Environmental Justice Mapping, Assessment and Protection Tool and Technical Guidance, clearly meet the legal standards requiring formal rulemaking and should be stricken.

PROCEDURAL HISTORY AND STATEMENT OF FACTS[1]

Appellant relies upon the procedural history and statement of facts set forth in its appellate brief, filed on February 7, 2024, with respect to the parameters of the EJ Law and the promulgation of the Rules. This reply brief supplements the procedural history to inform the Court of the more recent appellate filings by the NJDEP and third parties.[2]

On April 23, 2024, amici curiae Chemistry Council of New Jersey filed a brief in support of Appellant's challenge to the Rules. On June 18, 2024, amicus curiae New Jersey Business & Industry Association also filed a brief in support of Appellant's challenge to the Rules.

The NJDEP filed its response brief and appendix in support of the Rules on July 17, 2024. A total of four amici curiae groups filed briefs and several supplemental appendices in support of the Rules: (i) Ironbound Community Corporation, South Ward Environmental Alliance, and New Jersey Environmental Justice Alliance ("ICC Amici") filed on June 28, 2024; (ii) Clean Water Action and EmpowerNJ ("CWA Amici") filed on July 5, 2024; (iii) NAACP New Jersey State Conference, NAACP Newark Branch, Salvation and

[1] The procedural history and statement of facts are combined to avoid repetition.
[2] In a related appeal, the New Jersey Chapter of the Institute of Scrap Recycling Industries, Inc. ("ISRI") also challenges the NJDEP's regulations (Appellate Docket No.: A-2936-22) (the "Related Appeal").

Social Justice, Faith in New Jersey, Make the Road New Jersey, and Natural Resources Defense Council ("NRDC Amici") filed on July 10, 2024; and (iv) New Jersey Progressive Equitable Energy Coalition ("NJPEEC Amicus") filed on July 10, 2024. (ICC Amici, CWA Amici, NRDC Amici, and NJPEEC Amicus are collectively referred to as "the NJDEP Amici.")[3] As allowed by the Court's scheduling order, the NJDEP filed a brief in response to amicus curiae on July 17, 2024.

On August 15, 2024, the Court filed two Orders in response to Appellant's Motion to file an Overlength Brief and Motion to Conform the Briefing Schedules with ISRI's Related Appeal. The Orders granted Appellant's request to file an overlength reply brief (not to exceed 50 pages) and extended the time to file Appellant's reply brief to September 6, 2024.

[3] "DEPa" refers to DEP's appendix and "DEPb" refers to the NJDEP's brief in opposition to the Appeal. "ICCb" refers to ICC Amici's brief; "CWAb" refers to CWA Amici's brief; "NRDCb" refers to NRDC Amici's brief; and "NJPEECb" refers to NJDPEEC's Amici's brief.

LEGAL ARGUMENT

I. THE STANDARD OF REVIEW

This Court is not compelled to rubber stamp the NJDEP's arbitrary legal interpretations. Critically, the New Jersey Constitution requires that:

> [t]he powers of the government shall be divided among three distinct branches, the legislative, executive, and judicial. No person or persons belonging to or constituting one branch shall exercise any of the powers properly belonging to either of the others, except as expressly provided in this Constitution.
>
> [N.J. Const. art. III, ¶ 1.][4]

Consistent with the separation of powers mandated in our state's constitution, the Appellate Division must exercise de novo review of questions of law, such as an agency's legal interpretation of statutes. See e.g., Bowser v. Bd. of Trs. Police & Firemen's Ret. Sys., 445 N.J. Super. 165, 170-71 (App. Div. 2018); In re N.J.A.C. 7:1B-1.1 Et Seq., 431 N.J. Super. 100, 114 (App. Div. 2013) certif. denied, 216 N.J. 8 (2013); see also N.J. Chapter of Nat'l Ass'n of Indus. & Office Parks v. N.J. Dep't of Env't Prot., 241 N.J. Super. 145, 165 (App. Div 1990) ("While [the Court] must defer to the agency's expertise, [it] need not surrender to it[]"); Russo v. Bd. of Trustees, Police & Firemen's Ret. Sys., 206 N.J. 14, 27 (2011); Bowser v. Bd. of Trs., Police & Firemen's Ret.

[4] See also N.J. Const. art. VI, 1, ¶ 1 (""The judicial power shall be vested in a Supreme Court, a Superior Court, and other courts of limited jurisdiction.")

Sys., 455 N.J. Super. 165, 171 (App. Div. 2018) (citing Mayflower Sec. Co. v. Bureau of Sec. in Div. of Consumer Affairs of Dep't of Law & Pub. Safety, 64 N.J. 85, 93 (1973)).[5]

Contrary to the NJDEP's wish, an administrative agency "may not, under the guise of interpretation, extend a statute to give it a greater effect than its language permits." In re N.J.A.C. 7:1B-1.1 Et Seq., 431 N.J. Super. at 117 (citing GE Solid State, Inc. v. Dir., Div. of Taxation, 132 N.J. 298, 306 (1983)); see also Serv. Armament Co. v. Hyland, 70 N.J. 550, 563 (1976) ("[A]dministrative interpretation which attempts to add to a statute something which is not there can furnish no sustenance to the enactment"). Furthermore, where there "exists reasonable doubt as to whether [a particular] power is vested in the administrative body, the power is denied." In re N.J.A.C. 7:1B-1.1 Et Seq., 431 N.J. Super. at 117 (alterations in original) (quoting In re Closing of Jamesburgh High Sch., 83 N.J. 540, 549 (1980)).

[5] Notably, the U.S. Supreme Court reinforced the role of the courts in reviewing administrative agency legal interpretations. Loper Bright Enterprises v. Raimondo, 144 S. Ct. 2244, 2274 (2024) (Thomas J. concurring) (concurring with the overruling of the similar, highly deferential federal standard set forth in Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984)). As Justice Thomas noted, such enhanced deference "compromises this separation of powers" by "curb[ing] the judicial power afforded to courts, and simultaneously expand[ing] agencies' executive power beyond constitutional limits."

The NJDEP's opposition fails to address the blatant and problematic inconsistencies between the EJ Law and the Rules, the Rules' unsupported and unlawful expansion of the EJ Law, and the irreconcilable conflict between the Rules and other environmental permitting statutes created by the Legislature. See N.J. Ass'n of Sch. Adm'rs v. Cerf, 428 N.J. Super. 588, 595-96 (App. Div. 2012).

II. THE RULES' ATTEMPT TO REGULATE ZERO-POPULATION CENSUS BLOCKS IS ULTRA VIRES AND MUST BE STRICKEN (99a)

The NJDEP and NJDEP Amici have a policy gripe with the EJ Law's limitation to facilities physically sited, or proposed to be physically sited, **within** the boundaries of OBCs. See N.J.S.A. 13:1D-158; see also N.J.S.A. 13:1D-160(a) (the EJ Law applies only to facilities that are "**located**, or **proposed to be located**, in whole or in part, **in** an overburdened community[.]") (emphasis added); and N.J.S.A. 13:1D-157 (the Legislature intended "to limit the **future placement and expansion** of such facilities **in** overburdened communities.") (Emphasis added.) Unable to accept the fact that the EJ Law relates only to the regulation of facilities placed and sited within the geographical boundaries of OBC census blocks, NJDEP and NJDEP Amici set forth incredulous arguments to support the unlawful regulation of zero-population census blocks.

A. The EJ Law is Expressly Limited to Placing and Siting Facilities in OBC Census Blocks and the NJDEP's Attempt to Regulate Facilities Outside of Those Statutory Boundaries is Ultra Vires

The Rules attempt to add a provision that simply does not exist in the EJ Law. See e.g., In re N.J.A.C. 7:1B-1.1 Et Seq., 431 N.J. Super. at 117; see also TAC Associates v. New Jersey Dep't of Envtl. Prot., 202 N.J. 533, 541 (2010) ("If the plain language leads to a clear and unambiguous result, then [the] interpretive process is over."). Contrary to the NJDEP's assertions, [6] the EJ Law expressly limits its application to the physical siting and placing of facilities in OBCs, not whether pollution from a nearby facility may end up traversing an OBC. See N.J.S.A. 13:1D-157 ("the legacy of **siting** sources of pollution **in** overburdened communities continues to pose a threat to the health, well-being, and economic success of the State's most vulnerable residents [. . .] [and] the State's overburdened communities must have a meaningful opportunity to participate in any decision **to allow in such communities** certain types of facilities which, by the nature of their activity, have the potential to increase environmental and public health stressors; and that it is in the public interest for the State, where appropriate, to limit the **future placement** and expansion of such facilities **in** overburdened communities.") (Emphasis added.) As set forth in these statutory provisions, the EJ Law focuses on the physical location and placement of facilities in OBC census blocks.

The NJDEP fails to point to any statutory provision in the EJ Law to regulate areas outside of OBCs simply because pollution has the potential to pass through a nearby OBC.[7] On this basis alone, the Rules' provision at N.J.A.C. 7:1C-2.1(e) must be stricken as contrary to express statutory authority. See, e.g., In re Agric., Aquacultural, & Horticultural Water Usage Certification Rules, 410 N.J. Super. 209, 223 (App. Div. 2009) ("[A]dministrative agencies derive their authority from legislation, the terms of which they cannot alter, nor are they permitted to frustrate the legislative purpose.") (Internal citations omitted.) Similarly, whether the NJDEP is allowed to regulate facilities sited outside of OBCs, in direct contradiction to the express language in the EJ Law, is an "important policy question" that must be decided by the Legislature. See In re Centex Homes, LLC, 411 N.J. Super. 244, 252 (App. Div. 2009); see also Borough of Avalon v. New Jersey Dep't of Envtl. Prot., 403 N.J. Super. 590, 607 (App. Div. 2008).[8]

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[6] See DEPb31-32; NJDEEPb28-29.

[7] By the NJDEP's logic, even those facilities within non-OBCs could be regulated if they share a border with an OBC and have a potential to increase stressors in the abutting OBC, despite the EJ Law's direction to the contrary.

[8] See also, e.g., King v. Burwell, 576 U.S. 473, 486 (2015) (Questions of deep economic and political significance that are central to a statutory scheme are to be expressly delegated to an agency by the legislature); W. Virginia v. Envtl. Prot. Agency, 597 U.S. 697, 721, 723 (2022) (cases in which the "history and the breadth of the authority that [the agency] has asserted," and the "economic and political significance" of that assertion, provide a "reason to hesitate before concluding that

B. The NJDEP's Interpretation that Includes Zero-Population Census Blocks as "Located In" an OBC is Arbitrary and Capricious

Despite the EJ Law's clear, express statutory limitation to regulate facilities physically located in OBCs, the NJDEP baselessly asserts that the statutory phrase "located in" contains a "marginal ambiguity." DEPb37. No ambiguity exists, especially in reading the term "located in" with the related provisions in the EJ Law as addressed above. See DiProspero v. Penn, 183 N.J. 477, 492, (2005) ("We ascribe to the statutory words their ordinary meaning and significance, [. . .], and read them in context with related provisions so as to give sense to the legislation as a whole[.]") (Internal citations omitted.) The EJ Law's use of the term "located in" must be read in connection to the "**siting** of sources of pollution in [OBCs]" and "to limit the future **placement** and expansion of such facilities in [OBCs]." N.J.S.A. 13:1D-157 (emphasis added).

Alternatively, the NJDEP's novel interpretation that it can regulate areas adjacent to those areas expressly designated by the Legislature is the kind of

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Congress" meant to confer such authority [of administrative delegation][,]" and "[e]xtraordinary grants of regulatory authority are rarely accomplished through 'modest words,' 'vague terms,' or 'subtle device[s].' [. . .] Nor does Congress typically use oblique or elliptical language to empower an agency to make a 'radical or fundamental change' to a statutory scheme." (Internal citations omitted.)

"newly minted agency interpretation" that must be given little to no deference. See In re N.J.A.C. 17:2-6.5, 468 N.J. Super. 229, 233-34 (App. Div. 2021) (citing Kasper v. Bd. of Trs. Of the Tchrs.' Pension & Annuity Fund, 164 N.J. 564, 581 (2000)).

The NJDEP's attempt to regulate areas outside of express statutory markers is an obvious overreach by the NJDEP, considering that it has understood similar statutory language in the past as a clear limitation by the Legislature. For example, in the matter of N.J. Chapter of Nat'l Ass'n of Indus. & Office Parks v. N.J. Dep't of Env't Prot., 241 N.J. Super. 145, 165 (App. Div 1990), the court addressed the Freshwater Wetlands Protection Act's ("FWPA") provision in N.J.S.A. 13:9B-3 specifying that regulated activities are categories of activities "**in** a freshwater wetland." Id. at 158-159 (emphasis added). The appellant contended that the regulated activity of "placing obstructions," N.J.A.C. 7:7A-1.4 (now N.J.A.C. 7:7A-2.2), sought to regulate obstructions placed outside of a freshwater wetland. N.J. Chapter, 241 N.J. Super. at 165. The regulation defined "placing of obstructions" as meaning "to deposit, construct, install or otherwise situate any obstacle which will affect the values or functions of a freshwater wetland."

The N.J. Chapter Court noted that the authorizing statute and the regulation "made no express attempt" to "regulate activities outside the

wetlands." Notably, the NJDEP did not assert that it still had "implied" powers to regulate the "placing of obstructions" outside of freshwater wetlands that could affect the values or functions of a nearby freshwater wetlands, and the NJDEP even conceded in its brief the regulatory limitation of activities within freshwater wetlands. N.J. Chapter, 241 N.J. Super. at 159. Here, the express geographical limitation in the EJ Law (i.e., the regulation of siting sources **in** overburdened communities) is similar to the FWPA (i.e., regulated activities **in** a freshwater wetland). Accordingly, the NJDEP's shift to regulate adjacent areas outside of express, unambiguous geographical boundaries by the Legislature is a "newly minted agency interpretation" that must be given little deference. In re N.J.A.C. 17:2-6.5, 468 N.J. Super. at 233-34.

The NJDEP's attempt to distinguish the FWPA, N.J.S.A. 13:9B-1 to -30, and the EJ Law misses the mark. The Legislature in both the FWPA and EJ Law specify statutorily designated areas within which the NJDEP can regulate, and the judiciary has appropriately struck down rules seeking to expand regulation to additional areas. See In Re Freshwater Wetlands Protection Act Rules, 180 N.J. 478, 490-491 (2004) ("the statute clearly sets forth the dimensions of transition areas adjacent to freshwater wetlands of exceptional and intermediate resource value" and that "if the Legislature wanted to expand the transition areas, 'it would have specifically done so, [and would not have left] such a

decision to the regulator's initiative.'" [alterations in original]); and In Re Freshwater Wetlands Prot. Act Rules, N.J.A.C. 7:7A-1.1 Et Seq., 238 N.J. Super. 516, 530 (App. Div. 1989) (holding that the FWPA dealt very specifically with exemptions and directly incorporated the application and approval concepts of the Municipal Land Use Law, and therefore any approval deadlines would not have been left to the regulator's initiative).

Moreover, the NJDEP's case law to support the argument that environmental law generally allows for a statutorily designated unit of analysis to include what lies immediately adjacent is inapplicable to the mandates of the EJ Law. NJDEPb35. In Last Chance Dev. P'ship v. Kean, 119 N.J. 425, 429–30 (1990), the Court noted that Waterfront Development Act was concerned "with the regulation of development immediately contiguous to 'navigable water' [and] it refers to 'development of any *waterfront* upon any navigable water.'" (Emphasis in original.) However, the Last Chance Court noted that the Waterfront Development Act was ambiguous as it neither defined nor described what was encompassed by the term "waterfront," nor did it indicate how far inland or upland waterfront property may extend, or even whether a development had to directly involve the waterfront or the waterway itself. Ibid. In the instant case, the term OBC is not ambiguous, and the plain language of

the EJ Law states that its mandates are limited to facilities sited within the boundaries of an OBC, which is based upon the U.S. Census.

The NJDEP's reliance on In re Stormwater Mgmt. Rules, 384 N.J. Super. 451 (App. Div. 2006) is equally unpersuasive. The Stormwater Court assessed New Jersey's statutory scheme concerning stormwater management in upholding regulations creating a 300-foot buffer on "Category 1" water bodies and their associated streams. The Stormwater Court noted the broad scope of regulating water quality throughout the state's various water quality statues, including the express provision in the Stormwater Management Act that vested the NJDEP with the authority to promulgate comprehensive stormwater management regulations without regard to geographic limits. Id. at 463. Importantly, the Stormwater Court noted that the buffer was appropriate in light of the "broad scope of water quality and pollution concerns voiced by the Legislature in these various enactments and the totality of powers vested in the DEP to enable it to address these concerns [. . .]." The Stormwater Court contrasted that broad authority with other environmental statutes which expressly limited the NJDEP's authority to plan land development, clearly delineated precise areas within which NJDEP may regulate, or specifically mandated discrete buffers. Id. at 464-465. The EJ Law is limited to the

regulation of the placement and physical expansion of facilities in an OBC.[9] No ambiguity exists in the EJ Law as to the areas to be regulated.[10]

C. The NJDEP Amici's Additional Arguments Lack Merit

Several amici in support of the Rules raise the tenuous argument that a zero-population census block, i.e., an area with no people living in it, should also be considered a neighborhood constituting low-income populations, minority populations, or a population with limited English proficiency. ICCb21, NRDCb24. These NJDEP Amici independently raise these new arguments in this appeal and they should not be considered. See e.g., Matter of Request to Modify Prison Sentences, 242 N.J. 357, 395–96 (2020).

Alternatively, NJDEP Amici's argument lacks merit on its face, and actually supports Appellant's position. NJDEP Amici concede that the EJ Law's percentage-based determination of an OBC is unworkable with a zero-population census block. ICCb20-21, NRDCb24. As stated by NJDEP Amici (ICCb20-21), the EJ Law categorizes a census block group as an OBC based on

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[9] The NJDEP's reference to the definition of "facility" in N.J.A.C. 7:27-16.1 is meritless. It is of no moment that facilities can sometimes take up more than one or more contiguous or adjacent properties.

[10] When the Legislature intends to provide for cross boundary impacts to be recognized, it clearly does so. See N.J.S.A. 13:1E-28.3, which provides for an economic benefit to a municipality which shares a boundary with a municipality that hosts a sanitary landfill.

the percentage of the population that is low-income, minority, or with limited English proficiency, not the aggregate number of these residents. Per NJDEP Amici's assertion, the determination of an OBC strictly analyzes percentages, and there is no basis to assert that the Legislature would have intended to impose an unworkable provision, i.e., an opposing aggregate number assessment, into the EJ Law's percentage-based focus. See Brunetti v. New Milford, 68 N.J. 576, 599 (1975) ("Statutory provisions which are unworkable and impossible to comply with may be invalidated on the ground that they constitute a denial of substantive due process."); see also Grp. Health Ins. of N. J. v. Howell, 43 N.J. 104, 112 (1964) ("A regulation which in practice is illusory or impossible to comply with is arbitrary and oppressive and would violate due process.") As such, NJDEP Amici's position that the statutory intent is to abandon the percentage-based analysis of the EJ Law and instead use an aggregate number assessment for "a subset of facilities within a subset of the State's zero-population block groups"[11] lacks merit.

Accordingly, the Rules' attempt to regulate facilities in zero-population census blocks is ultra vires and must be stricken.

[11] ICCb21.

III. THE RULES INVENT VAGUE CONTROLLING TERMS THAT DEPRIVE THE PUBLIC OF AN ABILITY TO UNDERSTAND THE RULES' REQUIREMENTS WITH ASCERTAINABLE CERTAINTY AND MUST BE STRICKEN AS UNCONSTITUTIONALLY VAGUE, ULTRA VIRES, AND ARBITRARY AND CAPRICIOUS (99a)

The NJDEP and NJDEP Amici ask that the Court use the wrong standard to assess whether a regulation is unconstitutionally vague. In addition, the NJDEP and NJDEP Amici fail to demonstrate how the Rules' controlling definitions of "new facility," "existing facility," "change in use," and "expansion" of an existing facility provide any workable guideposts for the regulated public to understand. See N.J.A.C. 7:1C-1.5. Instead, the NJDEP's feeble justification for the creation of these terms demonstrates that the agency, with its "specialized" knowledge and expertise, is unable to provide context to these terms without post hoc reliance to information outside of the Rules themselves. The NJDEP's justification for creating these terms evidences its intent to provide itself loopholes to deny permits to existing facilities in direct contravention of the express terms of the EJ Law. These terms must be stricken as unconstitutionally vague, ultra vires, and arbitrary and capricious.

The NJDEP and NJDEP Amici also fail to justify the exclusion of economic factors from the term "compelling public interest," especially considering the EJ Law's remedial goals to correct and reverse environmental and economic injustice suffered by populations located in OBCs. The NJDEP

and NJDEP Amici concede the importance of economic and employment factors in the overall health of a community, and those same reasons demonstrate the arbitrary nature of excluding such economic factors in assessing "compelling public interest."

A. The NJDEP Asks the Court to Employ the Wrong Standard for Assessing Whether a Regulation is Unconstitutionally Vague

The NJDEP's use of entirely overbroad and vague terms in the Rules seeks to, under the guise of agency interpretation, overextend the NJDEP's authority outside the bounds of the EJ Law, and results in more questions than answers for the public. See In re N.J.A.C. 7:1B-1.1 Et Seq., 431 N.J. Super. at 117. Certain provisions of the Rules are so overbroad and vague that people of "common intelligence must necessarily guess at [their] meaning and differ as to [their] application." See Tanurb v. New Jersey Dep't of Envtl. Prot., 363 N.J. Super. 492, 499 (App. Div. 2003). Even NJDEP itself, with its "specialized" knowledge and expertise, is uncertain as to the meaning of the provisions it created in the Rules. Instead, the NJDEP must rely on post hoc, illusory fabrications to assert that limitations exist in the Rules' vague and overbroad scope. The NJDEP only raises these alleged limitations for the purpose of defending this appeal, as these limitations are not found anywhere in the language of the Rules themselves. The NJDEP's attempt to rehabilitate its actions after promulgating the rules by asserting additional explanations in its

brief is improper. See In re N.J.A.C. 7:1B-1.1 Et Seq., 431 N.J. Super. at 139 (internal citations omitted).

The NJDEP asserts that, in determining whether a regulation is unconstitutionally vague, "[t]he question is not whether the measure is ambiguous, but whether it provides 'no rule or standard at all.'" DEPb21, 51 (quoting FTC v. Wyndham Worldwide Corp., 799 F.3d 236, 250 (3d Cir. 2015)). However, the NJDEP's proposed lax standard is incorrect. A closer reading of the Third Circuit's decision in FTC v. Wyndham Worldwide Corp., which the NJDEP neglected to address in its brief, states that "[a] different set of considerations is implicated when agencies are involved in statutory or regulatory interpretation." Wyndham, 799 F.3d at 250-251. "[W]here an agency exercises its authority to fill gaps in a statutory scheme […] parties are entitled to have 'ascertainable certainty' of what conduct is legally required by the regulation." Ibid. Similarly, "where an agency interprets the meaning of its own regulations [. . .] private parties are entitled to know with 'ascertainable certainty' an agency's interpretations of its regulation." Id. at 251. As stated by the Third Circuit, "[a] higher standard of fair notice applies" in these contexts than "in the typical civil statutory interpretation case because agencies engage in interpretation differently than the courts." Id. at 251-252. While private parties can reliably predict a court's interpretation resolving statutory ambiguity

by applying traditional methods of construction, "[i]t is harder to predict how an agency will construe a statute or regulation at some unspecified point in the future, particularly when that interpretation will depend on the 'political views of the [Executive] in office at [that] time.'" Id. at 252. See also In re N.J.A.C. 7:1B-1.1 Et Seq., 431 N.J. Super. at 128 ("It is well-settled that a rule that does not contain a clear or objectively ascertainable standard may not be upheld.") The Third Circuit's reasoning is sound, especially considering the significant and important policy questions that are implicated in the Rules.[12] The proper standard to review the Rules' vague provisions and their implication is whether such provisions provide an "ascertainable certainty" to the regulated public of what the Rules require.

B. "New" and "Existing" Facilities

The scope of the EJ Law is expressly intended "to limit the **future placement and expansion** of [ ] facilities in overburdened communities." N.J.S.A. 13:1D-157 (emphasis added). This language makes clear that the Legislature intended to equate "new" with "future placement." "Placement" is defined as "an act or instance of placing[,]" and "placing" is defined as "to put

[12] As stated by the NJDEP, the reasons that both Federal and State Constitutions render vague laws unenforceable are the same. DEPb21, n.7 (citing State v. Cameron, 100 N.J. 586, 591 (1985).

in or as if in a particular place or position[,]" "to direct to a desired spot[;]" and "to find a place (as a home or employment)[.]" Merriam-Webster's Collegiate Dictionary 946 (11th ed. 2004). As such, the EJ Law's use of the terms "new" and "existing" clearly focuses on whether facilities are physically constructed (i.e., "placed") at the time of the EJ Law's effective date, April 17, 2023. See N.J.S.A. 13:1D-160(c) (if a new facility with disproportionate impacts in an overburdened community meets a compelling public interest, "the department may grant a permit that imposes conditions on the **construction** and operation of the facility [. . .]") (emphasis added); N.J.S.A. 13:1D-160(d) (the department may "apply conditions to a permit for the expansion of an existing facility [. . .] concerning the **construction** and operation of the facility [. . .]"). See e.g., DiProspero, 183 N.J. at 492 ("We ascribe to the statutory words their ordinary meaning and significance, [. . .], and read them in context with related provisions so as to give sense to the legislation as a whole[.]") (Internal citations omitted.)

The Rules' provision that an "existing facility" is deemed a "new facility" if the NJDEP determines it lacked a "valid approved registration or permit required by the [NJDEP] prior to April 17, 2023"[13] is an administrative

[13] N.J.A.C. 7:1C-1.5 (definition of "new facility").

fabrication that is ultra vires. The EJ Law is expressly limited to new facilities, or the physical expansion of existing facilities, placed and sited in an OBC.

The NJDEP's attempt to distinguish Port Hamilton Ref. & Transp. is similarly unavailing. Port Hamilton Ref. & Transp., LLLP v. U.S. Envtl. Prot. Agency, 75 F.4th 166, 173 (3d Cir. 2023), reh'g granted, 86 F.4th 1031 (3d Cir. 2023), and on reh'g, 87 F.4th 188 (3d Cir. 2023). DEPb24. The NJDEP asserts that Port Hamilton is distinguishable as the Federal Clean Air Act's scheme contained "unambiguous plain text" that spoke directly to facilities subject to permitting requirements, which included newly constructed or modified facilities. DEPb24. As set forth above, the EJ Law is also unambiguous in that a "new facility" is one that is constructed and brought into existence (i.e., "placed") after April 17, 2023.

The NJDEP's reliance to regulations implementing the Solid Waste Management Act ("SWMA"), N.J.A.C. 7:26-1.1 to -17.26, and the Coastal Area Facility Review Act ("CAFRA"), N.J.A.C. 7:7-1.1 to -29.10, are even more unpersuasive. The SWMA was enacted to implement a permitting program of then-existing solid waste facilities to remedy "piecemeal, uncoordinated activities[.]" See N.J.S.A. 13:1E-2(a); see also N.J.S.A. 13:1E-2(b)(1) (the SWMA is to "[e]stablish a statutory framework within which all statutory collection, disposal and utilization activity in this State may be coordinated[.]").

The SWMA's regulatory definitions of "existing solid waste facility" and "new solid waste facility," which assess whether a facility or operation possesses a valid registration, are irrelevant to the instant dispute. The SWMA directs the NJDEP to "require registration of all solid waste collection activities, solid waste facilities and solid waste disposal operations in [New Jersey]" existing at the time of enactment and to be constructed in the future. Similarly, the NJDEP's reliance on "existing developments" under CAFRA's regulations as those that received all necessary approvals is similarly distinguishable. CAFRA's use of the term "existing development" provided an exception from regulation. See N.J.A.C. 7:7-2.2(b)(1)(iii).

In sum, the NJDEP's definition of "new facility" goes beyond the intent of the EJ Law. Existing facilities are already impacting OBCs, and they are not creating new environmental stressors that are regulated under the EJ Law.

C. "Change of Use"

The NJDEP also fails to demonstrate how the overly broad and vague term "change in use" provides any definable standard for the regulated public to understand with ascertainable certainty. Wyndham, 799 F.3d at 250-251. The NJDEP intentionally keeps the regulated community in the dark as to what kind of proposed changes transform an "existing facility" into a "new facility" that can be denied a permit under the Rules.

Notably, the NJDEP is unable to cite to provisions or language in the Rules themselves to support its argument that the term "change in use" provides the regulated public with any definable standard. The NJDEP backtracks by stating that this term is actually better defined in the NJDEP's response to comments in the rule adoption, which states that the term "contemplates a 'fundamental change in the[] type of operation' that increases stressors [and that] any change would not suffice." DEPb19 (citing DEPa29). The NJDEP asserts, without citing to any authority, that "the Law's manifest intent confirms DEP reasonably concluded that a facility that undergoes a complete transformation—and generates different impacts on the local community—should be subject to the stricter new facility standard." DEPb20 (citing N.J.S.A. 13:1D-160(c)). There is no indication in the plain text of the Rules that "change in use" is limited to a "complete transformation" of a facility. If that is in fact the NJDEP's intent, the definition should have stated so expressly.

As such, the NJDEP demonstrates that despite its "specialized expertise necessary to enact regulations dealing with technical matters,"[14] it cannot describe the meaning of "change in use" by referring to the Rules themselves. A rule requiring the regulated public to dig through regulatory background

[14] DEPb15.

documents and refer to the NJDEP's post hoc arguments in litigation falls woefully short of providing any standard that people of "common intelligence" can understand. DEPb21 (citing Tanurb, 363 N.J. Super. at 499). Even more doubtful is how the term "change in use" provides any standard that can be understood with "ascertainable certainty." Wyndham, 799 F.3d at 250-251. The requirements for what activities qualify as a "change in use" should be readily evident from the plain language of the Rules, especially when the term can be interpreted to deny permits for "new facilities" in direct violation of the EJ Law's provisions.

From a policy perspective, the purposefully overbroad and vague definition for "change in use" creates a dangerous opportunity for arbitrary agency action in the future. The EJ Law certainly did not intend for the NJDEP to consider any operational changes with the potential to increase any of the many stressors as authority to shut down long-existing facilities that may be politically undesirable at a certain point in time, but that is what the plain text of the Rules allow. Permitting such a vague standard to exist, in addition to being legally unsupportable, threatens to cause safety, economic, and environmental inefficiencies by deterring entities from improving or changing operations that may trigger Environmental Justice Impact Statement ("EJIS") review and a potential finding of "new facility" status that can result in a permit denial.

The NJDEP grasps at straws in its reliance on Nouhan v. Bd. of Adjustment of City of Clifton, 392 N.J. Super. 283, 292 (App. Div. 2007). The Nouhan case involved a zoning violation following a restaurant's conversion of its use into a discotheque/nightclub where such use was not permitted under the municipality's zoning ordinance. Nouhan 392 N.J. Super. at 292-293. Furthermore, the specific business operations of a discotheque/nightclub were specifically defined in the required entertainment license. Id. at 294.

Accordingly, the Rules' definitions for "new facility," "existing facility," and "change in use" must be stricken as so broad and open-ended that they violate due process by failing to provide any regulatory standards to the public. See, e.g., N.J. Soc'y for Prevention of Cruelty to Animals, 196 N.J. 366, 386 (2008). In addition, these definitions should be stricken as ultra vires and contrary to the NJDEP's statutory authority. See, e.g., In re Agric., 410 N.J. Super. 223.

D. Expansion of an Existing Facility

The Rules invent an ultra vires definition of "expansion" which attempts to provide the NJDEP with authority to impose additional permit conditions on any existing facility seeking to implement "modifications" with any "potential" to contribute to an OBC's environmental and public health stressors. N.J.A.C. 7:1C-1.5. The NJDEP invents a term that is also arbitrary and capricious by

ignoring the EJ Law's focus on the "placement and expansion of such facilities in [OBCs]" which necessarily refers to the expansion of a facility's physical footprint. N.J.S.A. 13:1D-157.

Moreover, the Rules' definition of "expansion" is unconstitutionally broad and vague since it can impose additional conditions on an "existing facility" without any metric for the regulated community to understand what types of operational changes can result in a finding of an "expanded" facility. The NJDEP's arguments to the contrary are unavailing.

The NJDEP again attempts to fabricate post hoc limitations on these terms that are not based on the plain text of the EJ Law or Rules. Without any citations to the language in the Rules, the NJDEP asserts that the definition of an "expansion" is only for a modification that "already requires a permit under a separate law." DEPb27 (emphasis in original).[15] Again, the NJDEP suggests that people of "common intelligence" are expected to dig through the piles of regulatory background documents and the NJDEP's litigation arguments to understand the meaning of the Rules' terms. DEPb21 (citing Tanurb, 363 N.J.

[15] The unconstitutional vagueness in the use of the term "modification" is further apparent as the NJDEP and ICC Amici cannot even agree as to what this term actually means. Specifically, ICC Amici asserts that the NJDEP's interpretation is wrong since amici allege that the Rules' "modification" provision does not "apply only when a *separate permit* is required[.]" ICCb15 (emphasis in original).

Super. at 499). The Rules do not provide any "ascertainable certainty" as to what modifications amount to an "expansion" that, in the NJDEP's opinion at a certain point in time, require a permit under any one of the twelve environmental laws subject to the EJ Law. N.J.S.A. 13:1D-158 ("permit" definition"). Wyndham, 799 F.3d at 250-251. Reading between the lines, the NJDEP implicitly mandates that a facility seeking to modify its operations first comply with the lengthy EJIS process to obtain assurances that its modifications will not trigger requirements or violations under the EJ Rules. N.J.A.C. 7:1C-9.4. [16] This vague and arbitrary definition will harm the general welfare by deterring facilities from making changes to operations, even if such changes will improve the efficiency and safety of their business.

[16] While the Rules provides for a facility to request a determination of applicability by providing the NJDEP, in writing, the address of the existing facility and information necessary for the NJDEP to determine whether the existing or proposed facility is subject to the Rules' requirements, N.J.A.C. 7:1C-2.1(g), such a process does not address the constitutional defects in the Rules. This process does not provide any consistent or ascertainable standards to the regulated community. Such determinations will depend on NJDEP's attitudes at a point in time, and even on differences of opinion between the various NJDEP representatives who may change during the facility's operations. This process does not provide any guardrails against arbitrary and conflicting determinations, as the regulated community will always be subject to risks of changing determinations as to what modifications have triggered an "expansion."

E. Compelling Public Interest

The EJ Law requires that the NJDEP deny a permit for a new facility that creates a disproportionate impact unless the NJDEP determines the new facility will serve a "compelling public interest in the community where it is to be located." N.J.S.A. 13:1D-160(c). As stated by the New Jersey Supreme Court, "'[p]ublic interest,' of course, is a broad concept. The constitutional sufficiency off [sic] terms of such sweep may not be judged in a vacuum. The context must be considered[.]" Elizabeth Federal Sav. And Loan Ass'n v. Howell, 30 N.J. 190, 194 (1959). In reviewing the context and goals of the EJ Law, the NJDEP's exclusion of economic benefits from the definition of "compelling public interest" is ultra vires as it creates an exemption that does not exist in the EJ Law. Such a major policy decision to ignore all economic benefits of a new facility must be expressly granted by the Legislature. In re Centex Homes, LLC, 411 N.J. Super. 252 (quoting Borough of Avalon, 403 N.J. Super. at 607). Moreover, the NJDEP's exclusion of economic benefits is arbitrary and capricious as conflicting with the EJ Law's remedial purpose.

The EJ Law aspires to correct the injustice of siting industrial facilities in historically disadvantaged communities. As set forth in the EJ Law's legislative findings and declarations, "the legacy of siting sources of pollution in overburdened communities continues to pose a threat to the health, well-being,

and **economic success** of the State's most vulnerable residents; [and it is] past time for the State **to correct** this historical injustice." N.J.S.A. 13:1D-157 (emphasis added). The EJ Law's intent to consider economic factors is also evident by the statutory definition of an OBC, which assesses the percentage of low-income households in a census block. N.J.S.A. 13:1D-158.

Additionally, the term is arbitrary and capricious as evidenced by the NJDEP's and NJDEP Amici's own arguments that considering economic factors (i.e. "Social Determinants of Health") as stressors is a critical component in ensuring improved health conditions of a population in an OBC. N.J.A.C. 7:1C Appendix. DEPb45 ("social determinants of health are environmental conditions that affect a 'wide range of health, functioning, and quality-of-life outcomes and risks.'").

Specifically, the NJDEP Amici inadvertently set forth reasons why unemployment and lack of education attainment in OBCs should be considered in determining a "compelling public need." Based on NJPEEC Amici's reasoning, a "new facility" spurring economic growth would be beneficial to the public health: "[p]eople with steady employment are less likely to live in poverty and more likely to be health," and "[p]eople with higher levels of education are more likely to be healthier and live longer." NJPEECb18.

NRDC Amici also concede that "[p]eople with steady incomes and access to health-care benefits have better access to preventative care and early interventions that can reduce the baseline health risks they face." NRDCb10. "[U]nemployment can cause negative health consequences, including stress-related ailments like high-blood pressure, strokes, and heart attacks." NRDCb10-11. The EJ Law's "use of public health stressors" are to "empower[] [NJDEP] to start to reverse those effects." NRDCb4. See also CWAb23 (listing reasons why unemployment and underemployment should be considered environmental and public health stressors).

As such, the NJDEP and NJDEP Amici expound the importance of economic success for the long-term health of the OBC, but in the same breath assert that economic opportunities and benefits to an OBC stemming from a new facility should not be considered. The Rules' attempt to have it both ways is arbitrary and capricious, and contravenes the goal of the EJ Law which considers the economic conditions of the protected communities. N.J.S.A. 13:1D-158. In effect, the NJDEP and NJDEP Amici assert that OBCs based on low-income will always stay that way, without those populations having any say in whether a facility could improve their economic situation and remove them from OBC status. This defeats the statutory purpose of achieving "parity" amongst all communities in New Jersey. DEPb42 ("[T]he Legislature intended to achieve

greater parity, not to perpetuate a public-health divide between the State's regions or to keep polluting facilities out of the State's less-populated areas")

IV. THE RULES' LOCALIZED IMPACT CONTROL TECHNOLOGY STANDARD IS ULTRA VIRES AND CONFLICTS WITH THE AIR PERMITTING STANDARDS CREATED BY THE LEGISLATURE IN THE NEW JERSEY AIR POLLUTION CONTROL ACT (99a)

The NJDEP and NJDEP Amici attempt to soften the Rules' consequential impact to businesses and operating facilities by asserting that the EJ Law is simply a "framework" that "overlays" numerous environmental permitting statutes under other statutes. DEPb2 ("The EJ Law created a framework through which [OBCs] can participate in the environmental permitting process for regulated facilities in their midst[.]"); DEPb8 ("By creating an overlay on other environmental laws, the EJ Law adds environmental justice considerations on the permitting processes for a variety of already-regulated facilities."). The NJDEP even goes so far as to say that the Rules do not impose any new permitting regimes. DEPb9 ("To be clear, the EJ Law does not create a new, independent requirement to obtain a permit; instead, it adds a new process to existing permitting obligations"); DEPb20 ("The EJ Law imposes no new permitting regimes[.]"); see also DEPb29; DEPb47; DEPb54; ICCb17. These statements ask the Court to turn a blind eye to the additional and specific air permitting requirements for "Localized Impact Control Technology" ("LICT") set forth in N.J.A.C. 7:1C-7.1.

A. The LICT Standard is Ultra Vires

The LICT standard lacks any statutory basis in the EJ Law and unlawfully seeks to supplant the express statutory air permitting standards set forth by the Legislature in the New Jersey Air Pollution Control Act (the "APC Act"), N.J.S.A. 26:2C-1 to -25.2. See N.J.A.C. 7:1C Subchapter 7. Importantly, "[t]he Legislature is presumed to be aware of its prior enactments[.]" In Re Freshwater Wetlands Prot. Act Rules, 238 N.J. Super. at 530 (citing Mahwah Tp. v. Bergen County Bd. of Taxation, 98 N.J. 268, 279 (1985)). This is particularly true "where [the Legislature] specifically incorporates by reference prior enactments in subsequent legislation." In Re Freshwater Wetlands Prot. Act Rules, 238 N.J. Super. at 530 (citations omitted). "When cognate laws are passed, we presume that they were intended to be part of a consistent whole unless expressly or impliedly incompatible." Ibid. (citing Jacobs v. N.J. State Highway Authority, 54 N.J. 393, 401 (1969))

LICT is a new, stricter air emission standard that, without express authority, significantly departs from the Legislature's standard in the APC Act by not considering economic feasibility. Compare N.J.A.C. 7:1C-7.1 and N.J.S.A. 26:2C-9.2. Such an abandonment of economic considerations is "an important policy question" residing solely with the Legislature to address. In re Centex Homes, LLC, 411 N.J. Super. at 252.

In addition, the EJ Law refers to the permitting requirements in the APC Act, N.J.S.A. 13:1D-158 (definition of "permit"), but the Legislature did not make any attempt replace those same permitting standards for the purposes of facilities in OBCs, even though it could have easily done so. Similarly, in enacting the EJ Law, the Legislature did not make any amendments to the APC Act creating an exception from the Best Available Control Technology ("BACT") standards for facilities subject to the EJ Law. There is absolutely no language in the EJ Law to indicate that the Legislature sought to replace its pre-existing directives under the APC Act for OBCs, nor does the EJ Law delegate authority for the creation of new air pollution control standards beyond the requirements of the APC Act. The New Jersey APC Act, with its federal counterpart the Air Pollution Control Act, 42 U.S.C. § 7401 et seq., already contain permitting standards applicable to areas that are not in compliance with the Federal National Ambient Air Quality Standards ("NAAQS"). Most often, these nonattainment areas are largely within OBCs, and require either compliance with BACT technology to reach the Lowest Achievable Emission Rate ("LAER"). See 40 C.F.R. Part 60; N.J.A.C. 7:27-18.1.

In response, the NJDEP asserts that the EJ Law grants it unbridled authority to create new air standards out of whole cloth by virtue of including the phrase "notwithstanding the provisions of any other law [. . .] to the contrary"

in constrained paragraphs of N.J.S.A. 13:1D-160. DEPb40-41, 58. However, as the NJDEP and NJDEP Amici have admitted, the EJ Law is a framework and overlay of existing laws, and therefore the NJDEP must impose conditions and standards that currently exist and are consistent with and available under existing laws. N.J.S.A. 13:1D-158 (definition of "permit"). LICT is not that. LICT is a completely new set of permitting standards that go above and beyond what is mandated by the Legislature in the APC Act.

B. The LICT Standard is Unconstitutionally Vague

The NJDEP's assures the Court that LICT has "important built-in limitations" against a finding of LICT if "a particular measure will require a fundamental change and result in only minimal reductions[.]" DEPb56 (citing 55 N.J.R. at 720, DEPa60). The NJDEP's explanation amounts to an admission that the LICT standard is unconstitutional vague and arbitrary and capricious. Nowhere in the plain reading of the Rules does it set forth these "important built-in limitations," and the NJDEP must again rely on regulatory background to support its position. The NJDEP's reliance on regulatory background does not provide any "ascertainable certainty" of the alleged limitations to people of "common intelligence." DEPb21 (citing Tanurb, 363 N.J. Super. at 499; Wyndham, 799 F.3d at 250-251. The LICT standard must be stricken from the Rules as unconstitutionally vague.

V. THE RULES' PROVISION TO FOLLOW LOCAL ENVIRONMENTAL JUSTICE REQUIREMENTS IS AN UNLAWFUL DELEGATION OF AUTHORITY AND IS NOT SIMPLY INFORMATIONAL (99a)

The Rules' local environmental justice provisions is ultra vires and must be stricken. The Rules clearly require that a facility's EJIS provide evidence of satisfaction of any applicable local environmental justice or cumulative impact analysis ordinances to be considered complete to initiate the state's environmental justice procedures. N.J.A.C. 7:1C-3.2(a)(5). Such a requirement to comply with local environmental justice requirements before proceeding with an application to the NJDEP amounts to an unlawful delegation of power to the local authorities. See Mutschler v. New Jersey Dep't of Envtl. Prot., 337 N.J. Super. 1, 12–13 (App. Div. 2001) ("a power or duty delegated by statute to an administrative agency cannot be subdelegated in the absence of any indication that the Legislature so intends.").

The NJDEP's argument on this point is contained in a footnote and asserts that Appellant misunderstands this provision. The NJDEP argues that this requirement is simply "informational," does not sub-delegate decision-making authority or incorporate local laws, and is not ultra vires. DEPb37, n. 9. Accepting, the NJDEP's position requires willful blindness to the express terms of the Rules.

Notably, N.J.A.C. 7:1C-3.2(a)(5) is entitled "Environmental justice impact statement **requirements**[.]" (Emphasis added.) As set forth in the NJDEP's Notice of Adoption, 55 N.J.R. 661b, 695 (DEPa35), the NJDEP does not state that this provision is just "informational." Specifically, the NJDEP's understanding of this provision "refers to providing a copy to the [NJDEP] of satisfaction of any mandatory environmental justice or cumulative impacts analysis that may be required by duly adopted ordinance at the local government level." Ibid. (Response to Comment 303.) The absurdity of this provision is evident as it may apply to a solid waste facility. If a local environmental justice ordinance prohibits construction of any new solid waste facilities in the municipality, it would do so in direct contravention of the New Jersey SWMA, N.J.S.A. 13:1E-19, which directs counties to site waste facilities within their districts, preempting local ordinances. Under the Rules, municipalities would be given a veto power expressly denied to them by law.

VI. THE NJDEP'S EXCLUSION OF OTHER OBCS IN THE GEOGRAPHIC POINT OF COMPARISON IS ARBITRARY AND CONTRADICTS THE REMEDIAL PURPOSE OF THE EJ LAW (99a)

The EJ Law calls for a comparison between the cumulative environmental stressors impacting the particular OBC being assessed and the cumulative stressors impacting all other communities in a geographical area, regardless of whether those other communities are overburdened or not. See N.J.S.A. 13:1D-160(c) & (d) ("the NJDEP shall deny permits for a new facility, or apply conditions to a permit for the expansion of an existing facility, upon a finding that approval of the permit would "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 **geographic** unit of analysis as determined by the department[.]") (Emphasis added.)

The NJDEP ignores the EJ Law's directive that the comparison should be one of cumulative environmental and public health stressors of communities within a geographical point of comparison ("GPOC"),[17] and not a strictly economic or demographic point of comparison. The Rules contradict the

[17] N.J.A.C. 7:1C-1.5

remedial purpose of the EJ Law which seeks to create environmental parity between all kinds of communities within the state.

As set forth above, the EJ Law is remedial with the goal of correcting the injustice of siting polluting facilities in historically disadvantaged communities. The EJ Law aspires for a future where stressors associated with facilities are equitably allocated across the state. N.J.S.A. 13:1D-157 ("The Legislature further finds and declares that **no community** should bear a disproportionate share of the adverse environmental and public health consequences that accompany the State's economic growth[.]") (emphasis added); see also DEPb29 ("The statutory remedy is not to perpetuate the status quo, but a regulatory system to mitigate environmental harms and promote long-term health and welfare"); DEPb38 ("The Legislature sought greater parity in the environmental health of communities across the State[.]"); DEPb42 ("[T]he Legislature intended to achieve greater parity, not to perpetuate a public-health divide between the State's regions or to keep polluting facilities out of the State's less-populated areas"); NJPEECb8 ("The Legislature intended [. . .] to protect all New Jersey residents, regardless of income, race, ethnicity, color, or national origin, by considering cumulative impacts").

The Rules' GPOC fails to implement the parity sought by the EJ Law. The exclusion of all OBCs in the GPOC, in addition to being a significant departure

from clear statutory language, fails to create a comparison that will result in an equitable allocation of stressors among the different communities in New Jersey. The NJDEP asserts that OBCs are "found in urban, rural, and suburban areas all across New Jersey." DEPb42. The spread of OBCs across different kinds of communities in New Jersey is the underlying reason why the EJ Law intended to compare the specific OBC with all other communities in the GPOC, including other OBCs. Therefore, excluding OBCs from the GPOC is arbitrary and capricious by violating the EJ Law's purpose of creating a system where **all** communities in New Jersey are equally burdened with environmental and public health stressors that accompany the state's economic growth.

The NJDEP's argument that the GPOC does not conflict with the SWMA's requirement to develop plans and site facilities for solid waste disposal within a county's (or the New Jersey Sports and Exposition Authority's) geographic jurisdiction also fails. See N.J.S.A. 13:1E-21. In support of its argument, the NJDEP cites to In re Long-Term Out-of-State Waste Disposal Agreement, 237 N.J. Super. 516 (App. Div. 1990) certif. denied 121 N.J. 647 (1990). However, in Long-Term, the NJDEP disapproved of a county's contract for solid waste disposal at a facility in Pennsylvania, and the Appellate Division rejected the county's challenge to the NJDEP's administrative action and affirmed. 237 N.J. Super. at 528 ("We conclude that the decision by [NJDEP] to

avoid dependence on out-of-state solid waste in the long run has a rational basis and was within [NJDEP's] statutory authority"). A county may only look to sites outside their district if they can certify to the NJDEP "the absence of sufficient existing or available suitable sites for such solid waste facilities within the solid waste management district[.]" N.J.S.A. 13:1E-21(b)(3).

Accordingly, the definition of "geographic point of comparison" must be stricken as it is arbitrary and capricious, and conflicts with the EJ Law's clear statutory mandates.

VII. THE ENVIRONMENTAL JUSTICE MAPPING, ASSESSMENT AND PROTECTION TOOL IMPLEMENTING THE RULES IS A FORMAL RULE AND NOT A GUIDANCE DOCUMENT (99a)

The NJDEP puts the cart before the horse. The NJDEP's unilateral designation of the Environmental Justice Mapping, Assessment and Protection Tool ("EJMAP Tool") and associated Technical Guidance ("Guidance") as guidance documents does not automatically exclude them from the New Jersey Administrative Procedures Act ("APA") and the factors set forth in Metromedia v. Division of Taxation, 97 N.J. 313, 331–32 (1984). As set forth in the New Jersey APA, "[a] regulatory guidance document that has not been adopted as a rule [. . .], shall not: (1) impose any new or additional requirements that are not included in the State or federal law or rule that the regulatory guidance document is intended to clarify or explain; or (2) be used by the State agency as a substitute

for the State or federal law or rule for enforcement purposes." N.J.S.A. 52:14B-3a(c).18 The NJDEP's arguments to the contrary are unavailing.

An administrative rule includes an "agency statement of general applicability and continuing effect that implements or interprets law or policy, or describes the organization, procedure or practice requirements of any agency." N.J.S.A. 52:14B-2. The EJMAP Tool and Guidance are critical components to implement the provisions of the Rules, as they designate the specific areas that are subject to, and require compliance with, the Rules' requirements.

Similar "guidance documents" posted on the NJDEP's website have been stricken by the Court as constituting de facto rulemaking in violation of the APA's notice and comment requirements. In re N.J.A.C. 7:1B-1.1 Et Seq., 431 N.J. Super. at 133 (App. Div. 2013) certif. denied, 216 N.J. 8 (2013). The N.J.A.C. 7:1B Court held that "these postings go beyond merely facilitating administrative implementation of the rules as claimed by DEP and actually, to some extent, announce new substantive requirements, necessitating compliance

18 ICC Amici's assertion that the public had an opportunity to comment on the EJMAP Tool and Guidance fare no better. ICCb28. This is a new argument that was not raised by the NJDEP and is improper. See e.g., Matter of Request to Modify Prison Sentences, 242 N.J. 357, 395–96 (2020). Moreover, it conflicts with NJDEP's position that these are guidance documents that did not need to undergo formal rulemaking.

with the APA." Ibid. "Formal rulemaking, [. . .], 'allows the agency to further the policy goals of legislation by developing coherent and rational codes of conduct 'so those concerned may know in advance all the rules of the game, so to speak, and may act with reasonable assurance.'"' Id. at 133-134 (internal citations omitted); see also In the Matter of Authorization for Freshwater Wetlands Statewide General Permit 6, 433 N.J. Super. 385 (App. Div. 2013).

The NJDEP asserts that the totality of Metromedia factors weighs in its favor. Specifically, the NJDEP asserts that the fourth factor weighs strongly against formal rulemaking because the EJMAP Tool and Guidance do not prescribe a "legal standard." Metromedia, 97 N.J. at 331–32. The NJDEP's argument that these are non-mandatory guidance documents contradict the EJ Law's requirement that the NJDEP establish the "rules of the game" and designate the EJ Law's applicability in certain areas. N.J.S.A. 13:1D-159 ("the department **shall** publish and maintain on its Internet website a list of overburdened communities in the State" and "[t]he department shall notify a municipality if any part of the municipality has been **designated** an overburdened community[.]") (emphasis added). As such, the NJDEP is responsible for designating the OBCs to implement the Rules and notify the regulated public of what is required, and the Legislature expressly stated that the provisions to implement the EJ Law must comply with the APA. N.J.S.A.

13:1D-161(a). "By elaborating upon and clarifying the very standards by which applicants will be held and the outcomes of their applications determined, these newly posted measures will have a substantial impact on the regulated community as well as the public in general. As such, they form integral, substantive components of the […] rules, subject to rulemaking in accordance with the APA." In re N.J.A.C. 7:1B-1.1 Et Seq., 431 N.J. Super. at 138.

As such, the EJMAP Tool and Guidance are critical components to the implementation of the EJ Law and constitute rulemaking pursuant to N.J.S.A. 13:1D-161(a). In addition, these documents must be stricken as they set forth the legal standards to the regulated public and meet the remaining Metromedia factors requiring formal rulemaking.

CONCLUSION

The Rules should be stricken as they (i) are ultra vires by exceeding the plain language and scope of the EJ Law; (ii) are unconstitutionally vague; (iii) are arbitrary and capricious; and (iv) rely on specific regulatory requirements necessary to implement the Rules that were not properly included in or otherwise made subject to formal rulemaking under New Jersey's Administrative Procedure Act. More specifically, the Rules should be stricken for the reasons summarized below.

First, the NJDEP's position that the EJ Law is intended to permit the regulation of zero-population census blocks adjacent to OBCs is in direct contradiction to the express terms of the EJ Law.

Second, the definitions of the terms "new facility," "existing facility," "expansion," and "change in use" are implemented solely to provide for loopholes to deny permits to long-existing facilities in violation of the EJ Law, and raise more questions than answers for the regulated public. The NJDEP also oversteps its role by the arbitrary exclusion of economic considerations of new facilities in determining whether they provide a "compelling public interest."

Third, the Rules are a "framework" and "overlay" of existing permitting schemes, and the NJDEP does not have the authority to assume the role of the Legislature to create LICT, which is inconsistent with existing air permitting laws created by the Legislature.

Fourth, the Rules expressly require compliance with local environmental justice requirements which is an unlawful delegation.

Fifth, the Rules' arbitrary GPOC violates the clear terms of the EJ Law and its purpose of creating a system where all communities in New Jersey equally share the burden of stressors that accompany the state's economic growth.

Finally, one of the Rules' most critical components, the EJMAP Tool and Guidance, clearly meet the legal standards requiring formal rulemaking and should be stricken for failing to comply with the New Jersey APA.

As set forth above, the NJDEP is unable to support the Rules' unlawful overextension of the clear regulatory parameters defined in the EJ Law, and the NJDEP must instead rely on post hoc, illusory fabrications to assert limitations of the Rules' scope that are not found anywhere in the Rules themselves. The NJDEP's drafting of such vague and overbroad rules is a clear attempt to provide for de facto permit denials of facilities in OBCs, and non-OBCs, in violation of the EJ Law's scope and purpose.

Respectfully submitted,
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