EARTHJUSTICE

August 20, 2025

via eCourts
Marie C. Hanley
Clerk of the Appellate Division
Hughes Justice Complex
25 W. Market Street
P.O. Box 006
Trenton, New Jersey 08625-0006

Re: **In the Matter of Passaic Valley Sewerage Commission, Air Pollution Control Operating Permit Significant Modification, BOP 21002**
Docket No. A-002857-24

Notice of Appellant's Request for Stay of Permit with the New Jersey Department of Environmental Protection

Dear Marie C. Hanley,

Please accept this letter as notice to the Court that Appellant Ironbound Community Corporation ("ICC") has requested a stay of the permit at issue in the instant matter with Appellee the New Jersey Department of Environmental Protection ("DEP") pending the outcome of this litigation. This request was made first with DEP in accordance with Rule 2:9-7. Annexed to this letter is a copy of ICC's letter request to DEP. If DEP denies ICC's request, ICC plans to file a formal motion, brief, and appendix with this Court seeking the same relief.

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Respectfully submitted,

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Attachment 1

EARTHJUSTICE

August 20, 2025

via e-Mail

Shawn LaTourette, Commissioner
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CC: Kevin Greener, Director, Office of Permitting and Project Navigation, DEP
Kandyce Perry, Director, Office of Environmental Justice, DEP
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Nicholas G. Seminoff, New Jersey Division of Law

Re: Request for Stay of PVSC Permit Modification, BOP210002

Dear Commissioner LaTourette,

Please accept this letter request on behalf of the Ironbound Community Corporation ("ICC") for the New Jersey Department of Environmental Protection ("DEP") to stay the Preconstruction Approval and Final Permit of Air Pollution Control Operating Permit Significant Modification, BOP210002, granted to Passaic Valley Sewerage Commission ("PVSC") pending ICC's appeal of the permit to the New Jersey Superior Court, Appellate Division, Case No. A-002857-24. This request is being made first with DEP in accordance with Rule 2:9-7. If DEP denies this request, ICC plans to seek the same relief with the Court.

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PRELIMINARY STATEMENT

Appellant Ironbound Community Corporation ("ICC") moves under Rule 2:9-7 for a stay of the Preconstruction Approval and Final Permit of Appellee New Jersey Department of Environmental Protection ("DEP") that allows the Passaic Valley Sewerage Commission ("PVSC") to construct and operate a gas-fired power plant. See R. 2:9-7. ICC has appealed this Permit to the Appellate Division. See Notice of Appeal, In re PVSC Air Permit BOP 21002, Case No. A-002857-24, N.J. Super. App. Div. (filed May 14, 2025) (attached as Ex. 1).

ICC serves Newark's Ironbound neighborhood, home to approximately 50,000 primarily Black and Brown working-class residents and one of the densest industrial corridors in the state. See Declaration of Hazel Applewhite ¶ 20 (July 11, 2025) (attached as Ex. 2). These facilities include PVSC's wastewater treatment plant, the fifth largest in the country. Id. at ¶¶ 8, 15; Declaration of Cynthia Mellon ¶ 7 (July 11, 2025) (attached as Ex. 3). DEP's Permit allows the PVSC facility to emit over 300 tons per year of harmful pollution like carbon monoxide and smog-forming nitrogen oxides. DEP, Final Permit, Air Pollution Control Operating Permit Significant Modification for Passaic Valley Sewerage Commission, Permit Activity No. BOP210002, Program Interest No. 07349 at § A (Apr. 2, 2025) (attached as Ex. 4) [hereinafter Final Permit].

On May 14, 2025, ICC appealed DEP's Final Permit allowing PVSC to construct and operate a new on-site gas plant, which would be the fourth gas plant to be permitted by DEP and built in the Ironbound. See Notice of Appeal (ex. 1). New Jersey's Environmental Justice Law ("EJ Law") requires DEP to deny that Permit unless DEP finds that the gas plant would provide a compelling public interest to the Ironbound, but DEP nevertheless granted the Permit without making such a finding. In addition, DEP granted the Permit despite its questions about the assumptions that underly PVSC's stated need for the gas plant (questions which PVSC never answered), despite the emissions increases that the Permit would allow, and despite the EJ Law's directive for DEP to no longer permit new sources of pollution in overburdened communities.

With this Motion, ICC seeks a stay, during the pendency of its appeal to the Appellate Division, of the Preconstruction Approval and the Final Permit DEP granted to PVSC for the construction and operation of the gas plant. This stay is necessary to preserve the status quo, it is in the public interest, and the Crowe v. De Gioia factors strongly favor granting the stay.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

On September 18, 2020, Governor Murphy signed into law the Environmental Justice Law ("EJ Law"), N.J.S.A. 13:1D-157 to -161, whose goals include "limit[ing] the future placement and expansion of [polluting]

facilities in overburdened communities." N.J.S.A. 13:1D-157. To achieve that goal, the EJ Law requires DEP to deny permit applications for new facilities in overburdened communities that would cause or contribute to adverse stressors in those communities, unless DEP first determines that the new facility "will serve a compelling public interest in the community where it is to be located[.]" N.J.S.A. 13:1D-160(c). According to DEP, the Ironbound is considered an "overburdened community" under the EJ Law, and the two zip codes that make up the Ironbound collectively have more polluting facilities covered by the EJ Law than any other area in the state – a total of 44 facilities. Applewhite Decl. ¶ 11 (ex. 2); see also ICC, Comments on PVSC Significant Modification Title V Draft Permit at 2-3 (Oct. 29, 2024) (attached as Ex. 5) [hereinafter ICC Draft Permit Comments].

On July 2, 2021, PVSC submitted a permit application to DEP seeking permit modifications to allow PVSC to construct and operate an on-site, 84 megawatt ("MW") gas-fired power plant (named the "Standy Power Generation Facility" or "SPGF") for the purpose of providing emergency power in the event of an electrical grid outage. In the matter of PVSC, Project ID # 07329, BOP 190004, Title V Air Operating Permit Modification and Renewal, BOP210002, SPGF, Env't Justice Decision and Imposition of Special Conditions Pursuant to AO-25 at 2 (July 18, 2024), https://dep.nj.gov/wp-

content/uploads/ej/ej-decision-pvsc-backup-power-facility-20240718.pdf (attached as Ex. 6) [hereinafter EJ Decision]. PVSC had been developing this proposal since 2012, when flooding from Hurricane Sandy caused PVSC to lose grid power for approximately two days. See PVSC, AO 2021-25 Compliance Statement at 6-7 (Mar. 30, 2022) (attached as Ex. 7) [hereinafter AO Compliance Statement]. PVSC's July 2, 2021, application was the final amendment to the application, after PVSC twice amended the application to add or remove additional operating scenarios that would allow PVSC to use the gas plant during periods unrelated to storm or emergency events. EJ Decision at 5-6 (ex. 6).

On December 15, 2021, DEP sent PVSC a letter notifying PVSC that its application was subject to the requirements of Administrative Order No. 2021-25 ("AO-25"), an administrative order that DEP issued to implement portions of the EJ Law before the adoption of the Law's implementing rules. DEP, Letter to PVSC re AO-25 Compliance Statement (Dec. 15, 2021) (attached as Ex. 8) [hereinafter DEP AO-25 Letter]. DEP's letter noted that it determined PVSC's gas plant project was subject to AO-25 because it was "a new major source permit sited within an overburdened community[.]" Ibid.

On or about March 30, 2022, PVSC published its AO-25 Compliance Statement concerning the permit modification application for the proposed gas

plant. See generally AO Compliance Statement (ex. 7). In this Compliance Statement, PVSC noted that its wastewater treatment plant had lost grid power during Hurricane Sandy for approximately two days, but then indicated that a design requirement for the SPGF was that it must provide 34 MW of electric power – the wastewater treatment plant's expected maximum power load – for two weeks. Id. at 6-7, 14. PVSC did not provide an explanation as to why it chose to require two weeks' worth of peak power demand as a mandatory criterion for the SPGF. The Compliance Statement does, however, explain that PVSC rejected non-polluting, renewable alternatives to the gas plant on the basis of this design requirement. Id. at 33-34.

On July 1, 2022, ICC submitted written comments to PVSC and DEP on the Compliance Statement, attaching an expert report by the engineer Bill Powers. ICC, Comments on PVSC Standby Power Generation Facility AO-25 Compliance Statement (July 1, 2022) (attached as Ex. 9) [hereinafter ICC AO-25 Comments]; Bill Powers, P.E., Clean Alternative Emergency Power Supply for PVSC (July 1, 2022) (attached as Ex. 10) [hereinafter Powers July 2022 Report]. The expert report demonstrated that battery storage would be a cheaper, more resilient, and less polluting alternative to supply PVSC's emergency power needs, and that PVSC's basis to reject this superior alternative – a design requirement of 34 MW for two weeks – arbitrarily overestimated both the

amount and duration of power that PVSC would need in the event of another emergency. Powers July 2022 Report at 9-12 (ex. 10). PVSC's September 9, 2022, response to these and other public comments received during the AO-25 process did not recognize, let alone attempt to justify, PVSC's decision to require two weeks of maximum power as a minimum design requirement. See, e.g., PVSC, Response to Public Comments on AO-25 Compliance Statement at 37-38 (Sept. 9, 2022), https://dep.nj.gov/wp-content/uploads/ej/pvsc-response-to-comments.pdf (attached as Ex. 11).

After the close of the AO-25 public comment period, DEP also questioned PVSC's rigid design criteria. In a December 22, 2022, letter, DEP asked PVSC to "clarify the basis for PVSC's requirement for two (2) weeks of backup power capacity in its assessment of the feasibility of renewable energy alternatives. Similarly, clarify the basis for the need for thirty-four (34) megawatts (MWs) for maintenance of operations." DEP, Letter Response to PVSC's Response to Public Comments at 1 (Dec. 22, 2022) (attached as Ex. 12) [hereinafter DEP Dec. 2022 Letter].

In its January 11, 2023, response to DEP, PVSC noted that "Sandy led to PVSC losing power for over 48 hours" but provided no justification for its requirement that the power source run for two weeks. See PVSC, Response to NJDEP Comments Dated December 22, 2022 at 7 (Jan. 11, 2023) (attached as Ex.

13) [hereinafter PVSC Jan. 2023 Letter]. In response to DEP's question about the 34 MW requirement, PVSC noted that "[t]he need for power is greatest during inclement weather, when sewerage flow through PVSC must be maintained to the maximum extent possible[,]" but PVSC did not explain why it would need to operate at this maximum capacity for a full two weeks. Id. at 8.

On July 18, 2024, DEP published its Environmental Justice Decision ("EJ Decision"), explaining its decision to allow the permit to move forward. EJ Decision (ex. 6). DEP explained that its decision was based on its finding that new permit conditions would result in net emissions reductions at the facility by partially offsetting the emission increases from gas plant use during testing and maintenance only, but DEP's calculation did not consider gas plant emissions during storm preparation or emergency response modes. Id. at 12-14. Additionally, the EJ Decision did not make any mention of whether the proposed gas plant will serve a compelling public interest in the Ironbound. See N.J.S.A. 13:1D-160(c). Nor did the EJ Decision mention DEP's prior questioning of PVSC's design requirement, or PVSC's failure to address those questions. EJ Decision at 6 (ex. 6).

Throughout this permitting process, elected representatives, faith leaders, ICC, and other community members submitted additional comments and letters to DEP, PVSC, and the Governor's Office that continued to

question and oppose PVSC's choice to build a gas plant in the most overburdened community in the state despite the availability of cheaper, more resilient, and less polluting options. See, e.g., Letter of Concern from Health Professionals to Gov. Murphy & PVSC (Apr. 20, 2022) (attached as Ex. 14); Letter of Opposition from Newark Mayor Ras Baraka et al. to Gov. Murphy (Feb. 23, 2023) (attached as Ex. 15); Letter of Sen. M. Teresa Ruiz et al. to PVSC (July 19, 2024) (attached as Ex. 16); Letter of Charlene Walker, Faith in N.J. et al. to PVSC (Sept. 18, 2024) (attached as Ex. 17); ICC Draft Permit Comments (ex. 5).

DEP published a Draft Permit for the gas plant and held a public hearing on October 1, 2024. A total of 31 commenters, including ICC, provided public comment, none of whom supported the project. See Michael Sol Warren, DEP urged to block proposed Newark power plant, NJ Spotlight News (Oct. 3, 2024), https://www.njspotlightnews.org/2024/10/dep-urged-to-block-proposed-newark-power-plant/ [https://perma.cc/F6XY-MYMG] (attached as Ex. 18).

ICC submitted written comments on the Draft Permit on October 29, 2024. ICC Draft Permit Comments (ex. 5). Those comments noted that DEP should deny the permit application under the EJ Law, since no compelling public interest exists for PVSC to build the gas plant, particularly when non-polluting alternatives could better meet PVSC's emergency power needs. Id. at 7-9. The comments also reiterated that PVSC's rejection of non-polluting

alternatives was based on the unexplained and unreasonable design requirement. Id. at 9-13. In addition, the comments noted that, despite the EJ Decision's characterization that the permit would result in net overall emissions decreases, the Draft Permit allows emissions increases for all pollutants. Id. at 14.

On February 14, 2025, DEP issued its Proposed Permit and Response to Comments, and submitted the Proposed Permit to EPA for the 45-day review period mandated by the federal Clean Air Act. See DEP, Hearing Officer's Report, Response to Public Comments for PVSC (Feb. 13, 2025) (attached as Ex. 19) [hereinafter DEP 2025 RTC]. DEP also issued to PVSC a Preconstruction Approval under N.J.A.C. 7:27–22.33(e), allowing PVSC, at its own risk, to construct the gas plant before the close of the EPA review period and the issuance of the final permit. DEP, Air Pollution Control Operating Permit, Preconstruction Approval of a Significant Modification for PVSC, Permit Activity No. BOP210002, Program Interest No. 07349 (Feb. 14, 2025) (attached as Ex. 20).

On April 2, 2025, after the close of EPA's review period, DEP finalized the permit modification, thereby allowing PVSC to operate the new 84 MW gas plant in the Ironbound. See Final Permit (ex. 4). The Final Permit allows PVSC to increase its emissions of harmful air pollution like nitrogen oxides,

carbon monoxide, sulfur dioxide, volatile organic compounds, particulate matter, acrolein, ethylene dibromide, formaldehyde, ammonia, and other hazardous air pollutants. Id. at § A. These increases in pollution are all due exclusively to DEP's approval of the gas plant. See id. at Reason for Application (pdf. p. 13).

In its June 12, 2025, public meeting, the PVSC board of commissioners approved a contract for the construction of the gas plant. Transcript of June 12, 2025, PVSC Public Meeting at 244-45 (June 12, 2025) (excerpt attached as Ex. 21). Most recently, in a July 31, 2025, compliance filing to DEP, PVSC indicated that preliminary submittals regarding construction of the gas plant "are expected to start being submitted on or before August 31, 2025." PVSC, Letter to DEP re Semi-Annual Env't Justice Compliance Report at 3 (July 31, 2025), https://web.pvsc.com/bnews/Semi-Annual%20Environmental%20Justice%20Compliance%20Report112025.pdf [https://perma.cc/DC67-63AT] (attached as Ex. 22) [hereinafter PVSC EJ Compliance Report].

ARGUMENT

A stay of DEP's Preconstruction Approval and Final Permit is necessary to protect the interests of ICC and the broader public who would be harmed by the construction and operation of the PVSC gas plant.

Rule 2:9-7 provides that "after the filing with the Appellate Division of a notice of appeal . . . from a state administrative agency or officer, a motion for ad interim relief or for a stay of the decision, action or rule under review shall be made in the first instance to the agency whose order is appealed from . . ." R. 2:9-7. The test for granting a stay is the same as the test for granting a preliminary injunction set forth in Crowe v. De Gioia, 90 N.J. 126, 133 (1982). See Garden State Equal. v. Dow, 216 N.J. 314, 320 (2013) ("Applications for a stay pending appeal are governed by the familiar standard outlined in Crowe.").

Under Crowe, a stay or injunction is appropriate where "(1) relief is needed to prevent irreparable harm; (2) the applicant's claim rests on settled law and has a reasonable probability of succeeding on the merits; and (3) balancing the 'relative hardships to the parties reveals that greater harm would occur if a stay is not granted than if it were.'" Garden State Equal., 216 N.J. at 320 (quoting McNeil v. Legis. Apportionment Comm'n, 176 N.J. 484, 486 (2003) (LaVecchia, J., dissenting)).

In addition, "[w]hen a case presents an issue of 'significant public importance,' a court must consider the public interest in addition to the traditional Crowe factors." Id. at 321. Courts "may, and frequently do, go much further" than the Crowe factors if their decision on preliminary relief would be "in furtherance of the public interest." Waste Mgmt. of N.J., Inc. v. Union Cnty. Utils. Auth., 399

N.J. Super. 508, 520-21 (App. Div. 2008) (quoting Yakus v. United States, 321 U.S. 414 (1944)).

Furthermore, when "acting only to preserve the status quo, the court may 'place less emphasis on a particular Crowe factor if another greatly requires the issuance of the remedy.'" Garden State Equal., 216 N.J. at 320 (quoting Brown v. City of Paterson, 424 N.J. Super. 176, 183 (App. Div. 2012)). In such cases, the Crowe factors "are not to be looked upon as hard and fast" but instead as "but factors, among others, which must be weighed, one with another." Waste Mgmt. of N.J., Inc., 399 N.J. Super. at 534 (quoting General Elec. Co. v. Gem Vacuum Stores, Inc., 36 N.J. Super. 234, 236–37 (App. Div. 1955)).

Here, ICC's Motion for Stay seeks to protect the public interest by stopping the challenged gas plant from being built and exposing residents of the Ironbound to needless additional pollution while the court reviews DEP's issuance of the Final Permit. Moreover, ICC's Motion seeks to preserve the status quo (by leaving the plant unbuilt during the pendency of this litigation) and so the stay should be granted even if all the Crowe factors are not met. Nevertheless, all three Crowe factors are satisfied here: ICC is likely to succeed on its claims, which are based on settled legal rights, ICC will face irreparable harm if a stay of the Final Permit is not granted, and the balancing of hardships reveals greater harm would befall ICC and the Ironbound if a stay is not granted.

I. The Public Interest Favors Granting ICC's Motion for Stay.

The public interest would be served by granting the instant Motion and ensuring that the New Jersey community most overburdened by pollution, the Ironbound, need not suffer from additional pollution from the gas plant.

As noted above, courts "may, and frequently do" consider the public interest as the predominant factor in their decisions on preliminary injunctions. Waste Mgmt. of New Jersey, Inc., 399 N.J. Super. at 520–21 (quoting Yakus, 321 U.S. at 441). Even if ICC satisfied only two of the Crowe factors, that alone "does not necessarily preclude the granting of an interlocutory injunction," especially where, as here, the public interest "should play a significant role in the judge's determination." Waste Mgmt. of New Jersey, Inc., 399 N.J. Super. at 521, 536. The evaluation of the public interest considers the magnitude of the impacts a stay would have and the population that would be affected. See generally Garden State Equal., 216 N.J. 314 (finding that public interest favored denying a statewide stay that would have prevented same-sex couples from entering into civil marriage); see also PENPAC, Inc. v. Morris County Mun. Utils. Auth., 299 N.J. Super. 288, 293 (App. Div. 1997) (granting stay "due to the public interest involved").

Here, the magnitude of the harm is clear and the impact on the already overburdened population of the Ironbound and Newark as a whole would be significant if the stay were denied. DEP's Permit for the gas plant allows multiple

tons per year of additional emissions of pollutants like particulate matter and hazardous air pollutants. Final Permit at Reason for Application (pdf p. 13) (ex. 4). The pollutants emitted by gas plants are known to cause and aggravate health conditions like asthma, chronic bronchitis, emphysema, and chronic obstructive pulmonary disease. ICC Draft Permit Comments at 3-4 (ex. 5).

This pollution adds to the cumulative pollution burden that the surrounding community already faces. The Ironbound already has more facilities covered by the EJ Law than any other area in the state. Applewhite Decl. ¶ 11 (ex. 2). And as of 2024, the Ironbound was in the 93rd percentile statewide for Nitrogen Dioxide and 87th percentile statewide for small particulate matter. U.S. Env't Prot. Agency, EJScreen Community Report for the Ironbound at 3 (EJScreen Environmental and Socioeconomic Indicators Data table) (retrieved Oct. 7, 2024) (attached as Ex. 23).

Allowing the construction and operation of the gas plant while this case proceeds would result in increased pollution into the most over-polluted community of the state before the court rules on the validity of the Permit. And if this court were to agree with ICC on the merits and rescind or remand the Permit, any subsequent DEP permitting decision or PVSC decision on how to source emergency power would be unfairly tilted towards the gas plant if it were already constructed by that time. Alternatively, were the court to stay the Permit but ultimately rule for DEP on the merits, the stay would have resulted in a

comparatively short delay to a permitting process that has already taken five years, and to the construction of a gas plant that PVSC has been planning for over a decade. The public interest undoubtedly favors staying the Permit.

II. All Three Crowe Factors Favor Issuing a Stay and Preserving the Status Quo.

1. Because ICC's Motion Seeks to Preserve the Status Quo, the Crowe Factors Should be Treated as Part of a Balancing Test that Also Weighs the Public Interest.

As noted above, courts may exercise significant judicial discretion in weighing the Crowe factors where a litigant's motion would preserve the status quo. Waste Mgmt. of New Jersey, Inc., 399 N.J. Super. at 534. For example, "a claim with only 'some' factual merit or based on uncertain or novel legal principles may nevertheless support an interlocutory injunction, limited to preserving the status quo, so long as the harm confronting the movant is great and irreparable, and the hardship imposed on the opponent is not terribly significant[.]" Id. at 536; see also id. at 535 ("So long as there is some merit to the claim, a court may consider the extent to which the movant would be irreparably injured in the absence of pendente lite relief, and compare that potential harm to the relative hardship to be suffered by the opponent if an injunction preserving the status quo were to be entered."). "[M]ere doubt as to the validity of the claim is not an adequate basis for refusing to maintain the status quo." Crowe v. De Gioia, 90 N.J. 126, 133–34

(citing Naylor v. Harkins, 11 N.J. 435 (1953); Haines v. Burlington Cnty. Bridge Comm'n, 1 N.J. Super. 163, 175 (App. Div. 1949)).

Here, the stay that ICC requests would preserve the status quo of no gas plant existing at the PVSC site. Upon information and belief, PVSC has not yet begun construction of the gas plant, and a stay of the Preconstruction Approval and Permit would keep it that way during the pendency of the appeal. If the stay is not granted, PVSC could construct and potentially even begin operating the gas plant before the lawfulness of the Permit is ever decided. Because this is a case where granting a stay would preserve the status quo, doubts about any one Crowe factor should not prevent the issuance of the stay.

2. All Three Crowe Factors Strongly Favor Issuing a Stay.

a. There is a Settled Legal Right Underlying ICC's Claim and ICC is Likely to Succeed on the Merits.

The Crowe test asks if the movant has a claim that "rests on settled law" and demonstrates a likelihood of success on the merits. Garden State Equal., 216 N.J. at 320; Crowe, 90 N.J. at 133. ICC is likely to succeed on its claims that DEP's decision to approve the PVSC Permit exceeded its statutory authority and was arbitrary and capricious.

i. DEP Exceeded Its Statutory Authority Under the EJ Law When Approving the Final Permit.

EJ Law Section 13:1D-160(c) states that DEP "shall . . . deny a permit for a new facility" in an overburdened community that causes or contributes to

disproportionate adverse cumulative stressors. N.J.S.A. 13:1D-160(c). The only exception to this denial is if DEP first "determines that a new facility will serve a compelling public interest in the community where it is to be located." Ibid. For example, DEP would have to find that the new facility would "primarily serve an essential environmental, health, or safety need[] of the individuals in an overburdened community[,]" that the facility "is necessary to serve" those needs in the overburdened community, and that "[t]here are no reasonable alternatives that can be sited outside the overburdened community to serve the essential environmental, health, or safety needs of the individuals in an overburdened community." N.J.A.C. 7:1C–5.3(b). If DEP makes that determination, then DEP "may grant a permit that imposes conditions on the construction and operation of the facility to protect public health." N.J.S.A. 13:1D-160(c).

Here, DEP determined that PVSC's request was for "a new major source permit sited within an overburdened community." DEP AO-25 Letter (ex. 8). DEP also determined that the gas plant "as originally proposed would increase the emission of air pollutants from the PVSC facility, which could exacerbate adverse cumulative environmental and public health stressors affecting the host overburdened community." EJ Decision at 12 (ex. 6). Indeed, the Final Permit allowed PVSC to construct and operate the gas plant, thereby increasing the facility's potential to emit a variety of pollutants. Final Permit at

Reason for Application (pdf p. 13) (ex. 4). Under the EJ Law, then, DEP was required to deny the permit application unless DEP first determined that the gas plant would serve a compelling public interest in the Ironbound, for example, by finding that there were no reasonable alternatives to the gas plant. N.J.S.A. 13:1D-160(c); N.J.A.C. 7:1C–5.3(b). But DEP granted the permit application without making that required determination.

Nor could DEP make such a compelling public interest determination based on the record before it. Multiple expert reports and comments submitted to DEP and PVSC show that PVSC can more cheaply, reliably, and cleanly satisfy its emergency power needs using non-polluting alternatives like battery storage. See ICC AO-25 Comments (ex. 9); Powers July 2022 Report (ex. 10); ICC Draft Permit Comments (ex. 5). There is therefore no compelling public interest to construct a gas plant that will contribute to adverse cumulative environmental and public health stressors in the Ironbound, when PVSC's emergency power needs can be met with non-polluting alternatives.

In response to public comments that the EJ Law requires DEP to deny PVSC's application, DEP stated that "[t]he EJ Law at N.J.S.A. 13:1D-157, specifies that implementation of the law begins upon adoption of rules pursuant to the Administrative Procedures Act, N.J.S.A. 52:14B-1 et seq. [and] [t]he EJ Rule at N.J.A.C. 7:1C became effective on April 17, 2023, almost two full years after the

Department determined that PVSC's permit application was deemed complete," so according to DEP, "the EJ rule does not apply to the PVSC permit." DEP 2025 RTC at 13 (ex. 19).

But the EJ Law certainly does apply to the PVSC application. DEP's response presumably intended to point to EJ Law Section 13:1D-160(a) about Environmental Justice Impact Statements, which provides that "[b]eginning immediately upon the adoption of the rules and regulations required pursuant to section 5 of this act, [DEP] shall not consider complete for review any application . . . unless the permit applicant first [prepares an Environmental Justice Impact Statement for public comment]." N.J.S.A. 13:1D-160(a). In contrast, EJ Law Section 13:1D-160(c), which requires DEP to deny permits for new facilities like PVSC's gas plant, contains no such language about when the provision goes into effect. N.J.S.A. 13:1D-160(c). Therefore, Section 13:1D-160(c) has been in effect since the passage of the EJ Law in 2020. See DiProspero v. Penn, 183 N.J. 477, 494 (2005) ("[A] change of language in a statute ordinarily implies a purposeful alteration in [the] substance of the law") (quoting Nagy v. Ford Motor Co., 6 N.J. 341, 348 (1951)). And even if the opening clause of Subsection (a) can be imputed to Subsection (c) – which it should not – then Subsection (c) would still apply to DEP's permitting decision here, since the effectiveness of Subsection (c) would have "beg[un] immediately upon the adoption of the [EJ Rule]" in 2023, N.J.S.A.

13:1D-160(a) (emphasis added), and DEP's decision to finalize the Permit did not occur until two years later, in 2025. DEP's interpretation of the EJ Law is thus "inaccurate [and] contrary to legislative objectives," and the court is not "bound by [DEP's] interpretation of a statute or its determination of a strictly legal issue." S.L.W. v. N.J. Div. of Pensions & Benefits, 238 N.J. 385, 393–94 (2019).

Because DEP approved "a new major source" in an overburdened community that would "exacerbate adverse cumulative environmental and public health stressors" in that community, and did so without making the "compelling public interest" determination required by the EJ Law, ICC has a strong likelihood of success on its claim that DEP's Permit approval was contrary to law. See EJ Decision at 12 (ex. 6); DEP AO-25 Letter at 1 (ex. 8).

ii. DEP's Decision to Approve the PVSC Permit Modification Was Arbitrary and Capricious.

When evaluating whether a final agency action is arbitrary or capricious, New Jersey courts consider "whether the decision conforms with relevant law, whether there is substantial credible evidence in the record as a whole to support the agency's decision, and whether in applying the relevant law to the facts, the agency clearly erred in reaching its conclusion." In re Request to Modify Prison Sentences, 242 N.J. 357, 390 (2020) (quoting In re State & Sch. Emps.' Health Benefits Cmm'ns' Implementation of I/M/O Yucht, 233 N.J. 267, 280 (2018)). The discretion that administrative agencies normally enjoy in the exercise of their

statutorily delegated responsibilities "is not unbounded and must be exercised in a manner that will facilitate judicial review." In re Vey, 124 N.J. 534, 543-44 (1991). Agencies must "articulate the standards and principles that govern their discretionary decisions in as much detail as possible." Id. at 544 (quoting Van Holten Grp. v. Elizabethtown Water Co., 121 N.J. 48, 67 (1990)).

Here, the EJ Law instructs "the State, where appropriate, to limit the future placement and expansion of [polluting] facilities in overburdened communities." N.J.S.A. 13:1D-157. DEP nevertheless arbitrarily approved the PVSC Permit despite DEP's unanswered questions about the need for a new, polluting gas plant in the most over-polluted community in the state.

Public comments during the AO-25 process questioned PVSC's overblown design requirement – 34 MW straight for a full two weeks – which PVSC used as the basis to reject non-polluting alternatives. Commenters noted that PVSC's assumptions – that its facility would lose grid power for a full two weeks and need to operate at a maximum 34 MW load for those two weeks – were unreasonable, particularly given that PVSC has never lost grid power for longer than the two-day outage during Hurricane Sandy. See Powers July 2022 Report at 3-5 (ex. 10). After PVSC failed to address these and other points in its response to the AO-25 comments, DEP also asked PVSC to justify its choice of the 34 MW and two-week design requirements. See DEP Dec. 2022

Letter at 1 (ex. 12). In its response to DEP, PVSC again failed to explain either requirement. See PVSC Jan. 2023 Letter at 7-8 (ex. 13). In no record document does DEP or PVSC ever explain why this design requirement is a reasonable one. DEP nevertheless approved the Permit despite its misgivings as to the need of this gas plant and despite the EJ Law's mandate against allowing new source of pollution in overburdened communities.

In addition, DEP's decision to grant the permit was arbitrarily based on its representation that new Permit conditions would result in a "net overall reduction in facility-wide emissions of air pollutants[,]" EJ Decision at 12 (ex. 6), but in fact, the Draft Permit allows emissions of all pollutants to increase. Final Permit at Reason for Application (pdf p. 13) (ex. 4); ICC Draft Permit Comments at 14 (ex. 5). Moreover, DEP's "net overall reduction" calculation inexplicably considered only emissions from the 288 hours of permitted gas plant use for testing and maintenance, but ignored emissions during the more than 960 hours of permitted gas plant use for storm preparation and emergency modes – the sole stated purpose of the gas plant – thereby overlooking over 75% of permitted gas plant emissions. EJ Decision at 13-14 (ex. 6); ICC Draft Permit Comments at 6 (fn. 39), 14 (ex. 5).

DEP's decision to grant the Permit thus does not "conform[] with relevant law" and DEP "clearly erred in reaching its conclusion[s]" in support of this decision. In re Request to Modify Prison Sentences, 242 N.J. at 390. This decision

is not supported by "substantial credible evidence in the record," ibid., and failed to "articulate the standards and principles that govern[ed] [DEP's] discretionary decision[] in as much detail as possible." In re Vey, 124 N.J. at 544. ICC therefore has a strong likelihood of success in showing that DEP's decision was arbitrary and capricious.

b. Relief is Necessary to Prevent Irreparable Harm.

A stay of DEP's Preconstruction Approval and Final Permit are necessary to prevent the irreparable harm of PVSC building the gas plant, polluting the Ironbound and Newark during the pendency of the Permit appeal, and tipping the scales in favor of the gas plant after the conclusion of this case.

A harm is considered irreparable if it cannot adequately be redressed with money damages. Crowe, 90 N.J. at 132-33. The inadequacy of money damages can be determined by examining the nature of the injury, like the destruction of a building, the loss of a home, or award of a public contract for construction. Ajamian v. N. Bergen Twp., 103 N.J. Super. 61, 82 (Law. Div. 1968), aff'd, 107 N.J. Super. 175 (App. Div. 1969) ("In those cases where complete destruction of the building is ordered or absolute prohibition of future use is ordered there results irreparable harm against which equity would grant an injunction."); Crowe, 90 N.J. at 132-33 (finding that plaintiff would suffer irreparable harm if she lost her home because money damages would not undo her eviction).

Here, allowing the construction and operation of the gas plant pursuant to DEP's Permit would expose community members to multiple additional tons per year of hazardous pollutants that can cause and aggravate diseases like emphysema and asthma. Final Permit at Reason for Application (pdf p. 13) (ex. 4); ICC Draft Permit Comments at 3-4 (ex. 5). And these emissions would add to the already disproportionate pollution burden that Ironbound and Newark residents already face. Clearly, ICC cannot recover money damages for the health and environmental harms caused by pollution if PVSC were to construct and operate the gas plant during the pendency of this action. This fact alone satisfies this Crowe factor.

ICC filed its appeal on May 14, 2025, and to date DEP has yet to provide the Statement of Items Comprising the Record, a sign that litigation may be protracted and ICC might have a long wait before the court reaches the merits. Meanwhile, PVSC intends to begin construction submissions by the end of this month. PVSC EJ Compliance Report at 3 (ex. 22). If a stay is not granted and PVSC is allowed to build and operate the gas plant during the pendency of this appeal, then residents of the Ironbound would face increased pollution and irreversible health harms before the court reaches the merits of the appeal. And if the court were to ultimately require DEP to rescind or remand the Final Permit but the gas plant is already built by that time, any reconsideration on DEP or PVSC's part will likely be tipped in favor of utilizing the gas plant in some capacity if it has already been built.

c. The Balance of Relative Hardships Strongly Favors ICC.

New Jersey courts favor granting a stay when the stay spares the movant a hardship that is greater than any hardships on the enjoined party. See Crowe, 90 N.J. at 134 (holding that hardship of former romantic partner's potential eviction exceeded wealthy defendant's hardship in providing temporary financial support). This is especially true where the harm would be widespread or significant to the movant or public, relative to the potential inconvenience an enjoined party may suffer. St. John's Evangelical Lutheran Church v. City of Hoboken, 195 N.J. Super. 414, 420–21 (Law. Div. 1983) (holding that hardship of homeless shelter occupants forced onto the streets in the middle of winter would outweigh inconvenience to city from church's continued operation of homeless shelter); Sheppard v. Twp. of Frankford, 261 N.J. Super. 5, 10-11 (App. Div. 1992) (finding that hardship plaintiffs faced in consistent flooding of their property outweighed inconvenience to Township of remedying flooding due to new stormwater runoff system).

As discussed above, ICC will suffer significant harm if its community members and Newark residents are exposed to needless pollution because of the gas plant allowed by DEP's Permit. DEP will not be harmed if this court stays the Final Permit it issued to PVSC. Any potential harm to PVSC from a stay of the construction of the gas plant will be limited and does not exceed the potential harm to ICC. Some 13 years have passed since PVSC began planning for the gas plant

after Hurricane Sandy, and it was only earlier this year that DEP finalized PVSC's Permit allowing it to construct and operate its desired gas plant. Any slight delay in construction from a stay of the permit during the pendency of this litigation will be minor compared to the 5 years that DEP took to issue the Permit and 13 years that PVSC has been planning this project. And any potential inconvenience to PVSC from this slight delay is minor compared to the severe health harms that result from the operation of a gas plant, particularly when the lawfulness of the Permit allowing the construction of this plant is in question. The balance of the hardships thus strongly favors granting the stay.

CONCLUSION

For the reasons stated above, the instant Motion for Stay should be granted, thereby staying DEP's Preconstruction Approval and Final Permit during the pendency of ICC's appeal of the Permit.

Dated: August 20, 2025

Respectfully submitted,

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