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Anton & Sen. Lockman & Sen. Townsend
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HOUSE OF REPRESENTATIVES
151st GENERAL ASSEMBLY

HOUSE BILL NO. 466

AN ACT TO AMEND TITLE 7 OF THE DELAWARE CODE RELATING TO ENVIRONMENTAL PERMITS IN
OVERBURDENED COMMUNITIES.

1 WHEREAS, human health is directly impacted by the environment, including environmental exposures and
2 contaminants in air, soil, and water; and

3 WHEREAS, Delaware's Black, Latinx, Indigenous, people of color and low-income communities have
4 historically been located in areas of the State with higher density of contaminated sites and exposure to environmental
5 pollutants compared to other communities with the accompanying potential for increased negative environmental,
6 economic, and public health impacts; and

7 WHEREAS, the current State environmental permitting model which only considers emissions from facilities in
8 isolation is outmoded and inadvertently perpetuates environmental racism and injustice by ignoring cumulative impacts
9 which place a disproportionate burden on Black, Latinx, Indigenous, people of color and low-income communities; and

10 WHEREAS, numerous studies have linked environmental toxins to poor health outcomes, including the Centers
11 for Disease Control and Prevention (CDC) and other federal agencies documenting the prevalence of increasing childhood
12 asthma linked to poor air quality, with a far higher prevalence in Black and Latinx communities; and

13 WHEREAS, 90% of Delaware's natural waterways are polluted with excess contaminants and the availability of
14 clean drinking water depends upon geographic location, quality of monitoring, and access to regulated water systems; and

15 WHEREAS, the State of Delaware is committed to promoting the protection of human health and the
16 environment, empowerment via public involvement, and the dissemination of relevant information to all Delawareans,
17 particularly Black, Latinx, Indigenous, people of color and low-income communities; and

18 WHEREAS, the State of Delaware is committed to ensuring that Black, Latinx, Indigenous, people of color and
19 low-income communities are afforded equitable treatment and meaningful involvement in decision-making regardless of
20 race, color, age, gender, gender identity, sexual orientation, ethnicity, native language, religion, or income; and

21 WHEREAS, the State of Delaware is committed to ensuring that all of its citizens receive equal protection under
22 the law, enjoy a healthy environment and are given equitable opportunities to live free of contaminants and pollutants; and

WHEREAS, under Title VI of the Civil Rights Act of 1964 state agencies that receive EPA funding may not discriminate in regard to environmental permitting and enforcement.

NOW, THEREFORE:

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE:

Section 1. Amend Title 7 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline and by creating a new chapter as follows:

Chapter 60A. Environmental Permits in Overburdened Communities.

§ 6001A. Title.

This chapter shall be known as the “Healthy Communities and Environmental Justice Act”.

§ 6002A. Purpose.

The General Assembly finds that historically certain facilities have been located in low-income communities creating higher exposure to environmental pollutants and cumulative health risks. Therefore, it is the intent of the General Assembly that new and expanded facilities, and permit renewals in existing facilities, be assessed for potential negative health impacts on residents and further that if a new facility or expansion or renewal of an existing facility could result in negative health impacts, the Department has the authority to deny the permit or require modifications prior to approval.

§ 6003A. Definitions.

For purposes of this chapter the following definitions shall apply:

(a) “Cumulative impacts” means any exposure, public health, or environmental risk occurring in an overburdened community, from any environmental pollution emitted or released routinely, accidentally, or otherwise, into the land, water or air from any point or nonpoint sources, including any major source of air pollution as defined by the Clean Air Act, 42 U.S.C §7401 et. seq.; the Clean Water Act, 33 U.S.C. § 1251 et. seq.; the Safe Drinking Water Act, 42 U.S.C. §300f; the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §9601; Toxics Release Inventory, 42 U.S.C. §8921 and §11023; the Delaware Extremely Hazardous Substances Risk Management Act, Chapter 77, Title 7; and the Delaware Hazardous Substances Cleanup Act, Chapter 91, Title 7, and assessed based on the past, present, and reasonably foreseeable emissions and discharges affecting an overburdened community.

(b) “Department” means the Department of Natural Resources and Environmental Control.

(c) “Environmental justice impact report” means an assessment of a proposed new facility, expansion of an existing facility, or existing permit renewal, of any cumulative impacts on an overburdened community, including any adverse environmental effects that cannot be mitigated should the permit be granted and public health impact on the overburdened community where the facility is either located or proposed.

(d) “Facility” includes the following categories of commercial or industrial businesses:

(1) Manufacturers of animal food, meat, seafood, tobacco, manufactured homes, chemicals, pharmaceuticals, petroleum, cement, asphalt, ready-mix concrete, primary metal, nonmetallic mineral products, ammunition, or transportation equipment.

(2) Pulp, paper, paperboard and sawmills.

(3) Rail or water freight docks.

(4) Landfill, transfer station, resource recovery, scrap metal, recycle centers, or compost operator.

(5) Sewage treatment center, animal waste management or processing operation, or sludge processor.

(6) Large, concentrated animal feeding operations, as defined by the size threshold of the federal EPA definition, regardless of their discharge status.

(7) Energy generator or medical waste incinerator, except a medical waste incinerator attendant to a hospital or university intended to process self-generated medical waste.

(8) Commercial or industrial businesses not contained in (d)(1) through (d)(7) that currently contribute or upon permit approval would contribute to the cumulative pollution in an overburdened community, as identified by the Department in conjunction with the Environmental Justice Board, under §6006A of this title.

(e) “Governing body” means a city or town council in an incorporated municipality or the county government in an unincorporated area.

(f) “Overburdened community” means any census block group, as determined in accordance with the most recent United States Census, in which one or more of the following applies:

(1) 35% or more of the residents are below 185% of the federal poverty level.

(2) At least 25% or more of the residents identify as minority, or as members of state or federally recognized tribal communities, or as immigrants to the United States, as defined by the United States Census Bureau.

(3) 25% or more of the households have limited English proficiency as defined by the United State Census Bureau.

(4) Geographic locations that potentially experience harms and risks as determined by the Environmental Justice Board.

(g) “Permit” means any permit, registration, or license, issued by the Department to a facility, establishing the regulatory and management requirements for any regulated activity authorized under state and federal law. “Permit” does not include any authorization or approval necessary to perform a remediation, as defined in this title, or authorization or approval for minor modifications to a permit for activities or improvements that do not increase emissions.

(h) “Secretary” means the Secretary of the Department of Natural Resources and Environmental Control, or a duly authorized designee provided any such delegation of authority is consistent with Chapter 80 of Title 29.

§ 6004A. List of Overburdened Communities.

The Department, in conjunction with the Environmental Justice Board, shall establish and maintain a list of overburdened communities and shall update the list of overburdened communities at least every 2 years. The list of overburdened communities shall be published on the Department’s website. The Department shall notify a municipality if any part of the municipality meets the definition of an overburdened community.

§ 6005A. Environmental Justice Impact Report.

(a) No permit for a new facility, expansion of an existing facility, or the renewal of an existing facility, located in whole or in part in an overburdened community, may be granted unless the permit applicant submits an environmental justice impact report to the Department.

(b) The environmental justice impact report must be submitted to the Department, and the governing body overseeing where the facility will be located, at least 60 days prior to the required public hearing on the permit. The Department shall, upon its receipt, publish the environmental justice impact report on the Department’s website and provide it to the Environmental Justice Board.

(c) The use of emission off-sets generated by emission reduction credits, as defined in this title, are not permitted as credits in overburdened communities.

§ 6006A. Environmental Justice Board.

(a) The Environmental Justice Board (“Board”) is established to make recommendations to the Department on the following:

(1) Whether the Department should grant, deny, or modify a facility’s permit application. The Board will make its recommendation to the Department based upon its review of the environmental justice impact report submitted by the facility and any public hearing.

(2) The criteria used by the Department to define overburdened communities under § 6003A of this title.

(3) The list of overburdened communities established under §6004A of this title.

(4) The metrics used by the Department to determine whether an application for a permit for a new facility, expansion of an existing facility, or renewal of an existing permit requires an environmental justice report and public hearing.

(5) Whether the list of “facilities”, under §6003A(d) of this title, needs to be modified.

(6) Fulfilling the stated purpose of this chapter, as set forth in §6002A of this title, including identifying sources of pollution in overburdened communities.

(7) Creating or revising policies and regulations to implement and enforce this chapter.

(8) Investments to mitigate environmental impact.

(9) Develop criteria for inclusion of concentrated animal feeding operations for purposes of this chapter not currently regulated by the Clean Air Act, 42 U.S.C. §7401 et. seq.; the Clean Water Act, 33 U.S.C. §1251 et. seq.; the Safe Drinking Water Act, 42 U.S.C. §300f; the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §9601; Toxics Release Inventory, 42 U.S.C. §8921 and §11023; the Delaware Extremely Hazardous Substances Risk Management Act, Chapter 77 of this title, and the Delaware Hazardous Substances Cleanup Act, Chapter 91 of this title.

(b) The Board will be composed of 9 members, as follows:

(1) Three members, appointed by the Speaker of the House, all of whom shall reside in an overburdened community as defined in §6003A of this title.

(2) Three members, appointed by the President Pro Tempore of the Senate, all of whom shall reside in an overburdened community as defined in §6003A of this title.

(3) Three members from the public or private sector, appointed by the Department, at least 1 of whom has expertise in public health.

(4) The Board may invite non-voting ex-officio members at its sole discretion.

(c) Of the initial members, 3 must be appointed for a one-year term, 3 must be appointed for a two-year term, and 3 must be appointed for a four-year term. Thereafter, all members shall serve four-year terms.

(d) A majority of the voting members of the Board constitutes a quorum. A vacant position is not counted for quorum purposes.

(e) The approval of a majority of the voting members at a meeting with quorum is required for the Board to take official action.

(f) The Board shall select 1 member to serve as Chair for a term to be determined by the Board.

(g) The Board shall meet at the call of the Chair, or as provided by by-laws adopted by the Board, but must meet at least twice a year.

(h) The Board may adopt rules and bylaws as necessary for its operation.

(i) For administrative purposes the Board is placed within the Department and the Department shall provide staff support for the Board.

§ 6007A. Public hearings and permits.

(a) A public hearing, before the Environmental Justice Board, must be held for any final permit application that requires an environmental justice impact report.

(1) The Secretary shall advertise the public hearing in at least 2 newspapers circulating within the overburdened community and 1 newspaper in the predominate non-English language spoken in the overburdened community, a minimum of 30 days prior to the public hearing.

(2) A minimum of 30 days prior to the scheduled public hearing a copy of the notice of public hearing must be sent to the governing body overseeing where the facility or proposed facility is located. The governing body shall be invited to participate in the public hearing.

(3) The Department shall post the newspaper advertisement on its website and social media accounts in both English and the predominate non-English language. The notice of the public hearing must provide the date, time, and location of the public hearing, a description of the proposed new or expanded facility or existing permit, as applicable, a map indicating the location of the facility, a brief summary of the environmental justice impact report, information on how an interested person may review a copy of the complete environmental justice impact report, an address for the submission of written comments, and any other information deemed appropriate by the Department. The applicant is responsible for the cost of any such advertisements and notices, made by the Department, as required in this subsection.

(4) The Environmental Justice Board must hold the public hearing at a site located in the overburdened community.

(c) If a permit applicant is applying for more than 1 permit for a proposed new or expanded facility the permit applicant may submit 1 report and attend 1 hearing to address all of its permit applications, unless the Environmental Justice Board determines, in its discretion, that more than 1 public hearing is necessary due to the complexity of the permit application necessary for the proposed new or expanded facility.

(d) At the hearing the permit applicant must provide clear, accurate, and complete information about the proposed new or expanded facility, or existing permit, as applicable, and the potential cumulative impacts associated with the new or expanded or existing facility. The public hearing must offer an opportunity for participation, either in person or remotely, by the Environmental Justice Board, members of the public, residents of the overburdened community, and representatives of the overburdened community. Both written and oral public comment may be permitted at the hearing. The hearing will be recorded, and a transcript prepared, both at the applicant's expense. The transcript, along with any written comments, must be provided by the applicant, to both the Environmental Justice Board and the Department, within 10 days after the

172 public hearing. The Department will make a copy of the public hearing transcript available online and to any member of the
173 public upon request.

174 (e) The Environmental Justice Board shall make a recommendation to the Department within 2 weeks of receiving
175 the public hearing transcript, to either grant, deny, or modify a permit based upon its review of the environmental justice
176 impact report and the public hearing record.

177 (f) The Department may not issue a decision on a permit application for a new facility, expansion of an existing
178 facility, or renewal of an existing facility's permit, when the proposed or existing facility is located, in whole or in part, in
179 an overburdened community, until it has received and reviewed the recommendation of the Environmental Justice Board
180 and the full public hearing record.

181 (g) The Secretary, when evaluating an application for a permit that requires an environmental justice impact
182 report, shall assess the recommendation of the Environmental Justice Board, community support for the facility, as
183 demonstrated at the public hearing, as well as communications in support or opposition to the facility. The Secretary must
184 consider community support, or the lack thereof, in the decision to grant or deny a permit.

185 (h) The Secretary shall deny a permit application for a new facility, or the expansion of an existing facility, or
186 apply conditions to the renewal of an existing facility's permit, located in an overburdened community, upon a finding that
187 the approval of the permit would, together with existing conditions, including conditions for permitted activities, cause or
188 contribute to adverse cumulative impact in the overburdened community or constitute an unreasonable risk to the health of
189 the residents of the overburdened community or to the environment in that community. The Department may grant a permit
190 that imposes conditions on the construction and operation of the facility to protect the public health of residents located in
191 an overburdened community.

192 (i) Should the Secretary issue a permit decision that is contrary to the recommendation of the Environmental
193 Justice Board, the Secretary shall state, in writing, the reasons for the decision and what additional actions will be taken to
194 reduce pollution in the overburdened community in which the facility is located. The Department must provide the
195 document to all members of the Environmental Justice Board and make a copy available online and to any member of the
196 public upon request.

197 (j) Nothing in this subsection shall be construed to limit the authority of the Department to hold or require
198 additional public hearings as may be required by any law, rule, or regulation.

199 (k) Nothing in this subsection shall be construed to limit the right of an applicant to continue facility operations
200 during the process of applying for permit expansion to the extent such right is conveyed by applicable law, rule, or
201 regulation.

(l) The Department is responsible for coordinating with other state and federal agencies when regulatory and permitting responsibilities are shared.

(m) The Department shall develop criteria on how to evaluate cumulative impacts based upon the best available science and data and shall publish the criteria, on its website, after consulting with and receiving recommendations from the Environmental Justice Board.

Section 2. The Department must compile and issue a list of overburdened communities, in accordance with this chapter, after consulting with and receiving recommendations from the Environmental Justice Board, within 6 months after enactment. The Department shall adopt any rules or regulations necessary for implementing the provisions of this Act within 6 months after enactment.

SYNOPSIS

This Act defines certain facilities which will require an applicant seeking a permit for a new facility, or expansion of an existing facility, or renewal of an existing permit, located in an overburdened community, as defined in the Act, to provide an environmental justice impact report. Facility includes the following commercial or industrial business: (1) Manufacturer of animal food, meat, seafood, tobacco, manufactured home, chemicals, pharmaceuticals, petroleum, asphalt, ready-mix concrete, primary metal, nonmetallic mineral products, ammunition or transport equipment; (2) pulp, paper, paperboard and sawmills; (3) rail or water freight dock; (4) landfill, transfer station, resource recovery, scrap metal or recycle center or compost operator; (5) sewage treatment center, animal waste processor or sludge processor; (6) commercial livestock and poultry growers; (7) medical waste incinerator (with the exception of those attendant to a hospital or university intended to process self-generated medical waste); and (8) commercial or industrial businesses not contained in (1)-(7) that currently contribute or upon permit approval would contribute to the cumulative pollution in an overburdened community, as identified by the Department in conjunction with the Environmental Justice Board.

For all permit applications, the environmental justice impact report would be required at least 60 days before a required public hearing.

Under the Act an "overburdened community" is defined as any census tract, as delineated in the most recent U.S. Census, in which one or more of the following applies: (1) 35% of the residents are below 185% of federal poverty level. (2) At least 25% or more identify as minority or member of a state or federally recognized tribal community or immigrant. (3) 25% or more have limited English proficiency as defined by U.S. Census Bureau. (4) Geographic locations that potentially experience harms and risks as determined by the Environmental Justice Board.

The Department would be required to create and post on its website a list of "overburdened communities" and update the list every 2 years.

The Act establishes the Environmental Justice Board to review and make recommendations on the environmental justice impact reports, conduct public hearings, and other measures to help the Department fulfill the purpose of this chapter.

The public hearing on the permit would be required to provide an opportunity for meaningful public participation by the overburdened community.

Following the public hearing the Secretary would be required to consider the recommendation of the Environmental Justice Board and the testimony presented at the public hearing. The Secretary could impose conditions to the permit that may be necessary to reduce the adverse impact to the public health or to the environment in the overburdened community.

The Secretary would have the authority to deny a permit application in an overburdened community upon a finding that the cumulative impact imposed by the new or expanded facility would constitute an unreasonable risk to the health of the residents of the overburdened community or to the environment in that community.

The Act requires the Department to establish rules and regulations to implement the Act, in consultation with the Environmental Justice Board, within 6 months after its enactment.