



CITY OF NEW BEDFORD

In the Year Two Thousand AND SIXTEEN

AN ORDINANCE

RELATIVE TO ENVIRONMENTAL JUSTICE

31- 509

Be it ordained by the City Council of the City of New Bedford as follows:—

SECTION 1.

WHEREAS, it is important to the City Council to achieve an appropriate balance between environmental protection and economic development in the City of New Bedford, and the risk levels established by this Ordinance are intended to strike that balance;

WHEREAS, certain types of industrial activities, including those releasing pollutants into air, water or land, create a significant potential that residents of the New Bedford will be subject to material, cumulative, adverse impacts on health or the environment of the communities in which they live;

WHEREAS, regulation of the siting of such activities is an effective means to protect New Bedford residents from material, cumulative, adverse impacts on health or the environment, and serves to place appropriate limits on the amount of additional pollution that the siting of such activities can add to the current level of pollution in the region;

WHEREAS, the Environmental Justice Permit ("EJ Permit") required by this Ordinance will substantially promote the protection of New Bedford residents from material, cumulative, adverse impacts on health or the environment;

WHEREAS, this Ordinance is intended to have no impact on State or Federal statutory requirements regarding the issuance of permits concerning health, the environment, planning or zoning;

WHEREAS, on February 11, 1994, the President of the United States issued Executive Order No. 12898 entitled "Federal Actions to Address Environmental Justice in Minority Populations and Low-income Populations," stating that each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States and its territories and possessions, Puerto Rico, and the Mariana Islands;

WHEREAS, a panel of the National Academy of Public Administration for the United States Environmental Protection Agency (EPA) published a report in July 2003 entitled, "Addressing Community Concerns: How Environmental Justice Relates to Land Use Planning and Zoning." Based on the research described in that report, the Panel recommended the following:

State and local executive and legislative branches of government must demonstrate leadership to address Environmental Justice concerns. They should use their full legal authorities to enact appropriate legislation, issue policies, develop guidance, and develop accountability measures to ensure that, at both levels of government, core government functions are authorized and required to address Environmental Justice. They should also enhance opportunities for meaningful public participation in all government decisions that have environmental and public health impacts.

WHEREAS, the EPA has recognized the importance of local governments' exercising local Police powers to protect local populations from excess levels of pollution and that it does not have the authority to make local permitting or land use decisions;

WHEREAS, Article 97 of the Amendments to the Constitution of the Commonwealth of Massachusetts states: "The people shall have the right to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and esthetic qualities of their environment; and the protection of the people in their right to the conservation, development and utilization of the agricultural, mineral, forest, water, air, and other natural resources is hereby declared to be a public purpose;"

WHEREAS, the Massachusetts Executive Office of Energy and Environmental Affairs (EOEEA) established an Environmental Justice Policy to help address the disproportionate share of environmental burdens sometimes experienced by lower-income people and communities of color who also often lack environmental assets in their neighborhoods, which Policy is designed to protect those populations from pollution as well as promote community involvement in planning and environmental decision-making to maintain and/or enhance the environmental quality of those neighborhoods;

WHEREAS, the Commonwealth of Massachusetts is a Home Rule jurisdiction;

WHEREAS, Massachusetts municipalities have broad powers to protect the health of their Citizens pursuant to Massachusetts General Laws, Chapter 111 and otherwise; and

WHEREAS, this Ordinance is intended to implement an added measure of protection of all New Bedford residents from activities that have the potential to further degrade the air, water or land or exacerbate community health impacts;

Now, therefore,

Be it ordained by the City Council of the City of New Bedford as follows:

SECTION 1.

Article I of Chapter 12 of the Code of Ordinances is hereby amended by inserting, after Section 12-10, the following new Sections:-

Article I, Section 12-11. Environmental Justice.

Environmental Justice ("EJ") is the fair treatment and meaningful involvement of all people regardless of race, color, national origin or income with respect to the development, implementation and enforcement of health and environmental laws, regulations and policies. Fair treatment means that no group of people, including racial, ethnic or socioeconomic groups, should bear disproportionately high and adverse human health or environmental effects.

The purpose of this Ordinance shall be to provide Environmental Justice to all Citizens of New Bedford by insuring that Proposed Projects will not have a material, cumulative, adverse impact on the health or environment of the communities in which they are located.

12-11.1 Definitions.

For the purpose of this Section 12-11, the words and phrases defined shall have the meaning set forth below, unless a different meaning is clearly indicated by the context, and words and phrases left undefined shall have their ordinary meaning.

- A. "Air Quality Modeling" means CTSCREEN and AERMOD as described in Appendix W to 40 C.F.R. Ch. I Part 51 – "Guideline on Air Quality Models." The EJ Examiner may use any modeling described in Appendix W to analyze EJ Permit applications.
- B. "Community" means the area surrounding the Proposed Project encompassing a one-mile radius.
- C. "Comprehensive Information" means relevant information on the Proposed Project and its location, including but not limited to the type of facility to be operated, the regulated activities to be conducted at the Proposed Project, a list of Hazardous Material expected to be released from or stored at the facility, and a detailed analysis of human health and environmental risks to the surrounding Community as the result of normal operations or in the event of an accident or malicious act at the Proposed Project.
- D. "Criteria Air Pollutant" means an air pollutant listed by the EPA Administrator pursuant to Section 108(a) of the Clean Air Act, 42 U.S.C. Section 7408(a).
- E. "Cumulative" means the aggregation of all of the health or environmental impacts experienced by a Community, including existing background level impacts and additional impacts from existing or Proposed Projects.
- F. "EJ Examiner" means a person with a background in a health-related or environment-related field of engineering or science designated by the Mayor to apply Environmental Justice standards to the applications required under this Section. The EJ Examiner shall be an employee of the City.
- G. "EJ Permit" means a permit or conditional permit issued pursuant to this Section 12-11.
- H. "Excess Cancer Risk" means a cancer risk in excess of one in 1,000,000. This may be determined, when applicable, by referring to data in EPA's IRIS (Integrated Risk Information System) database, found on line at <http://www.epa.gov/iris/index.html>, and risk assessment procedures described in EPA's Guidelines for Carcinogen Risk Assessment, March 2005, EPA/630/P-03001F, or the most current update of that guidance, or by reviewing the statistically significant standardized incidence ratios available in the Massachusetts Cancer Registry, City/Town Supplement: <http://www.mass.gov/dph/mcr>.
- I. "Excess Risk in the Event of an Accident or Malicious Act" means an unreasonable risk that an accident or malicious act will cause exposure to chemical concentrations or other pollutants beyond the facility's property line at levels exceeding a Final, Interim, or Proposed Acute Exposure Guideline Level (AEGL), Level 2, 4 hour, as established by EPA and listed at <http://www.epa.gov/oppt/aegl/index.htm>, as determined by the Areal Locations of Hazardous Atmospheres at <http://epa.gov/emergencies/content/cameo/aloha.htm>.

- J. "Excess Risk of Health Effects" means a risk to the Community of a health effect significantly higher than the risk to the general population of New Bedford for that health effect. Such excess risk may exist because the Community is particularly vulnerable to particular health effects, or because the cumulative impacts of the Proposed Project with other impacts in the Community will cause a higher risk of health effects than exists in the general population of New Bedford. In determining whether a Proposed Project will cause an Excess Risk of Health Effects, the EJ Examiner may, where appropriate, consider whether there is a hazard quotient exceeding 1.0 as determined by Air Quality Modeling and data contained in EPA's IRIS (Integrated Risk Information System) database, <http://www.epa.gov/iris/index.html> or as described in Appendix W to 40 C.F.R. ch. I Part 51 – "Guideline on Air Quality Models."
- K. "Hazardous Material" means material including but not limited to, any material, in whatever form, which, because of its quantity, concentration, chemical, corrosive, flammable, reactive, toxic, infectious or radioactive characteristics, either separately or in combination with any substance or substances, constitutes a present or potential threat to human health, safety, welfare, or to the environment, when improperly stored, treated, transported, disposed of, used, or otherwise managed. The term shall not include oil. The term shall also include all those substances which are included under 42 U.S.C. § 9601(14).
- L. "Hazardous Air Pollutant" means an air pollutant listed in Section 112(b) of the Clean Air Act, 42 U.S.C. § 7412(b), and 40 C.F.R. 63, Subpart C.
- M. "Interested Party" means any person or legal guardian of a person who owns property, lives, works at or attends a school, daycare, elder care or special needs facility, or who regularly recreates on conservation land or in a public park or playground, in the Community.
- N. "Proposed Project" means any proposed facility or activity to be wholly or partly located within the City of New Bedford and required by EPA or the Massachusetts Department of Environmental Protection ("DEP") to do any one or more of the following:
- i) Obtain a permit under Title V of the Clean Air Act or its implementing regulations published at 40 C.F.R. Part 70; or
 - ii) Obtain a permit as a Major Source under the Clean Air Act, unless such permit is solely obtained in relation to the construction or demolition phase of a Proposed Project and is in effect for no more than a total of 180 days, regardless of whether the days are consecutive or not; or
 - iii) Obtain a permit as a Synthetic Minor Source under the Clean Air Act; or
 - iv) Provide notification that they store one or more Extremely Hazardous Substance other than sulfuric acid or nitric acid in quantities that exceed the Threshold Planning Quantity as those terms are defined in Section 302(a) of the Emergency Planning and Community Right to Know Act, 42 U.S.C. § 11002(a); or
 - v) File a Toxic Release Inventory Report pursuant to Section 313 of the Emergency Planning and Community Right to Know Act, 42 U.S.C. § 11023; or
 - vi) Obtain a Permit for the treatment, storage, or disposal of hazardous waste pursuant to Section 3005 of the Resource Conservation and Recovery Act, 42 U.S.C. § 6925; or

- vii) Provide a Notification of Hazardous Waste Activity indicating Large Quantity Generator status pursuant to Section 3010 of the Resource Conservation and Recovery Act, 42 U.S.C. § 6930, unless such Notification is made solely in relation to the cleanup of historic soil contamination during the construction or demolition phase of a Proposed Project and shipments of contaminated soil are limited to a period of no more than a total of 180 days, regardless of whether the days are consecutive or not; or
- viii) Obtain a license or permit to operate a solid waste landfill, incinerator or transfer station pursuant to M.G.L. c. 111, § 150A; or
- ix) Obtain a permit, license, or approval for coastal development or use pursuant to M.G.L. c. 91; or
- x) Obtain a permit or approval for water pollution control pursuant to M.G.L. c. 21, §§ 26-53.

A pre-existing facility or activity is not a Proposed Project, regardless of whether it triggers any permit, approval, license, notification or other requirement in Section 12-11.1(N)(i) through (x). An expansion or alteration of a pre-existing facility or activity is a Proposed Project only if, in addition to meeting the other criteria of this Subsection N, the expansion or alteration would involve a significant, material and fundamental change in the use of the facility or the nature of the activity conducted at the facility. In such a case, the Proposed Project is only the expansion or alteration, not the entire pre-existing facility or activity.

Notwithstanding any other provision in this Section 12-11, a facility or activity shall not be deemed a Proposed Project under Section 12-11.1(N) if it received all permits or licenses and filed all reports or notifications referenced in this Section 12-11.1(N) before January 1, 2013.

Sec. 12-11.2. Application for Environmental Justice Permit; Application Fee.

No person or entity shall construct or operate a Proposed Project, or the part of the Proposed Project in New Bedford, without an EJ Permit. Failure to comply with any of the terms of a conditional EJ Permit shall constitute a violation of this Section.

The EJ Examiner shall develop an EJ Permit application and renewal forms, which forms shall be available at the City Clerk's Office.

The EJ Permit application and renewal forms shall include, at minimum, requirements that the applicant provide Comprehensive Information regarding the Proposed Project and that the application be verified and signed by the applicant. It also shall state the application fee that is required.

The application and renewal fees for an EJ Permit shall be set by the City Council in consultation with the EJ Examiner. Such application fee shall not exceed \$1,000 for any Proposed Project. Such renewal fee shall not exceed \$750.

Each applicant for an EJ Permit or an EJ Permit renewal shall provide the City Clerk with a complete verified application. Within 10 days of receiving the application for the EJ Permit or the EJ Permit renewal, the City Clerk will review the application to ensure that it purports to include Comprehensive Information regarding the Proposed Project, it is verified by the applicant's signature, and the application fee has been paid. If these conditions have not been met, the application form will be deemed incomplete, and the City Clerk will so notify the applicant. If the application is complete, the City Clerk shall forward the materials to the EJ Examiner for consideration.

An EJ Permit shall be valid for 3 years from the date of issuance. It may be renewed for additional three-year terms.

Receipt of an EJ Permit does not eliminate or replace the requirement for any other Federal, State or local permit, license or approval.

Sec. 12-11.3. Notice to Public.

Within 10 days of receipt of an application for an EJ Permit or an EJ Permit renewal from the City Clerk, the EJ Examiner shall, at the applicant's expense, provide written notice, in English and such other language(s) as are appropriate for the surrounding community, of the request for an EJ Permit or renewal by United States mail to:

- i) The owners or operators of any residences, community councils, schools, hospitals, elder care or special needs facilities, daycare centers, public parks, playgrounds or conservation land located in the Community; and
- ii) All readily ascertainable addresses within one quarter of a mile of the Proposed Project.

The EJ Examiner shall also give notice through the City's website of all applications for EJ Permits or renewals.

Within 20 days of receipt of an application for an EJ Permit or renewal from the City Clerk, the EJ Examiner shall make all Comprehensive Information submitted by the applicant available to the public on the City's website and at the EJ Examiner's Office or City Hall during normal City business hours. During this same period, the EJ Examiner shall consult with the Board of Health and may consult with any City Health or Environmental official regarding the application.

Any person may submit information regarding either the Proposed Project or the Community to the EJ Examiner, and the EJ Examiner shall consider all such information in the decision on an EJ Permit or renewal.

The EJ Examiner may also, on his own initiative, consult any person or source that he deems relevant and reliable concerning any EJ Permit application or renewal application. When the EJ Examiner consults any person or source on his own initiative as part of his review, he shall document the information obtained from that person or source that is relevant to the EJ Permit or renewal application.

Any person shall have a reasonable opportunity during normal City business hours to examine any information that has been submitted concerning the EJ Permit or renewal application for a Proposed Project, including any information documented by the EJ Examiner on his own initiative. The EJ Examiner shall be responsible for collecting and storing any information relating to the application and for maintaining a copy of the entire file in an organized fashion reasonably accessible to the public.

Sec. 12-11.4. Environmental Justice Standards and Factors.

In reviewing an EJ Permit application or a renewal application, the EJ Examiner shall determine whether a Proposed Project will have a "material, cumulative, adverse impact" on the health or environment of the Community (including noise or odors, but not including aesthetics). A Proposed Project will have a "material, cumulative, adverse impact" on the health or environment of the Community when its construction or operation would cause any of the following effects:

- i) A public nuisance;
- ii) An Excess Cancer Risk;
- iii) An Excess Risk in the Event of an Accident or Malicious Act;
- iv) An Excess Risk of Health Effects; or
- v) An Air Pollution Nuisance as described under 310 CMR 7.01 *et seq.*

In reviewing an EJ Permit or renewal application, the EJ Examiner may consider the following information:

- A. Demographic information about the Community, including demographic maps and environmental maps from:
 - 1. The Planning or Community Development offices of the City of New Bedford or EPA;
 - 2. MASS GIS EJ Maps located at: <http://www.mass.gov/anf/research-and-tech/it-serv-and-support/application-serv/office-of-geographic-information-massgis/>.
- B. Information on the pollution burden borne by the Community from sources within and outside the Community, including:
 - 1. Number of pollution sources that potentially affect the Community;
 - 2. Proximity of the sources to the Community;
 - 3. Emission information, including total toxic emissions and total criteria air pollutant emissions;
 - 4. Major roads and traffic routes that affect the Community;
 - 5. Parks and greenbelts that may be affected;
 - 6. Areas of lead contamination;
 - 7. Number of currently licensed, registered, closed, or deregulated solid waste management or transfer facilities, superfund sites and hazardous waste sites;
 - 8. Air, water and soil quality data collected by the City of New Bedford, the Commonwealth of Massachusetts, DEP, EPA or other entities;

- C. Information on the vulnerability of the Community to particular health impacts and the prevalence of disease in the Community, including cancers, asthma and heart disease, including:
1. Information on the presence of sensitive receptors in the Community, including residences, schools, hospitals, elder care or special needs facilities, daycare centers, public parks, playgrounds or conservation land.
 2. Information on the vulnerability of the population of the Community to particular health impacts.
- D. Information on the impacts of the Proposed Project, including:
1. The Comprehensive Information provided by the applicant.
 2. Impacts of increases in the emission of hazardous air pollutants caused by the Proposed Project and the air dispersion characteristics of the Proposed Project.
 3. Impacts of increases in the emission of hazardous water or soil pollutants caused by the Proposed Project and the dispersion characteristics of the pollutants.
 4. Whether the Proposed Project itself would cause or contribute to Excess Cancer Risk, Excess Risk in the Event of an Accident or Malicious Act or Excess Risk of Health Effects.
 5. Material Safety Data Sheets filed with the DEP pursuant to Massachusetts General Laws, Chapter 111F, Section 16.
 6. Other information provided by applicant or others about the impacts of the Proposed Project.
- E. Research and Outside Sources.

As part of the EJ Examiner's administrative duties, the EJ Examiner shall collect pollution data for the City. The EJ Examiner may rely upon that information or any reliable research or outside source data, including the following, in reviewing any EJ Permit application:

1. the Toxic Release Inventory (TRI), which is available on EPA's website and which measures cumulative, adverse environmental impact from toxic releases to air, water and land by various facilities;
2. the release of OSHA carcinogens on the TM database, which is available on EPA's website and which measures on-site releases by various facilities;
3. the number of superfund sites on EPA's Envirofacts database or other databases;
4. actual measured air quality from monitors operated by a Federal, State or local governmental agency or private entity; and
5. the number of facilities reporting releases of criteria pollutants as listed on Massachusetts DEP or EPA databases.

The EJ Examiner shall publish bi-annual reports identifying statistical pollution data for the entire City, including, to the extent available, a breakdown of such data by neighborhood.

Sec. 12-11.5. Administrative Review by EJ Examiner.

The EJ Examiner shall issue an EJ Permit or renewal for any Proposed Project that will not have a material, cumulative, adverse impact on the health or environment of the Community. The EJ Examiner may issue a conditional EJ Permit or renewal for any Proposed Project that will not have such a material, cumulative, adverse impact as long as the conditions are complied with but would have such an impact without such compliance. The EJ Examiner shall deny an EJ Permit or renewal to any Proposed Project that will have such a material, cumulative, adverse impact.

An EJ Permit or renewal shall issue only if the applicant demonstrates to the EJ Examiner by a preponderance of the evidence that the construction or operation of the Proposed Project will not cause any material, cumulative, adverse impact to the Community over the 3-year term of the EJ Permit or renewal permit.

In considering the EJ Permit or renewal application, the EJ Examiner shall consider all information submitted by the applicant or any other person concerning that application. Within 45 days following the EJ Examiner's receipt of the EJ Permit or renewal application from the Town Clerk, but not sooner than 30 days after that date, the EJ Examiner shall issue a written decision on the application, including findings and conclusions addressing the relevant factors and standards described in this Section.

Conditions in an EJ Permit or renewal may include, but are not limited to, limitations on the scope of the project, project materials, equipment, pollution controls and transportation. The EJ Examiner may require a bond or other acceptable form of surety to insure compliance with the conditions.

Upon issuance of the decision by the EJ Examiner, such decision will be mailed by certified mail by the EJ Examiner to the applicant. The decision shall also be posted on the City's website. The EJ Examiner shall forward a copy of the decision to the City of New Bedford Board of Health and the City of New Bedford EJ Board of Appeals.

Sec. 12-11.6. Appeal Process.

Within 30 days of the EJ Examiner's decision on an EJ Permit or renewal, or within 30 days of the deadline for the EJ Examiner to issue a decision if the EJ Examiner has failed to act: 1) the applicant, or 2) any owner or operator of any school, daycare, elder care or special needs facility, conservation land, public park or playground in the Community; or 3) any group of 10 or more Interested Parties, may file an appeal in writing with the City of New Bedford EJ Board of Appeals appealing the decision. Any such written appeal must be accompanied by a filing fee to be established by the City Council in consultation with the EJ Examiner. Notice of the appeal, with a copy of the written appeal, shall be filed with the City Clerk within such 30 days. The appeal shall allege that the EJ Examiner's decision exceeds his authority and any facts pertinent to the issue, and shall state the relief requested. The appellant shall attach to the appeal a copy of the decision appealed from, bearing the date of that decision.

If the appeal is filed by someone other than the applicant, the appellant shall name the applicant as an appellee and shall notify the applicant of the appeal within the 30-day period.

Sec. 12-11.7. EJ Board of Appeals.

The EJ Board of Appeals shall consist of five persons designated by the Mayor with the approval of the City Council, to serve for terms of three years each. City residents shall be afforded preference for appointment to the Board. The members of the EJ Board of Appeals shall consist of one public environmental health professional (or an attorney with relevant experience), one environmental engineering professional (or an attorney with relevant experience), one representative of the New Bedford business community and two community representatives who are City residents with background knowledge and experience with EJ issues. The EJ Board of Appeals may adopt rules of practice and procedure as necessary. The EJ Examiner shall provide administrative resources to the EJ Board of Appeals including, but not limited to, handling correspondence, issuing notices, compiling necessary data, and services relating to hearings.

Within 20 days of any written appeal, the EJ Examiner shall collect the record of all materials received or reviewed concerning the EJ Permit or renewal application at issue and provide a copy of that written record to the EJ Board of Appeals, the appellant, and the applicant if the applicant is not the appellant.

Within 30 days of the filing of a written appeal, the EJ Board of Appeals shall conduct an evidentiary hearing on the record and shall, by majority vote, affirm, reverse or modify the EJ Examiner's decision. The EJ Board of Appeals shall issue a written decision within 14 days of any vote and shall send a copy of such decision by Certified Mail to the appellant and the applicant, if the applicant is not the appellant. The Board shall also send a copy of the decision to the EJ Examiner. If the EJ Board of Appeals does not render and mail a written decision within 90 days following the filing of the appeal, the Board shall be deemed to have affirmed the decision of the EJ Examiner, unless an extension is granted by the Board for good cause, with the assent of the appellant and the applicant if the applicant is not the appellant.

Any decision by the EJ Board of Appeals shall be deemed a final administrative decision of the City for purposes of appeal.

Sec. 12-11.8. Administrative Policies and Procedures.

The EJ Examiner and the EJ Board of Appeals shall develop administrative policies and procedures as necessary to implement this Section.

Sec. 12-11.9. Enforcement.

Any violation of this Section may subject the violator to civil or criminal penalties, including a fine of up to \$100 per day of violation.

Whenever the EJ Examiner determines that any person or entity has violated or is in violation of this Section, the EJ Examiner may:

1. Engage in the Non-Criminal Disposition Process described in Sections 17-18 of these Ordinances; or
2. Request that the New Bedford Police Prosecutor bring a criminal complaint in a court of competent jurisdiction.

The City and the EJ Examiner may also engage in any other enforcement mechanism permitted by law.

Sec. 12-11.10. Annual Reporting Requirement.

The Mayor or his designee shall file an annual report to the City Council providing the number of EJ Permit applications filed for Proposed Projects, the disposition of those applications by the EJ Examiner and, if applicable, the EJ Board of Appeals, and enforcement actions regarding EJ Permits undertaken by the City within the preceding 12 months.

Sec. 12-11.11. Severability.

If any provision of this Article I, Section 12-11 is held to be unconstitutional or otherwise unlawful, this Section shall not affect the validity, force or effect of any other provision of Article I, Section 12.

Sec. 12-11.12. Effective Date.

This Ordinance shall take effect on January 1 of the year following its adoption by the City of New Bedford.

