

This document was prepared by WE ACT for Environmental Justice and the Sabin Center for Climate Change Law separate from the LPDD Project. With the permission of these organizations, it is being included here as part of the implementation project of Legal Pathways to Deep Decarbonization (Michael B. Gerrard and John C. Dernbach, eds. Environmental Law Institute [2019]) (LPDD). For background information on the LPDD project, see <https://lpdd.org>. For more information on the collaboration between WE ACT for Environmental Justice and the Sabin Center for Climate Change Law, see <http://DismantlingInjustice.org>.

MODEL STATUTE REQUIRING CUMULATIVE IMPACT ANALYSIS TO RENEW PERMIT OF COVERED FACILITY IN AN ENVIRONMENTAL JUSTICE AREA

Bill No. [Number]

Sponsored by [Sponsor]

AN ACT OF THE
[LEGISLATIVE BODY] OF
[State]

Section 1. Legislative findings.

[Legislature] finds the following:

1. All [State] residents deserve to live, work, and recreate in a clean and healthy environment free from the burdens of environmental pollution and degradation;
2. Historically, [State]’s communities of color, low-income communities, and other marginalized groups have been subject to disproportionate levels of air, water, and soil pollution, while also being disproportionately impacted by other environmental and public health stressors;
3. As a result, residents of [State]’s overburdened communities suffer from increased adverse health effects, including asthma, cancer, elevated blood lead levels, respiratory and cardiovascular disease, and developmental disorders. Because children are particularly vulnerable to the adverse health effects caused by pollution, the cumulative environmental and public health impacts of polluting facilities impede the growth, stability, and long-term well-being of overburdened communities and their residents;
4. These disproportionate burdens are in part the result of many years of policy decisions at all levels of government, which continue to pose a threat to the health, well-being, and success of [State]’s most vulnerable residents;
5. No community should bear a disproportionate share of these adverse environmental or public health impacts;
6. The potential for environmental, climate, and public health threats to compound one another and disproportionately impact vulnerable communities requires increased consideration and engagement of impacted communities in decision-making processes;
7. It is in the public interest to limit the future development or expansion of polluting facilities and infrastructure in overburdened communities;
8. The development, expansion, or continued operation of polluting facilities and infrastructure in overburdened communities should not be permitted without careful review taking into consideration the potential harms of the development for the immediate community and vulnerable populations;

9. The renewal of state-issued permits is an opportunity to periodically assess a facility's contribution to cumulative impacts within the surrounding community; and

10. By ending automatic permit renewals and incorporating cumulative impact analysis into the permit renewal process, [State] can ensure that existing facilities limit the harms they cause in overburdened communities to the greatest extent possible.

Section 2. Definitions

1. Agency. The term “agency” means the [state environmental protection agency].
2. Applicant facility. The term “applicant facility” means the covered facility for which a permit or permit renewal is being sought under this act.
3. Community exposure points. The term “community exposure points” means locations where vulnerable members of the public, including children, the elderly, those with underlying health conditions, and those who may lack access to healthcare, are likely to spend time. These locations include but are not limited to schools, day care centers, nursing homes, hospitals, health clinics, detention centers, homeless shelters, places of religious worship, parks, playgrounds, and community centers.
4. Direct cumulative impacts. The term “direct cumulative impacts” means environmental hazards and other chemical and non-chemical stressors that have the potential to negatively impact human health, well-being, and quality of life in their immediate area.
5. Environmental justice area. The term “environmental justice area” means:
 - a. Any contiguous area made up of one or more census block groups, as determined in accordance with the most recent United States Census or American Community Survey, in which:
 - i. At least 35 percent of the households have an income less than or equal to two times the federal poverty level;
 - ii. At least 40 percent of individuals list their racial status Black or African American; American Indian or Alaska Native; Asian; Native Hawaiian or Other Pacific Islander; or Middle Eastern or North African, or list their ethnicity as Hispanic or Latino;
 - iii. At least 40 percent of the households have limited English proficiency; or
 - iv. At least 35 percent of the people over the age of 25 have not earned a high school diploma;
 - b. Any contiguous area made up of one or more census block groups which fall at or above the 90th percentile for susceptibility to environmental pollution as determined in accordance with the United States Environmental Protection Agency EJSCREEN demographic index or United States Environmental Protection Agency EJSCREEN supplemental demographic index;
 - c. Any area within the lands of a federally recognized Tribe; and
 - d. Any other area identified or approved by [State environmental protection agency] as having a history of environmental disparities, vulnerability to environmental degradation, disproportionate health impacts, or lack of public participation.
6. Lands of a federally recognized Tribe. The term “lands of a federally recognized Tribe” means any land area designated as an American Indian land area under the United States Bureau of Indian Affairs Land Area Representation.

7. Permit. The term “permit” shall mean any permit, license, or registration issued by [State] authorizing the operation of or establishing the regulatory and management requirements for a covered facility, excluding remediation permits.
8. Covered facility. The term “covered facility” means any of the following actual or potential sources of pollution:
 - a. solid waste management or transfer facilities;
 - b. recycling facilities receiving more than 5 tons per day of recyclable materials based on a weekly average, excluding take back sites at a retailer or wholesaler collecting recyclables similar to those sold or distributed by the retailer or wholesaler;
 - c. waste-to-energy or incineration facilities, including medical waste incinerators;
 - d. sludge processing facilities, combustors, or incinerators;
 - e. landfills for disposal of waste, including but not limited to landfills that accept ash, solid waste, sewage sludge, or debris from construction or demolition;
 - f. facilities for the underground injection of waste;
 - g. facilities handling, transferring, storing, managing, or disposing of radioactive waste;
 - h. wastewater treatment plants;
 - i. other waste processing or storage facilities handling more than 20 cubic yards of waste per day based on a weekly average;
 - j. wells for the extraction of oil or natural gas;
 - k. mines for the extraction of minerals, including but not limited to coal, sand, gravel, and hard rock minerals;
 - l. petroleum or chemical manufacturing, treatment, or disposal facilities and petroleum or chemical storage facilities operating pursuant to a state or federal storage permit;
 - m. facilities operating pursuant to a permit under Title V of the Clean Air Act;
 - n. facilities operating pursuant to a National Pollutant Discharge Elimination System permit or state equivalent;
 - o. treatment, storage, or disposal facilities operating pursuant to a Resource Conservation and Recovery Act permit or state equivalent;
 - p. large quantity generators of hazardous waste that are subject to the reporting requirements under 40 C.F.R. § 262.41;
 - q. facilities subject to the reporting requirements under the Emergency Planning and Community Right-to-Know Act;
 - r. sites included on the National Priorities List under the Comprehensive Environmental Response, Compensation, and Liability Act or the [State Superfund list]; and
 - s. any other category of sources of significant air, water, soil, or other pollution that the agency identifies through regulation or guidance as actually or potentially contributing to direct cumulative impacts in [State].

Section 3. Permit renewal requirements.

1. This act shall apply to any covered facility operating in or within [XX mile/miles] of any environmental justice area.
2. Notwithstanding any other provision of law that allows for automatic permit renewal, for any covered facility operating pursuant to a permit issued by [State] that requires renewal, no renewal

shall be granted unless the requirements of [Section 4] have been satisfied and the agency has made the determinations required under [subsection 6.3].

3. Any covered facility that (i) operates pursuant to a permit issued by [State] that does not require renewal and (ii) is not otherwise covered by [subsection 3.2] shall not operate beyond three years following the enactment of this act without a valid impact management permit issued by the [state environmental protection agency]. The agency shall not issue or renew an impact management permit unless the requirements of [Section 4] have been satisfied and the agency has made the determinations required under [subsection 6.3]. An impact management permit shall be valid for a period of no more than five years from the date of issuance.
4. In the event that the covered facility has complied with all requirements under this section and [Section 4] but the agency is unable to issue a decision on the facility's application for (i) permit renewal before the expiration of the facility's permit or (ii) the issuance of an impact management permit within three years of the enactment of this act, the facility shall be permitted to continue operating until the agency issues its decision. The agency shall maintain on its website a current list of all facilities operating pursuant to this subsection along with an explanation of the delay in processing each facility's application. Nothing in this section shall preclude any existing right of action.

Section 4. Permit application.

1. In addition to any materials required for permit renewal under applicable [State] laws, rules, regulations, or guidance, applications for permit renewal under [subsection 3.2] or an impact management permit under [subsection 3.3] must include the following:
 - a. A list of all governmental permits held by the facility, whether issued by the [state environmental agency] or any other federal, state or municipal agency;
 - b. Copies of any notices of violation, complaints or petitions in any civil or criminal proceedings, consent agreements or orders, or other documents evidencing legal proceedings concerning the facility's environmental compliance or noncompliance;
 - c. Copies of all discharge or emission monitoring reports and reports by government inspectors;
 - d. A description of any pollution control devices in use at the facility or other measures they or others are actively taking or planning to take to reduce the facility's environmental impact;
 - e. A list and brief description of any new pollution control technologies and techniques that have become available since the facility's last permit renewal or application that could reduce the pollution emitted by the facility but that are not currently in use at the facility;
 - f. A list of all other covered facilities located within [State] that are owned or operated by the applicant or an entity controlled by the applicant. For each covered facility listed, the applicant shall provide evidence of the covered facility's compliance with all applicable legal requirements; and
 - g. Any additional information as required by the agency to determine the covered facility's contribution to direct cumulative impacts in surrounding environmental justice areas.
2. In addition to any other fee authorized by law, the agency shall set a fee schedule and shall assess each permit applicant a reasonable fee to cover the agency's costs associated with the implementation of this act, including costs to compile the existing burden report required under

[subsection 5.1] and to provide technical assistance to permit applicants and impacted communities as needed to comply with this act. The agency's fee schedule shall include procedures for allocating the costs of compiling the existing burden report among multiple applicants in the event that a combined report is warranted under [subsection 5.1]. The agency shall promulgate rules to establish procedures and specifications to guide the provision of technical assistance under this subsection.

3. Any covered facility that operates pursuant to more than one permit issued by [State] shall be required to comply with the provisions of this act only once every five years. For any covered facility that has submitted an application under this Section in the last five years, additional applications required by [Section 3] may include a brief statement of recent compliance with this section in lieu of the materials required under [subsection 4.1].
4. After the filing of the application under this section and upon request of the agency or any resident of the municipality in which the covered facility is located, the applicant shall meet with the agency to discuss possible methods to reduce the environmental impact of the facility.
5. The agency shall publish notice of the filing of any application under this section on its website within 14 days of the filing date and shall include such notice in any bulletin it issues concerning permit activity. All applications under this section shall be available for public inspection and shall be available under [State's public information law].

Section 5. Permit determination and issuance.

1. Before issuing or renewing any permit covered by [Section 3], the agency shall prepare an existing burden report to assess the extent to which the covered facility currently contributes and could continue to contribute to direct cumulative impacts in surrounding environmental justice areas if the permit is issued or renewed. The agency, at its discretion, may prepare a single existing burden report for multiple covered facilities seeking permit renewal or issuance under [Section 4]. The existing burden report shall include but not be limited to the following information about the applicant facility and any surrounding environmental justice areas that may be impacted by its continued operation:
 - a. A list and map of all other covered facilities within [XX mile/miles] of the applicant facility;
 - i. The agency may exclude any covered facility upon determining that the pollution generated by the facility is de minimis.
 - b. A list and map of community exposure points located within [XX mile/miles] of the applicant facility;
 - c. Any potential routes of human exposure to pollution for the covered facilities identified under [subsection 5.1(a)];
 - d. Sources of exposure or potential exposure to lead through the air, water, or soil;
 - e. Sources of exposure or potential exposure to contaminated drinking water supplies;
 - f. Any source of pollution covered by this section that no longer exists but that has left residual pollution that has spread beyond its site;
 - g. The potential or documented public health effects of the foregoing pollution sources; and
 - h. A description of the existing and potential benefits to surrounding environmental justice areas of the covered facility's continued operation.

- c. At least 30 days prior to each public meeting, the agency shall provide [notice] to the public of the upcoming meeting on its website, through social media, in at least one newspaper of general circulation, and by posting a sign at the site of the covered facility. All notices must be provided in English as well as any language other than English that is spoken by more than five percent of the residents in the zip code where the covered facility is located, and must include instructions for requesting interpretation or disability accommodation at the public meeting. The agency shall also provide notice of the upcoming meeting in at least one additional newspaper written in the language other than English that is most commonly spoken in the zip code where the covered facility is located, unless no such newspaper is distributed in the county where the covered facility is located.
- d. The input shared through this process shall be considered by the agency and addressed in the agency's permit decision under [section 6].

Section 6. Permit determination.

1. When considering an application under this act, the agency shall consider the existing burden report and any comments received during the public comment period under [Section 5]. The input received during the public comment period must be addressed on the agency's website in a document accompanying the agency's determination to approve or deny the permit renewal application. This document shall also include a list of any conditions or safeguards attached to the approval of a permit renewal under [subsection 6.4].
2. The agency shall not issue a decision on an application until at least 20 days after the end of the public comment period.
3. Notwithstanding any other provision of law or regulation to the contrary, the agency shall not issue or renew any permit under this act unless it determines that:
 - a. The permit application complies with the permit application requirements of [Section 4];
 - b. The applicant has demonstrated that all other facilities located in [State] that are owned or operated by the applicant or any entity controlled by the applicant are in compliance, or on a schedule for compliance, with all applicable laws and the requirements of any permit issued by the U.S. Environmental Protection Agency, [state environmental protection agency], or any municipal environmental protection agency; and
 - c. Either:
 - i. The covered facility will make no more than a de minimis contribution to direct cumulative impacts within an environmental justice area; or
 - ii. The covered facility is necessary for the public interest of the environmental justice area and no suitable alternative site exists. In determining whether a covered facility is necessary for the public interest, the promise of one or more benefits to the environmental justice area shall not automatically outweigh the burden of pollution generated by the covered facility, and must be considered in light of the full scope of the area's needs, including the need to be free of undue environmental and public health burdens. The existence of a community benefit agreement may be considered evidence that the facility's continued operation is necessary for the public interest, while failure to abide by an existing community

benefit agreement may be considered evidence that the facility's continued operation is not necessary for the public interest.

4. When approving a permit pursuant to [subsection 6.3(c)(ii)], the agency shall prescribe reasonable and appropriate conditions or safeguards to protect public health and minimize the cumulative impacts of any covered facility permitted under this Section, which may include but are not limited to monitoring and reporting requirements, emissions limitations, mitigation measures, and community engagement plans.
5. In addition to any regulations required under other sections of this act, the agency shall adopt rules, regulations, and guidance to implement the provisions of this act and shall issue technical guidance for compliance with this act, which the department shall publish on its website. However, the absence of such rules or guidance shall not delay the effective date of the requirements of this act, impair the obligations established under this law, or limit the ability of the agency to enforce its provisions.