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This memorandum relates to the **MODEL STATUTE REQUIRING CUMULATIVE IMPACT ANALYSIS TO RENEW PERMIT OF COVERED FACILITY IN AN ENVIRONMENTAL JUSTICE AREA.**

Introduction

This model bill addresses the issue of ongoing pollution from existing facilities. Even as pollution control technology improves and regulatory standards become more stringent for new facilities, grandfathered approval for the operation of existing facilities is a common feature of environmental regulation. Because existing facilities are often exempted from new, heightened regulatory standards, significant polluters can continue operating and may be incentivized to operate for longer than they otherwise would have to avoid the high costs of new facility development.¹ In fact, an early study by the U.S. Environmental Protection Agency determined that approximately seventy percent of land-based hazardous waste treatment, storage, and disposal facilities did not meet the agency's then-current criteria for siting new facilities.²

As a result, the areas where polluting facilities are already located may not see the benefits of improved regulation.³ Existing polluting facilities are more likely to be located in low-income communities and communities of color,⁴ whose residents are more likely to suffer from cardiovascular disease, diabetes, and other medical conditions that leave them more susceptible to the negative health effects of pollution.⁵ Because existing facilities are often granted permission to operate under outdated, less stringent requirements, the pollution generated by these facilities can pose a greater threat to the health and well-being of environmental justice communities compared to new facilities proposed in the area.

Exposure to common pollutants has a number of serious negative health effects, including cancer, cardiovascular and respiratory disease, infertility, asthma, and neurological and

¹ Richard Revesz et al., Grandfathering Coal: Power Plant Regulation Under the Clean Air Act (Jan. 27, 2016), https://www.law.nyu.edu/sites/default/files/2016-ELI_Grandfathering.Coal...Power_.Plant_.Regulation.Under_the_CAA_.pdf.

² Michael B. Gerrard, Fear and Loathing in the Siting of Hazardous and Radioactive Waste Facilities: A Comprehensive Approach to a Misperceived Crisis, 68 Tul. L. Rev. 1047, 1099 (1994).

³ Heidi Gorovitz Robertson, If Your Grandfather Could Pollute, So Can You: Environmental "Grandfather Clauses" and Their Role in Environmental Inequality, 45 Catholic Univ. L. Rev. 131 (1995), <https://scholarship.law.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1601&context=lawreview> ("[G]randfather clauses make it difficult to reduce the risk presented by polluting facilities currently located in low-income minority communities.").

⁴ California Office of Environmental Health Hazard Assessment, Cumulative Impacts: Building a Scientific Foundation 7-10 (2010),

<https://oehha.ca.gov/media/downloads/calenviroscreen/report/cireport123110.pdf>.

⁵ Rachel Morello-Frosch et al., Understanding the Cumulative Impacts of Inequalities in Environmental Health: Implications for Policy, *Health Affairs* (May 2011), at 882, <https://www.healthaffairs.org/doi/10.1377/hlthaff.2011.0153>.

developmental disorders.⁶ The legacy of racism, income inequality, and marginalization exacerbates these effects. Limited access to essential services like affordable housing, quality healthcare, clean water, and reliable home heating and energy, combined with obstacles to social and economic mobility, increase a community's susceptibility to environmental harms and toxins.⁷ The presence of multiple sources of pollution in a given area can increase health risks,⁸ as cumulative impacts negatively affect the health and well-being of residents in ways that are not identifiable when examining the impacts of a single stressor or source of pollution.⁹ However, the pollution contributed by even a single source in isolation can have detrimental health effects for those who live, work, attend school, or recreate nearby.¹⁰

To ensure that polluting facilities do not continue to pollute overburdened communities without a significant regulatory check, this model bill imposes new permit renewal requirements for certain existing facilities operating in or near designated environmental justice areas, utilizing the cumulative impacts framework to assess the full scope of a facility's impact in the area.¹¹ By analyzing how a given facility interacts with other environmental stressors in the area and through consultation with affected communities, the bill ensures more thorough review of the environmental impacts of existing facilities and allows for more informed government decision-making about their continued operation.

Functions of the Bill

This bill creates new requirements for the continued operation of covered facilities located in or within close proximity to designated environmental justice areas and applies to a broad range of facilities that may contribute to environmental burdens in the surrounding area. The bill includes a placeholder for legislators to specify the radius within which facilities must comply with the bill's requirements. A minimum of one-quarter mile is suggested to account for facilities located slightly outside the boundaries of environmental justice areas, although legislators may wish to extend this distance based on the needs of their jurisdiction. In addition

⁶ California OEHHA, *supra*, at 7.

⁷ Equitable and Just National Climate Platform, September 2021, <https://www.weact.org/wp-content/uploads/2023/05/Defining-EJ-Community-for-Mandatory-Emissions-Reduction-Policy.pdf>.

⁸ California OEHHA, *supra*, at 7.

⁹ Morello-Frosch et al., *supra*, at 879.

¹⁰ See, e.g., Sarah Penney et al., Environmental Defense Fund, *Estimating the Health Impacts of Coal-Fired Power Plants Receiving International Financing* (2009).

¹¹ U.S. Environmental Protection Agency, *Cumulative Impacts Research: Recommendations for EPA's Office of Research and Development 2* (2022), https://www.epa.gov/system/files/documents/2022-09/Cumulative%20Impacts%20Research%20Final%20Report_FINAL-EPA%20600-R-22-014a.pdf (“Solving longstanding, recalcitrant environmental health problems, including health disparities exacerbated by racial and social injustices, requires an accurate and realistic assessment of the effects from the combined exposures to chemical and non-chemical stressors (i.e., cumulative impacts) that inform decision-making at all levels.”); Amy J. Dunn & George V. Alexeeff, *Beyond Risk Assessment: Principles for Assessing Community Impacts*, *Int. J. Toxicology* 78-87 (Jan.-Feb. 2010), <https://pubmed.ncbi.nlm.nih.gov/19959838/>.

to many types of waste management, treatment, disposal, and storage sites, as well as oil, gas, and mining operations, the bill targets facilities operating under several federal pollution control programs and their state equivalents. The state environmental protection agency¹² is also empowered to identify additional categories of sources of pollution through regulation that will be subject to the bill's renewal requirements, giving the agency flexibility as standards, technologies, and expertise change over time.

For facilities that operate pursuant to a state-issued permit that needs to be periodically renewed, the bill requires the state environmental protection agency to make specific findings about the continued operation of the facility before a renewed permit can be issued. This provision overrides existing laws that may allow for facilities to automatically renew their permits without any kind of administrative review. The bill also applies to facilities that operate under state-issued permits that do not require renewal. However, because there is no existing renewal process for these facilities, the bill creates a new impact management permit that they must acquire and renew regularly through the state environmental protection agency. Facilities that fall under this category must obtain an impact management permit within three years of the enactment of the law in order to continue operating, and must renew the permit at least once every five years.

The requirements to apply for permit renewal or a new impact management permit under this bill are the same. Applicants must comply with existing requirements for renewal under state law, but must also provide additional information on the operations of the covered facility, including information about regulatory violations or legal proceedings related to the facility's environmental compliance, reporting on the facility's discharge or emissions, and information about the compliance of other facilities owned by the applicant. Some facilities may operate under multiple state-issued permits, in which case they are only required to provide these application materials once every five years rather than at every renewal.

Before making a decision on a permit application under this bill, the agency is required to compile an existing burden report to understand the facility's contribution to cumulative impacts in the nearby environmental justice area. Like the radius for covered facilities discussed above, the bill contains a bracketed placeholder for the geographic scope of the existing burden report. A minimum radius of one-half to one mile is suggested for this section,¹³ though legislators may wish to extend this distance based on the needs of their jurisdiction. The agency's report must include information on existing levels of pollution and other covered facilities in the area, as well as places like schools, hospitals, and nursing homes, where vulnerable members of the community may gather. Some of this information can be costly to compile, so the bill allows the agency to impose a reasonable fee on permit applicants to cover the costs of assembling the existing burden report, among other things.

¹² The bill and this memo both use the generic "state environmental protection agency" to refer to the state agency tasked with overseeing environmental conservation, quality, and protection.

¹³ Jayajit Chakraborty et al., Disproportionate Proximity to Environmental Health Hazards: Methods, Models, and Measurement, *Am. J. Public Health* (Dec. 2011), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3222485/>.

When information on ambient air pollution, traffic, noise, and odor levels is available—as it may be in existing environmental impact statements or other materials related to the siting and operation of nearby facilities—the agency must include these data points in the report. However, because this information can be costly and difficult to compile, and may not be relevant for every permitting decision, the bill provides the agency with discretion to determine when additional data collection is necessary. If this information is not available but the agency finds that it is necessary to inform its permitting decision, it may require the applicant to compile the information.

The bill has several provisions meant to promote and encourage public participation in the permitting process. First, the agency is required to publish notice of all applications on its website within 14 days of the application's filing and make the application publicly available. Next, the agency is required to solicit public comments on both the permit application and the related existing burden report before it can make a decision on the application. Members of the public have the opportunity to request a public hearing, and the agency is required to conduct a hearing if it receives such a request from at least two members of the public for a facility located in a municipality of less than 20,000 residents, or five members of the public in larger municipalities. Because this bill applies to the permits of many facilities, the agency is not automatically required to host a public hearing on what may ultimately be an uncontested application. The agency is also granted discretion to combine its reports and public hearings for multiple facilities in close proximity to one another.

In making its decision on the permit application, the agency is required to consider its existing burden report and any comments received from the public. Comments received through the public participation process must be addressed in the agency's decision to approve or deny a permit renewal application. In order to issue or renew a permit under this bill, the agency must find either that the continued operation of the facility will only have a de minimis impact on the environmental justice area or that it is necessary for the public interest of the environmental justice area. In assessing whether the permit renewal is necessary for the public interest, the agency can take into account whether the benefits of the permit to the impacted community will outweigh the negative environmental impacts it generates. The agency may also consider the existence of a community benefit agreement as evidence that the facility is necessary for the public interest. However, it may also consider failure to abide by an existing community benefit agreement to be evidence that the facility's continued operation is not necessary for the public interest. This provision is designed to prevent the continued operation of burdensome facilities based on vague promises of potential benefits.

The bill also includes several provisions to reduce the pollution emitted by covered facilities. Applicants are required to provide a list of technologies and techniques that the facility is currently using or planning to use to reduce its environmental impact, as well as new pollution control technologies and techniques that are not currently in use at the facility but that may be able to reduce the pollution emitted by the facility. Upon the request of the agency or local residents, applicants may also be required to meet with the agency to discuss pollution reduction

strategies. These disclosures and meetings provide the agency with detailed information about potential avenues for improving the environmental impact of each permitted facility, enabling it to identify solutions tailored to the operations of individual facilities. Although applicants are not required to commit to specific reductions or the implementation of specific technologies, the agency must place reasonable and appropriate conditions on the permit in order to minimize the negative environmental impacts on the surrounding area, which could include a requirement that the applicant abide by the impact reduction plans described in its application. In addition to requiring the use of specific pollution control technologies as a permit condition, the agency should also consider conditions to improve the facility's engagement with affected communities, such as regular public meetings. In some cases, permit conditions can have constitutional implications, which are discussed in more detail below.

Environmental Justice Area Definition

This bill uses the term “environmental justice area” to designate areas that are known to experience or are likely to experience disproportionate environmental hazards, as well as communities that may face increased obstacles to participating in public decision-making processes.¹⁴ Under this bill, only facilities located in or within a specified distance of a designated environmental justice area are subject to the permit renewal requirements. The bill's definition of “environmental justice area” is therefore critical to ensuring that the benefits of the bill flow to the communities at greatest risk of carrying a disproportionate pollution burden.

To that end, the definition uses four criteria to identify qualifying areas: 1) areas that qualify based on a single demographic factor that is closely tied to increased risk or decreased public participation; 2) areas ranking highly on national indices of susceptibility to environmental pollution; 3) lands of federally recognized tribes; and 4) specially designated areas.

1. Demographics

First, an area may be designated as an environmental justice area based on the demographics of its residents, as determined by the most recent U.S. Census or American Community Survey. Communities with more low-income households, households with limited English proficiency, or limited formal education are included, as these demographics correspond

¹⁴ The language used in similar legislation can vary, but this bill uses the term “environmental justice area” rather than “overburdened” or “disadvantaged community” because it intends to capture communities that are most likely to be affected by cumulative impacts, therefore warranting additional attention in decision-making processes. It does not assume that all communities that meet these criteria are necessarily overburdened or disproportionately impacted by environmental stressors. Similarly, the word “area” is used in place of “community” to acknowledge that the boundaries used by the definition do not necessarily correspond with organic community boundaries and that multiple communities may overlap or intersect within a single qualifying area.

to increased vulnerability to environmental hazards¹⁵ or decreased ability to participate in public decision-making processes.¹⁶ Information on these demographics is widely available, regularly updated, and fairly high-resolution, making these neighborhood characteristics well-suited to use in statewide legislation, particularly in jurisdictions that do not have resources to conduct additional data collection.¹⁷

The demographic category also incorporates racial demographics¹⁸ based on the close correlation between race and exposure to environmental hazards.¹⁹ Racial demographics are a significant predictor of the distribution of environmental burdens because of the legacy of racial segregation and discrimination, and the “spatially concentrated disproportionate pollution burdens in communities of color” that increase their risk of exposure to environmental harms.²⁰ More information about this designation, including an analysis of the potential legal implications of including this factor, is included below in the section titled “Use of race in designation of environmental justice area.”

2. Susceptibility metrics

In addition to the single demographic metrics, the bill includes areas that have been designated as highly susceptible to environmental pollution by the United States Environmental Protection Agency’s demographic indices.²¹ While these indices rely on much of the same

¹⁵ Lori M. Hunter, *The Spatial Association Between U.S. Immigrant Residential Concentration and Environmental Hazards*, *Int. Migration Rev.* 460 (2000), <https://doi.org/10.2307/2675910>; California Office of Environmental Health Hazard Assessment, *Cumulative Impacts: Building a Scientific Foundation* 7 (2010), <https://oehha.ca.gov/media/downloads/calenviroscreen/report/cireport123110.pdf>.

¹⁶ Janet A. Phoenix, *Anti-Resilience Factors of Environmental Justice Communities*, in *Environmental Justice and Resiliency in an Age of Uncertainty* 72, 74 (2022) (“This has the potential to reduce the number of residents in environmental justice communities who are able to interpret what data exists documenting exposures, leaving communities more vulnerable. . . . Reports that are released for public comment may be written in technical language and/or at a high reading level or in language that cannot be understood by affected community members.”).

¹⁷ EPA, *Cumulative Impacts Research*, *supra*, at 31 (“Cumulative impact assessments to inform local and site-specific decisions often need environmental and socioeconomic data at high-resolution temporal and spatial scales, such as the census block or finer. The costs of monitoring equipment and the lack of data collection infrastructure make it challenging to collect reliable data at fine spatial and temporal scales.”).

¹⁸ Although the Census and American Community Survey do not currently include Middle Eastern or North African as a racial status option, it is included in the bill due to the U.S. EEOC’s recent listing of this status and in anticipation of its inclusion in future surveys.

¹⁹ Bullard, R. D., Mohai, P., Saha, R., & Wright, B., *Toxic Wastes and Race at Twenty 1987–2007: Grassroots Struggles to Dismantle Environmental rRacism in the United States* (2007); Anderton, D. L., Anderson, A. B., Oakes, J. M., & Fraser, M. R., *Environmental Equity: The Demographics of Dumping*, *Demography*, 31(2), 229–248 (1994).

²⁰ Equitable & Just National Climate Platform, *Approaches to Defining Environmental Justice Community for Mandatory Emissions Reduction Policy* (Sept. 2021), <https://www.weact.org/wp-content/uploads/2023/05/Defining-EJ-Community-for-Mandatory-Emissions-Reduction-Policy.pdf>.

²¹ U.S. Environmental Protection Agency, *EJSCREEN Technical Documentation 24-30* (2022), <https://www.epa.gov/system/files/documents/2023-01/EJScreen%20Technical%20Documentation%20October%202022.pdf>.

demographic data included in the demographic definition, a high overall score on these susceptibility metrics may help to identify additional communities that fall slightly below the demographic thresholds identified but that are nevertheless still at heightened risk of cumulative impacts. As discussed in the section below on the use of race in designating environmental justice areas, the United States Environmental Protection Agency EJSCREEN demographic index relies in part on racial demographics.

3. Tribal land

The designation of lands of federally recognized tribes as “environmental justice areas” serves two purposes. First, it recognizes that Indigenous communities bear a disproportionate share of pollution.²² Second, it recognizes the unique status and sovereignty of tribal nations by ensuring that they are included and adequately consulted in decisions impacting their land.

4. Agency approval

Lastly, the state environmental protection agency may designate additional areas as “environmental justice areas” if they are particularly vulnerable to environmental or public health hazards, have a history of disproportionate environmental burdens, or have a diminished capacity for public participation. This category gives the agency some discretion to identify additional areas that may benefit from the designation, and encourages flexibility in recognizing the input of community organizations, residents, and advocates who are closely connected to the issue of cumulative impacts.²³ By doing so, it gives communities an opportunity to identify themselves for further consideration and ensures that no overburdened community is categorically excluded from being designated an environmental justice area.

Additional Issues to Consider

Use of race in designation of environmental justice area:

This model bill utilizes racial demographics in its definition of “environmental justice area,” a term that is used to identify areas that are more likely to be burdened by environmental hazards or associated health problems. These demographics are a strong predictor of an area’s exposure to environmental hazards,²⁴ making them a particularly salient metric for this bill.²⁵ However, their inclusion in this definition may increase the risk of litigation under state or federal equal protection law, which could delay or completely prevent implementation of the bill.

²² Maggie Li et al., Air Pollution in American Indian Versus Non-American Indian Communities, 2000-2018, 112 American Journal of Public Health 615 (2022), <https://doi.org/10.2105/AJPH.2021.306650>.

²³ Kiana Courtney, Environmental Law & Policy Center, #DenyThePermit? A Call for Cumulative Impacts Legislation by Frontline Communities (Dec. 8, 2021), <https://elpc.org/blog/deny-the-permit-a-call-for-cumulative-impacts-legislation-by-frontline-communities>.

²⁴ Letter from Sacoby Wilson, Professor, University of Maryland, to White House Council on Environmental Quality (Apr. 8, 2022), available at https://downloads.regulations.gov/CEQ-2022-0002-0012/attachment_1.pdf.

²⁵ Both New Jersey and New York utilize race-based criteria for identifying impacted communities in environmental justice laws. *See* 13 NJ ST Ch. 1D-158; NY Enviro. Conserv. Law § 75-0111).

Federal courts in multiple states have recently halted federal programs that contain racial classifications on the grounds that these classifications violate the Constitution’s Equal Protection Clause.²⁶

While the use of race-conscious metrics carries a risk of litigation, legislators might reduce this risk by ensuring that the use of race in their bill is narrowly tailored to achieve a compelling government interest, such as remedying past discrimination.²⁷ The Supreme Court's recent decision in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*²⁸ affirmed this standard for the consideration of race in government decision-making. Legislators wishing to further minimize the risk of an equal protection challenge can modify the definition of “environmental justice area” to eliminate the use of racial demographics. To do so, provision [2.5(a)(ii)] should be removed, as well as the reference to “United States Environmental Protection Agency EJSCREEN demographic index” in [2.5(b)]. Legislators should also consider the extent to which state constitutional law may limit the use of race.

Conditions on permit approval

[Subsection 6.4] of the model law requires the state environmental protection agency to prescribe reasonable and appropriate conditions and safeguards on the permitted facility to minimize negative environmental impacts in the surrounding area. Federal constitutional law places some limits on the ability of permitting bodies to place restrictive conditions on permit approvals.²⁹ While state authorities “may choose whether and how a permit applicant is required to mitigate the impacts of a proposed development,” the Constitution requires that “an essential nexus and rough proportionality” exists between the conditions imposed and the government’s interest in mitigating the effects of the development.³⁰ This enables regulators to impose permit conditions that minimize the impacts of a polluting facility, but prohibits the imposition of conditions that are not closely tied to this purpose, which may be seen by courts as improperly restricting the property rights of the permit applicant. As a result, conditions placed on permit approvals should be reasonably designed to address the nature and extent of the impacts that the permitted facility will have on surrounding communities.

This bill is written to comply with these federal constitutional limits, but modifications may be necessary to comply with any more restrictive state constitutional doctrines.

Jurisdictions Implementing Similar Legislation

²⁶ See, e.g., *Vitolo v. Guzman*, 999 F.3d 353, 360 (6th Cir., 2021) (enjoining a program that prioritized minority-owned businesses, among others, for coronavirus relief grants); *Faust v. Vilsack*, 519 F.Supp.3d 470 (E.D. Wis. 2021) (enjoining a program that provided loan relief to “socially disadvantaged” farmers, a category defined in part based on race).

²⁷ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995).

²⁸ 600 U.S. ____ (2023).

²⁹ *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

³⁰ *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 606 (2013).

This model law draws on the cumulative impacts legislation passed recently in New Jersey and New York. The New York law, passed in 2022 and amended in 2023,³¹ requires applicants for certain permit renewals to submit an existing burden report when their facility may contribute to a disproportionate pollution burden in a disadvantaged community.³² The New York Department of Environmental Conservation must consider this report in its permitting decision, and cannot issue the renewal if it will significantly increase the existing burden borne by the community. New York's cumulative impacts law is still a recent development, so it remains to be seen how it will be implemented and enforced. The passage of New York's environmental justice legislation was the result of the efforts of numerous organizations across the state, co-led by WE ACT for Environmental Justice, South Bronx Unite, and the JustGreen Partnership, along with Clean and Healthy New York, New York Lawyers for the Public Interest, Riverkeeper, Sierra Club Atlantic Chapter, New York State American Academy of Pediatrics, Environmental Advocates NY, Moms for a Nontoxic New York, Earthjustice, 350 Brooklyn/City Action, and others.

In September 2020, after years of research and activism, environmental justice advocates in New Jersey led the passage of the nation's first comprehensive environmental justice and cumulative impacts law.³³ The following groups, among others, were leading voices behind the legislation: The Ironbound Community Corporation, New Jersey Environmental Justice Alliance, Southward, Environmental Alliance, and Clean Water Action New Jersey.

Because New Jersey's cumulative impacts law was passed in 2020, the state is further along in its implementation and the development of supporting regulations. While the New Jersey law applies to a narrower subset of permit renewals, it also requires the renewal applicant to submit an environmental justice impact statement assessing the environmental and public health stressors that the facility places on the surrounding community.³⁴ Using this information, the agency is empowered to place conditions on the permit renewal to mitigate the environmental impacts of the facility. The New Jersey Department of Environmental Protection recently finalized regulations under the law.³⁵ Both the proposed rule and the comments of local environmental justice advocacy groups³⁶ helped to shape this model law, particularly the provisions regarding community notification and participation in the permitting process.

³¹ 2022 Sess. Law News of N.Y. Ch. 840 (S. 8830); 2023 Sess. Law News of N.Y. Ch. 49 (A. 1286).

³² N.Y. Env'tl. Conserv. Law § 70-0118.

³³ Environmental Law Monitor, New Jersey Governor Announces Nation's First Environmental Justice Regulations (Apr. 21, 2023), <https://environmentallawmonitor.com/regulations/new-jersey-governor-announces-nations-first-environmental-justice-regulations/>.

³⁴ N.J. Pub. L. 2020, Ch. 92, <https://dep.nj.gov/wp-content/uploads/ej/docs/ej-law.pdf>.

³⁵ N.J.A.C. 7:1C; N.J. Dept. Enviro. Protect., Governor Murphy Announces Nation's First Environmental Justice Rules to Reduce Pollution in Vulnerable Communities (Apr. 17, 2023), <https://www.nj.gov/governor/news/news/562023/approved/20230417a.shtml>.

³⁶ Comments Received on Rulemaking for Environmental Justice Law, <https://dep.nj.gov/wp-content/uploads/ej/docs/rule-comments.pdf>.