

Opportunities for the Massachusetts Energy Facilities Siting Board to Advance Environmental Justice

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I. INTRODUCTION

This paper explores how the Massachusetts Energy Facilities Siting Board (“EFSB” or “Board”) can or must use its existing authorities to better incorporate environmental justice (“EJ”) principles in its review process. In particular, this paper identifies the Board’s obligations and opportunities to advance *substantive* environmental justice—as opposed to procedural environmental justice—under its organic statutes,¹ the Environmental Justice Policy (“EJ Policy” or “Policy”) of the Executive Office of Energy and Environmental Affairs (“EEA”),² and the Massachusetts Environmental Policy Act³ (“MEPA”) as amended by the Climate Roadmap Act of 2021.⁴

The Board is an independent executive agency housed within the Massachusetts Department of Public Utilities (“DPU”).⁵ Since 2007, the Board has fallen within the EEA’s purview.⁶ The Board plays a crucial role in the process of greenlighting energy facilities in Massachusetts. Specifically, anyone seeking to construct large power plants, transmission lines, intrastate natural gas pipelines, and other energy facilities must obtain siting approval from the Board. EFSB review, however, is not the only permitting process for such facilities; project developers must also seek approval from other state agencies, including obtaining, for instance, air pollution control permits from the Massachusetts Department of Environmental Protection (“DEP”). In addition, projects undergoing EFSB review are subject to the Massachusetts Environmental Policy Act (“MEPA”), which establishes a process for assessing projects’ environmental impacts. While this paper focuses on the EFSB’s decision making process, the Board often relies to some extent on the regulatory standards relevant to these other approval processes. Aspects of the MEPA process, in particular, figure prominently in the EFSB’s analysis.⁷

MEPA requires the EEA secretary to “direct its agencies, including the [EFSB and others] to *consider the environmental justice principles*⁸ in making any policy, determination or taking any other action related to a project review ... that is likely to affect environmental justice populations.”⁹ Although this mandate applies directly to the EEA, in effect the EFSB itself must consider EJ principles in reviewing proposals, at the EEA secretary’s direction. Similarly, the EJ

¹ M.G.L. c. 164, §§ 69G–69Q; 980 CMR 1.00–12.00.

² Environmental Justice Policy of the Executive Office of Energy and Environmental Affairs (June 2021), *available at* <https://www.mass.gov/doc/environmental-justice-policy6242021-update/download> [hereinafter “EJ Policy”].

³ M.G.L. c. 30, §§ 61–62H; 301 CMR 11.00.

⁴ *An Act Creating a Next-Generation Roadmap for Massachusetts Climate Policy* (“Climate Roadmap Act”), 2021 Mass. Acts c. 8.

⁵ M.G.L. c. 164, § 69G, first par.

⁶ *City of Brockton v. EFSB*, 469 Mass. 196, 199 n.9 (2014).

⁷ This paper does not address other aspects of the EFSB’s governing statutes—namely, electric and gas long-range forecasts, hydropower generation facilities, or certificates of environmental impact and public interest.

⁸ “Environmental justice principles” is defined in M.G.L. c. 30, § 62.

⁹ M.G.L. c. 30, § 62K, second par.

Policy’s provides that “environmental justice principles¹⁰ shall be an integral consideration, to the extent applicable and allowable by law” in, among other things, “making any determination or other action related to a project review.”¹¹ The Board must ensure that the construction of any project it approves is “consistent” with state policies,¹² including the EJ Policy. In this way, the Board’s application of the EJ Policy is judicially reviewable.¹³

This paper asks, therefore: ***in what ways can the EFSB “consider” substantive environmental justice principles¹⁴ in its decision-making, and how can the EFSB ensure that such consideration is “integral” to that process?*** Additionally, how can the EFSB apply the EJ Policy—via the statutory requirement that projects it approves must be “consistent” with that policy—in order to put EJ principles into practice? In other words, how can the EFSB better take into account any disproportionate, adverse impacts on environmental justice communities¹⁵ caused by projects under review, with the goal of mitigating such impacts by imposing conditions on, or potentially denying, a proposal?¹⁶

¹⁰ The EJ Policy now uses the definitions of “environmental justice principles” and related terms which the Climate Roadmap Act added in MEPA.

¹¹ EJ Policy, *supra* note 2, at 5.

¹² M.G.L. c. 164, §§ 69J, fourth par. & 69J¼, fourth par.

¹³ *Brockton*, 469 Mass. at 203.

¹⁴ As now defined in Massachusetts law, “environmental justice principles” include both *procedural* (“meaningful involvement of all people with respect to the development, implementation and enforcement of environmental laws”) and *substantive* (“equitable distribution of energy and environmental benefits and environmental burdens”) aspects. Although both are crucial, and the line between the two is not always bright, this paper generally focuses on substantive environmental justice. As for the procedural component, in July 2021 the Board opened a notice of inquiry soliciting public comment on “Procedures for Enhancing Public Awareness of and Participation in its Proceedings,” which has received more than a dozen comments. See EFSB Docket No. 21-01.

¹⁵ The Climate Roadmap Act codified a definition of “environmental justice population” which is provided in the definitions section below. See M.G.L. c. 30, § 62 and the definitions section below.

¹⁶ Environmental justice involves the equitable distribution not only of environmental burdens but also of environmental benefits. (“Environmental burdens” and “environmental benefits” are both defined terms in M.G.L. c. 30, § 62.) Thus a related high-level question concerns how the EFSB’s decision making process can help promote environmental benefits, including the benefits of renewable energy deployment, in EJ communities. Climate change and clean energy are critical issues when it comes to pursuing environmental justice, given that climate impacts will fall disproportionately on EJ communities. Relatedly, some commentators have raised the question of how to balance achieving distributive justice (*i.e.*, equitable distribution of burdens and benefits) while also building out the clean energy and associated transmission infrastructure at the speed and scale necessary to avert the worst impacts of climate change. See, e.g., J.B. Ruhl & James Salzman, *What Happens When the Green New Deal Meets the Old Green Laws?*, 44 VT. L. REV. 693, 720 (2020) (arguing that “the Green New Deal needs New Green Laws, or perhaps a New Green Law, that somehow balances the infrastructure deployment goals and timelines with the ideals of environmental protection, distributive justice, and public participation”). Although these aspects of the problem is beyond the scope of this paper, it will be important for the EFSB to take into account the substantial benefits that EJ communities will derive from the transition to renewable sources of energy, and therefore for it to ensure that its processes do not unduly burden the expansion of renewable energy infrastructure. This, too, is a difficult question that would benefit greatly from robust dialogue between policy makers and those impacted the most by their policy choices.

This paper’s overarching recommendation is for the Board to conduct a community engagement and rulemaking process—or multiple rulemakings—to decide how it should best carry out these statute-based requirements, among others. A related recommendation is for the Board to comply with the EJ Policy by assigning high-level Board officials to be in charge of EJ policy setting, and by developing an EJ strategy, which has been a Policy requirement applicable to the Board since 2007. For projects near environmental justice populations, the Board can leverage information in environmental impact reports about disproportionate, adverse effects projects would have on nearby EJ communities. A major issue for the Board is to what extent such effects would warrant denying a project or imposing significant pollution-mitigating conditions.

Although this paper explores how the EFSB can advance environmental justice under current law, a more direct strategy for achieving that goal would be to change the law. For example, legislation pending in the Massachusetts General Court would amend the EFSB’s governing authorities to require, for instance, that project proponents provide an analysis of potential impacts to environmental justice populations, climate change impacts, the facility’s climate change adaptation plans, and a cumulative impacts assessment covering past, present, and reasonably foreseeable pollution in the area where the facility is proposed.¹⁷ Nonetheless, so long as the existing authorities remain in place, it is worth asking how the EFSB can make the most of them to implement the Commonwealth’s codified environmental justice principles.

In the following sections, this paper begins by explaining the EFSB’s governing authorities, describes relevant aspects of the MEPA process, and details key elements of the EJ Policy. Then it provides recommendations on how the EFSB can advance environmental justice under current law. In addition, an appendix highlights examples from other jurisdictions currently incorporating substantive environmental justice considerations into the energy facilities siting process, which could provide guidance both for how the EFSB can use its existing authorities and for additional legislative reform in Massachusetts.

II. THE EFSB’S GOVERNING STATUTES

The Board has nine members: the EEA Secretary (who is the chair), the Housing and Economic Development Secretary, the DEP Commissioner, the Department of Energy Resources Commissioner, two DPU commissioners, and three public members appointed by the governor and whose terms align with the governor’s.¹⁸ One public member must be “experienced in environmental issues,” another in labor issues, and the third in energy issues.¹⁹ These public members serve part-time, receive \$100 per diem, and can be reimbursed for Board-related

¹⁷ *An Act relative to energy facilities siting reform to address environmental justice*, 2021 Massachusetts House Bill No. 3336, 192nd General Court of the Commonwealth of Massachusetts. The specific changes mentioned above would amend M.G.L. c. 164, § 69J.

¹⁸ M.G.L. c. 164, § 69H, second par.

¹⁹ *Id.*

expenses. Finally, the public members may not work or have worked, even part-time or indirectly, for an energy company.²⁰

The EFSB has jurisdiction over proposals to construct both “facilities” and “oil facilities.” “Facilities” include certain transmission lines, natural gas pipelines, gas manufacture or storage units, as well as “generating facilities” (large power plants). “Oil facilities” are separately defined and are not included in the definition of “facilities.”²¹ For simplicity’s sake, this paper uses the term “non-generating facility” (even though it is not a statutorily defined term) to cover the “facilities” that are not “generating facilities.” (An oil facility is *not* a non-generating facility, because “oil facility” and “facility” are defined separately.)

The Board’s general mandate is “to provide a reliable energy supply for the commonwealth with a minimum impact on the environment at the lowest possible cost.”²² At the same time, the Board’s review criteria in a given case depend on the type of project being proposed. Specifically, for oil facilities and non-generating facilities, the Board must balance (1) the need for the project (i.e., reliability concerns), (2) its cost, and (3) its environmental impacts.²³ M.G.L. c. 164, § 69J provides more details about the Board’s review of these facilities; this paper addresses only that section’s provisions involving non-generating facilities.

For “generating facilities,” the Board reviews “only the[ir] environmental impacts ... consistent with the commonwealth’s policy of allowing market forces to determine the need for and cost of such facilities.”²⁴ M.G.L. c. 164, § 69J¼ spells out additional requirements for the Board’s review of generating facilities.

The Board’s decisions are reviewable in court and subject to a deferential standard of review:

The scope of such judicial review shall be limited to whether the decision of the board is in conformity with the [state and federal] constitution[s], was made in accordance with the procedures established under [§§ 69H–69O and implementing regulations], was supported by substantial evidence of record in the board’s proceedings; and was arbitrary, capricious or an abuse of the board’s discretion under [§§ 69H–69O].²⁵

Accordingly, whether reviewing the Board’s decisions under either section 69J or 69J¼, courts have granted it wide discretion. For example, in a case under section 69J¼ concerning the

²⁰ *Id.*

²¹ M.G.L. c. 164, § 69G provides the definitions of “facility,” “generating facility,” and “oil facility.” See the definitions section below.

²² M.G.L. c. 164, § 69H, first par.

²³ See *Town of Sudbury v. EFSB*, 487 Mass. 737, 738 (2021) (interpreting the Board’s general mandate, in the context of a non-generating facility, as follows: “the board’s obligation is to balance the reliability, cost, and environmental impact of each proposal before it”).

²⁴ M.G.L. c. 164, § 69H, first par.

²⁵ M.G.L. c. 164, § 69P.

Board's approval of a power plant, the Supreme Judicial Court stated that it "give[s] the board's evidentiary rulings great deference."²⁶ Similarly, in a case under section 69J concerning proposed transmission lines, the Court wrote, referring to the factors of reliability, cost, and environmental impact: "No one factor is determinative, and the board has wide discretion to balance the factors from case to case to achieve its statutory mandate."²⁷

The following sections explain the requirements for applicants' petitions, the Board's approval criteria, and other statutory provisions applicable to non-generating and generating facilities.²⁸ Next is a section explaining that the Board's application of the EJ Policy is judicially reviewable, given that the Board must determine if proposed projects (whether non-generating or generating facilities) are consistent with the Policy.

A. Non-Generating Facilities

In petitions to construct non-generating facilities, applicants must provide:

- (1) a description of the facility, site and surrounding areas;
- (2) an analysis of the need for the facility, either within or outside, or both within and outside the commonwealth;
- (3) a description of the alternatives to the facility, such as other methods of transmitting or storing energy, other site locations, other sources of electrical power or gas, or a reduction of requirements through load management; and
- (4) a description of the environmental impacts of the facility.²⁹

The Board may require this information about each project "in such form and detail as the [B]oard shall from time to time prescribe."³⁰

Although the Board has never done so, it may "issue and revise filing guidelines after public notice and a period for comment."³¹ A "minimum of data shall be required by these guidelines from the applicant for review concerning land use impact, water resource impact, air quality impact, solid waste impact, radiation impact and noise impact."³²

²⁶ *Brockton*, 469 Mass. at 199.

²⁷ *Sudbury*, 487 Mass. at 738.

²⁸ The Board has promulgated regulations, in 980 CMR 1.00–12.00, which do not substantially elaborate on the statutory provisions discussed in this paper.

²⁹ M.G.L. c. 164, § 69J, third par. (line breaks added).

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

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The Board, in fact, is required to address these types of impacts of a proposed facility.³³ Moreover, as an example of the Board’s discretion, it has interpreted its role to include addressing impacts not explicitly named in that list, such as traffic, safety, and magnetic field impacts.³⁴ In this context, the *Brockton* Court only considered traffic impacts, but its reasoning should apply to other types of impacts not explicitly listed in the statute.

The Board must approve a petition to construct a non-generating facility within twelve months of the date of filing if the Board finds that the following criteria have been met:

- (i) ***all information relating to*** current activities, ***environmental impacts,*** facilities agreements and energy policies as adopted by the commonwealth is substantially accurate and complete;
- (ii) projections of the demand for electric power, or gas requirements[,] and of the capacities for existing and proposed facilities are based on substantially accurate historical information and reasonable statistical projection methods and include an adequate consideration of conservation and load management . . . ;
- (iii) projections relating to service area, facility use and pooling or sharing arrangements are consistent with such forecasts of other companies . . . ;
[and]
- (iv) ***plans for expansion and construction of the applicant’s new facilities are consistent with current health, environmental protection, and resource use and development policies as adopted by the commonwealth;*** and are consistent with the policies stated in [§ 69H] to provide a necessary energy supply for the commonwealth with a minimum impact on the environment at lowest possible cost.³⁵

As stated above, the Board must balance need, cost, and environmental impacts.³⁶ This does not mean the Board must pick only the alternative with the least environmental impacts. Instead, the

³³ *Brockton*, 469 Mass. at 214 (stating that very similar language in section 69J¼ “requires” the Board to review “a range of impacts”).

³⁴ See, e.g., *New England Power*, EFSB 19-04, at 80–102 (2021); *Andrew-Dewar*, EFSB 19-03, at 68–90. The Supreme Judicial Court has upheld this exercise of discretion. *Brockton*, 469 Mass. at 214 (“The board has consistently interpreted this mandate to include the environmental impacts of traffic, and “[w]e accord substantial discretion to an agency to interpret the statute it is charged with enforcing.”).

³⁵ M.G.L. c. 164, § 69J fourth par. (line breaks, roman numerals, and emphasis added). This list continues, but the rest of the criteria apply only to oil facilities. Indeed, those criteria also appear in the corresponding regulation, 980 CMR 8.03, concerning the procedures for seeking to construct an oil facility. In addition, EFSB decisions involving non-generating facilities under M.G.L. c. 164, § 69J do not address these criteria specific to oil facilities. E.g., EFSB 19-04 (Oct. 8, 2021).

³⁶ *Sudbury*, 487 Mass. at 738.

Board has “wide discretion” to find the appropriate balance in each case.³⁷ In *Sudbury*, in which the Board approved a proposal to build transmission lines, non-transmission alternatives would have had the least environmental impact but were less reliable. The preferred alternative, by contrast, “fell somewhere in the middle on cost and was comparable to the all-street route [another alternative] on environmental impact.”³⁸

At the same time, the Board’s “assessment of the environmental impact of a proposal is not simply a relative exercise”—in other words, for a given formulation of a project, the environmental impacts must be “minimized.”³⁹ In *Sudbury*, the challengers disagreed with how the Board weighed various types of environmental impacts (temporary vs. permanent, and impacts on the natural vs. built environment), and the Court affirmed the Board’s approval of the project proponent’s use of a multi-criteria test to evaluate environmental impacts.⁴⁰ On the issue of minimizing environmental impacts, the Court held that “deference [was] due” because the Board “undertook a comprehensive comparative analysis of environmental impacts and carefully explained its reasoning.”⁴¹

In practice, the Board has found that environmental impacts are “minimized” when project proponents comply with applicable environmental regulations and, often, take other steps to reduce pollution. For instance, in the decision upheld in *Sudbury*, the Board found that air impacts would be minimized because the proponent would comply with applicable DEP regulations and also deploy certain dust-reducing equipment.⁴²

B. Generating Facilities

In petitions to construct generating facilities, applicants must provide:

- (i) a description of the proposed generating facility, including any ancillary structures and related facilities;
- (ii) a description of the environmental impacts and the costs associated with the mitigation, control, or reduction of the environmental impacts of the proposed generating facility;
- (iii) a description of the project development and site selection process used in choosing the design and location of the proposed generating facility;

³⁷ *Id.* at 746.

³⁸ *Id.*

³⁹ *Id.* at 747.

⁴⁰ *Id.* at 745–55.

⁴¹ *Id.* at 755.

⁴² *Sudbury, Hudson, and Stow*, EFSB 17-02, at 153 (2019).

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- (iv) either (a) evidence that the expected emissions from the facility meet the technology performance standard in effect at the time of filing, or (b) a description of the environmental impacts, costs, and reliability of other fossil fuel generating technologies, and an explanation of why the proposed technology was chosen; and
- (v) any other information necessary to demonstrate that the generating facility meets the requirements for approval specified in this section.⁴³

As with non-generating facilities, the Board may issue and revise guidelines after notice and comment, but has never done so.⁴⁴ “Sufficient data shall be required from the applicant by these guidelines to enable the board to review the local and regional land use impact, local and regional cumulative health impact, water resource impact, wetlands impact, air quality impact, solid waste impact, radiation impact, visual impact, and noise impact of the proposed generating facility.”⁴⁵ This list matches that in section 69J, except for (a) the phrase “local and regional” before “land use impacts,” and (b) the addition of local and regional cumulative health impacts, wetlands impacts, and visual impacts.

The Board must approve a petition for a generating facility within one year from the date of filing if it finds that the following criteria have been met:

- (i) [T]he description of the proposed generating facility and its environmental impacts are substantially accurate and complete;
- (ii) the description of the site selection process used is accurate;
- (iii) ***the plans for the construction of the proposed generating facility are consistent with current health and environmental protection policies of the commonwealth*** and with such energy policies as are adopted by the commonwealth for the specific purpose of guiding the decisions of the board;
- (iv) ***such plans minimize the environmental impacts consistent with the minimization of costs associated with the mitigation, control, and reduction of the environmental impacts of the proposed generating facility;*** and
- (v) if the petitioner was required to provide information on other fossil fuel generating technologies, the construction of the proposed generating facility on balance contributes to a reliable, low-cost, diverse, regional energy supply with minimal environmental impacts.⁴⁶

⁴³ M.G.L. c. 164, § 69J¼, third par. (line breaks added).

⁴⁴ *Id.*, fourth par.

⁴⁵ *Id.*

⁴⁶ M.G.L. c. 164, § 69J¼, fifth par. (line breaks and emphasis added).

The “consistent with current health and environmental protection policies” criterion is important, and it is addressed in the following section and further below. Meanwhile, the “minimize the environmental impacts” criterion operates similarly to the criterion about minimizing environmental impacts of non-generating facilities under section 69J, in that the Board generally finds this criterion satisfied when the project proponent has complied with applicable environmental laws or even taken additional steps to mitigate pollution. For instance, in the decision reviewed in *Brockton*, in determining whether this criterion was satisfied with respect to air pollution, the Board relied on compliance with the National Ambient Air Quality Standards (“NAAQS”). Specifically, based on modeling by the proponents of the power plant under review, the Board concluded that the combination of background air emissions and the plant’s emissions would not exceed the applicable NAAQS.⁴⁷ The Court upheld this determination.⁴⁸

C. Reviewability of Consistency with the EJ Policy

In *Brockton*, a case involving a generating facility, the SJC reasoned that the Board’s “application of the EJ policy is subject to judicial review as part of the court’s consideration whether the board’s decision meets the requirements of § 69J ¼, fifth par.”—specifically the language requiring the Board to ensure that the proposed generating facility will be “consistent with current health and environmental protection policies of the commonwealth. . . .”⁴⁹ The same logic applies to section 69J, given the similarly worded approval criterion in that section: the Board must ensure that “the applicant’s new facilities are consistent with current health, environmental protection, and resource use and development policies as adopted by the commonwealth.”⁵⁰

As described further below, this requirement that a project be consistent with the EJ Policy is a primary obligation—and opportunity—for the Board to advance environmental justice. Although the Board has so far taken a minimalist approach—typically addressing only the “enhanced participation” and “enhanced review” aspects of the EJ Policy discussed below—the Board could instead give significantly greater meaning to the statutory requirement of consistency with the EJ Policy.

III. THE MASSACHUSETTS ENVIRONMENTAL POLICY ACT AND THE CLIMATE ROADMAP ACT

MEPA, which is implemented by the MEPA Office within EEA, requires developers to evaluate the environmental impacts of their projects if they exceed certain thresholds that are set by regulation.⁵¹ If a project will exceed a lesser type of threshold, the proponent must submit to EEA an Environmental Notification Form (“ENF”), which must, among other things, describe

⁴⁷ 469 Mass. at 204–08.

⁴⁸ *Id.* at 208.

⁴⁹ *Id.* at 203.

⁵⁰ M.G.L. c. 164, § 69J, fourth par.

⁵¹ The thresholds are defined in 301 CMR 11.03.

the project, provide an initial assessment of environmental impacts, and propose mitigation measures.⁵² For projects that also exceed a higher threshold, or if otherwise required by the MEPA Office, proponents must submit an Environmental Impact Report (“EIR”),⁵³ which provides significantly more information than ENFs, including, for instance, detailed descriptions of environmental or public health impacts and of mitigation measures to address those impacts.⁵⁴ EIRs also must address the “existing environment.” Specifically, they must describe and analyze the “physical, biological, chemical, economic, and social conditions of the Project site, its immediate surroundings, and the region.”⁵⁵

The Climate Roadmap Act of 2021 amended MEPA to address environmental justice. The law added definitions of “environmental justice principles” and related terms.⁵⁶ It also established this overarching mandate: “To further the environmental justice principles the [EEA] secretary shall direct its agencies, including the departments, divisions, boards and offices under the secretary’s control and authority”—including the EFSB—“***to consider the environmental justice principles in making any policy, determination or taking any other action related to a project review, or in undertaking any project pursuant to [MEPA] that is likely to affect environmental justice populations.***”⁵⁷ ***In effect, therefore, the EFSB itself must “consider” the statutory EJ principles in deciding whether to approve a project.***

In addition, the Climate Roadmap Act requires that ENFs indicate whether a proposed project is “reasonably likely to negatively affect any Environmental Justice Population located in whole or in part” either within a mile of the project or within five miles for projects that exceed certain air emission thresholds.⁵⁸ For projects “likely to cause damage to the environment” and within those same distances from an EJ population, EIRs

shall contain statements about the results of an assessment of any existing unfair or inequitable environmental burden and related public health consequences impacting the environmental justice population from any prior or current private, industrial, commercial, state, or municipal operation or project that has damaged the environment. The required assessment shall conform to the standards and guidelines established by the [EEA] secretary.

If the assessment indicates an environmental justice population is subject to an existing unfair or inequitable environmental burden or related health consequence the report shall identify any: (i) environmental and public health impact from the proposed project that would likely result in a disproportionate adverse effect on

⁵² 301 CMR 11.05(5)(a).

⁵³ 301 CMR 11.06(7).

⁵⁴ 301 CMR 11.07(6)(h) & (j).

⁵⁵ 301 CMR 11.07(6)(g).

⁵⁶ See M.G.L. c. 30, § 62.

⁵⁷ *Id.* § 62K (emphasis added).

⁵⁸ 301 CMR 11.05(5)(a).

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such population; and (ii) potential impact or consequence from the proposed project that would increase or reduce the effects of climate change on the environmental justice population. The secretary may require that an assessment be performed at any stage of the review process.⁵⁹

In other words, EIRs for projects near EJ populations must now assess whether there is an “existing unfair or inequitable” environmental or public health burden on the EJ community; if so, the EIR must evaluate whether the project will likely cause disproportionate, adverse effects as well as climate impacts on the affected EJ community.

In addition to amending the MEPA regulations to incorporate this and other changes from the Climate Roadmap Act, the MEPA Office issued a MEPA Public Involvement Protocol for Environmental Justice Populations (“Public Involvement Protocol”) and a MEPA Interim Protocol for Analysis of Project Impacts on Environmental Justice Populations (“Project Impacts Protocol”) that went into effect on January 1, 2022.⁶⁰ Consistent with prior regulations, the office interprets “likely to cause damage to the environment” to mean that the project exceeds one or more regulatory MEPA thresholds.⁶¹ As for analyzing whether there is an existing unfair or inequitable environmental or public health burden, the Project Impacts Protocol directs developers to use a suite of state and federal mapping tools to identify, among other things, whether communities satisfy certain “vulnerable health EJ criteria.”⁶² At the same time, this protocol encourages project proponents to conduct their own research “into localized sources of data that may show additional public health vulnerabilities of the identified EJ population.”⁶³

For areas with inequitable burdens, in addition to an assessment involving climate impacts, the statute requires analyzing whether the project “would likely result in a disproportionate adverse effect” on the relevant EJ population. The regulations flesh this out: project proponents must consider (1) “the extent to which the environmental and public health impact of the Project may exacerbate any existing unfair or inequitable Environmental Burden and related public health consequence” and (2) “the comparative impact of the Project on Environmental Justice Populations versus non-Environmental Justice Populations and any benefits conferred by the Project to reduce the potential for unfair or inequitable effects on the Environmental Justice

⁵⁹ Climate Roadmap Act, § 58, codified at M.G.L. c. 30, § 62B.; *see also* 301 CMR 11.07(6)(n).

⁶⁰ *See Information About Upcoming Regulatory Updates*, MEPA Office, <https://www.mass.gov/service-details/information-about-upcoming-regulatory-updates> (last visited July 1, 2022) (providing, among other things, links to the two protocols).

⁶¹ *See* Project Impacts Protocol at 2.

⁶² “Vulnerable health EJ criteria” are “environmentally related health indicators that are measured to be 110% above statewide rates based on a five-year rolling average.” *Id.* at 3.

⁶³ *Id.* Relatedly, ENFs must “indicate whether the Project is reasonably likely to negatively affect any Environmental Justice Population located in whole or in part within the Project’s Designated Geographic Area [within 1–5 miles of the project, depending on the type of pollution—see 301 CMR 11.02] and what measures were taken prior to the filing of the ENF to provide meaningful opportunities for public involvement by such Environmental Justice Populations.” 301 CMR 11.05(5)(a). In describing negative effects on EJ populations in an ENF, project proponents should look for reference to 301 CMR 11.07(6)(n) and the Project Impacts Protocol. Public Involvement Protocol at 3.

Population.”⁶⁴ Likewise, the Project Impacts Protocol directs project proponents to evaluate, in part, the “nature and severity of the project’s environmental and public health impacts” and “the comparative impact on EJ populations versus non-EJ populations within the project site or other comparable area.”⁶⁵ The protocol recognizes that mitigation measures can be considered as well. But, at the same time, it is “important to note that, where the level of existing burden is high, even a small addition of project impacts may create disproportionate adverse effects.”⁶⁶

As for conducting the comparative analysis of impacts, the protocol provides:

The Proponent should conclude that the project will have a disproportionate adverse effect on the EJ population, if the adverse impacts of the project are materially greater on EJ populations than on non-EJ populations in the comparison area. If so, the Proponent must provide an explanation of whether the project has considered practical alternatives to reduce or mitigate the impacts on EJ populations, and if so, what, if any, of such alternatives or mitigation were incorporated into the project.⁶⁷

The EFSB should look to these comparative analyses and assessments of disproportionate, adverse effects both when considering the statutory EJ principles, as M.G.L. c. 30, § 62K requires it to do, and when ensuring consistency with the EJ Policy, as required by M.G.L. c. 164, §§ 69J & 69J¼.

IV. EEA’S ENVIRONMENTAL JUSTICE POLICY

EEA has had an EJ Policy since 2002, which has applied to the EFSB since 2007. The Policy was most recently updated in June 2021 in light of the EJ-related definitions and other provisions in the Climate Roadmap Act. And, since 2002, the EJ Policy’s stated purpose has been “that environmental justice principles shall be an integral consideration” in, among other things, “making any determination or other action related to a project review.”⁶⁸ This language is now echoed in the MEPA statutory provision, cited above, added by the Climate Roadmap Act: the EEA Secretary “shall direct its agencies, including the departments, divisions, boards and offices under the secretary’s control and authority”—including the EFSB—to, among other things, “consider the environmental justice principles in making any policy, determination or taking any other action related to a project review.”⁶⁹

The Climate Roadmap Act codified EJ definitions that are also in the EJ Policy. Most fundamental is this definition of “environmental justice principles”:

⁶⁴ 301 CMR 11.07(6)(n)(2)(ii).

⁶⁵ Project Impacts Protocol at 6.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ EJ Policy, *supra* note 2, at 5.

⁶⁹ M.G.L. c. 30, § 62K.

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principles that support protection from environmental pollution and the ability to live in and enjoy a clean and healthy environment, regardless of race, color, income, class, handicap, gender identity, sexual orientation, national origin, ethnicity or ancestry, religious belief or English language proficiency, which includes: (i) the meaningful involvement of all people with respect to the development, implementation and enforcement of environmental laws, regulations and policies, including climate change policies; and (ii) the equitable distribution of energy and environmental benefits and environmental burdens.

In addition, an “environmental justice population” is a neighborhood⁷⁰ that meets one or more of the following criteria:

- (i) “[T]he annual median household income is not more than 65 per cent of the statewide annual median household income;
- (ii) minorities comprise 40 per cent or more of the population;
- (iii) 25 per cent or more of households lack English language proficiency; or
- (iv) minorities comprise 25 per cent or more of the population and the annual median household income of the municipality in which the neighborhood is located does not exceed 150 per cent of the statewide annual median household income[.]”⁷¹

The EEA Secretary may also designate a geographic area as an environmental justice population through a petition process even if it does not meet one of the above criteria, and there are safeguards against a community petitioning to become an environmental justice population without the historical context of disproportionate burdens that motivated the definition.⁷²

The EJ Policy also contains the concept of a “vulnerable health EJ population,” which refers to population segments with “evidence of higher than average rates of environmentally-related health outcomes” such as childhood asthma and heart disease morbidity.⁷³ These health-based criteria are assessed at the neighborhood level:

- The neighborhood resides in an area with a 5-year average rate of emergency department visits for childhood (ages 5-14 years) asthmas in greater than or equal to 110% of the state rate; or

⁷⁰ The term “neighborhood” is also defined in the statute and includes a census block group but excludes people living in college dormitories and incarcerated individuals. M.G.L. c. 30, § 62.

⁷¹ M.G.L. c. 30, § 62 (line breaks added); EJ Policy *supra* note 2, at 4.

⁷² See M.G.L. c. 30, § 62.

⁷³ EJ Policy *supra* note 2, at 7.

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- The neighborhood resides in an area with a 5-year average prevalence of confirmed elevated childhood blood lead levels (ages 9-47 months) that is greater than 110% of the state prevalence; or
- The neighborhood resides in an area with a 5-year average low birth weight rate that is greater than 110% of the state rate; or
- The neighborhood resides in an area with a 5-year average age-adjusted rate of hospitalizations for myocardial infarction that is greater than 110% of the state rate.⁷⁴

A. EJ Strategy Requirement

The EJ Policy requires⁷⁵ all EEA agencies to “***develop their own strategies to proactively promote environmental justice in all neighborhoods in ways that are tailored to the agencies’ mission.***”⁷⁶ This language was in the original EJ Policy in 2002, so this strategy requirement has applied to the Board since 2007. In addition, agencies “***shall consider how to appropriately integrate environmental justice considerations into their departments through policies, programs, or other strategies.***”⁷⁷ These strategies, which could be implemented through “agency-sponsored projects, funding decisions, rulemakings or other actions” should demonstrate a measurable fair distribution of benefits and will be consolidated into a strategy for the EEA Secretary to implement.⁷⁸

In a case upholding the EFSB’s approval of a power plant, the SJC stated that the EJ Policy imposes an affirmative obligation on the Board to craft an EJ strategy:

The EJ policy does impose a general, but affirmative, requirement on all agencies covered by it (and therefore the board) to develop strategies designed “to proactively promote environmental justice in all neighborhoods” in a manner tailored to and consistent with that agency’s “specific mission”; and to promote, inter alia, “rulemakings or other actions intended to further environmental justice

⁷⁴ *Id.*

⁷⁵ The EJ Policy “is not intended to, nor does it create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by a party against EEA, its agencies, its officers, or any person,” and it “shall not be construed to create any right to judicial review involving the compliance or noncompliance of EEA, its agencies, its officers, or any other person with this Policy.” *Id.* at 15. This limitation does not, however, undermine the thrust of this paper, which concerns the EFSB’s authorities, opportunities, and obligations (whether enforceable or not) to advance environmental justice.

⁷⁶ *Id.* at 10 (emphasis added).

⁷⁷ *Id.* (emphasis added).

⁷⁸ *Id.* As for EEA’s role, the Policy provides that the individual agencies’ strategies “will be consolidated into one Secretariat EJ Strategy and will be finalized by a date established by the Secretary.” *Id.* at 10. In a separate provision concerning climate change, the EJ Policy states requires all agencies to consider impacts to environmental justice populations from climate change and “take appropriate measures ensuring that EJ populations are equally protected from [climate-change-induced] hazards and health risks.” *Id.* at 15.

in the Commonwealth.” There may be an argument that under this general requirement, the board, in connection with issuing “its own list of [petition review] guidelines” pursuant to § 69J ¼, fourth par., or otherwise, has an obligation under the EJ policy to incorporate specific environmental justice principles into its consideration of petitions to construct generating facilities.⁷⁹

Despite its obligation since 2007 to develop an EJ strategy, the Board has not done so. In a 2021 filing in its public involvement proceeding, the Board mentioned “its ongoing development of an environmental justice strategy . . . consistent with” the 2017 EJ Policy.⁸⁰ Otherwise, this paper’s authors are not aware of any other statement by the EFSB regarding its progress in developing an EJ strategy or how it plans to involve the public in crafting that strategy (apart from seeking comments as part of its public awareness proceeding).

B. Enhanced Participation and Analysis

The EJ policy establishes a requirement concerning “enhanced public participation and analysis of impacts and mitigation” that is specific to the EFSB. This paper focuses on the enhanced analysis component. For projects that exceed mandatory EIR thresholds⁸¹ and are within one mile of an EJ population (or five miles if the project affects air quality), the EFSB “*shall continue to use enhanced analysis of impacts and mitigation procedures in its review of proposed energy facilities.*”⁸²

In addition to summarizing the types of impacts the EFSB must consider under its governing statutes (e.g., air quality impacts, water resource impacts, etc.), the Policy elaborates on the term “cumulative health impacts” from section 69J¼ concerning review of generating facilities. The Policy notes that the EFSB “considers the term ‘cumulative health impacts’ to encompass the range of effects that a proposed facility could have on human health due to exposure to noise, electromagnetic fields, substances emitted during construction and operation of the facility, and possible effects on human health unrelated to substances.” This statement more or less fairly reflects how the EFSB has interpreted that term in its decisions.⁸³ The Policy, though, then adds that “cumulative health impacts would include consideration of compound effects caused by proximity to multiple energy, industrial, or transportation sources.” This addition goes somewhat beyond how the EFSB has interpreted the term to date.

⁷⁹ *Brockton*, 469 Mass. at 204 n. 17.

⁸⁰ Notice of Inquiry, at 1, EFSB 21-01 (July 1, 2021).

⁸¹ *See supra* part III, about thresholds.

⁸² EJ Policy *supra* note 2, at 12 (emphasis added).

⁸³ *See, e.g.*, EFSB 15-01, at 124 (Nov. 18, 2016) (analyzing cumulative health impacts and concluding that the proposed power plant “would not exacerbate health problems in the communities surrounding the proposed Project” because it “would meet the NAAQS so health impacts of criteria pollutants and air toxics would be minimized; . . . hazardous materials would be managed appropriately; . . . noise impacts would be minimized; and . . . the Facility would not create significant increases in off-site magnetic fields”).

This “enhanced participation and analysis” requirement has typically been the only aspect of the EJ Policy that the EFSB has addressed in its final decisions.⁸⁴ When a project does not exceed MEPA thresholds, the EFSB’s decisions point that out and stop there. In fact, in at least one final decision, the Board has stated: “Because the Project does not exceed any MEPA . . . thresholds that trigger the enhanced public participation or enhanced review provisions, the Board’s review of the Project in this proceeding is not subject to the EJ Policy.”⁸⁵ Meanwhile, in at least one decision where both MEPA thresholds were exceeded (triggering both the enhanced participation and enhanced review requirements), the EFSB indicated that it does not give independent meaning to the EJ Policy’s “enhanced review” requirement.⁸⁶

In *Exelon West Medway*, the company had included an EJ section in its EIR, concluding that “impacts from the proposed Facility would not be disproportionately high in EJ areas as compared to non-EJ areas” and “it did not expect any adverse human health impacts to occur as a result of Facility operation,” based on air dispersion modeling and air impacts analysis conducted for the purposes of receiving a permit from MassDEP under the Clean Air Act.⁸⁷ Because the EEA Secretary referenced this modeling in finding that the project’s final EIR “adequately and properly complied with MEPA” and required no additional review on environmental justice, the Board also concluded that the project’s additional analysis requirements had been met.⁸⁸

As for the independent value of “enhanced review,” the Board stated that its

comprehensive environmental review of the proposed Project in this proceeding is consistent with the Board’s statutory mandate, and with its established practice and precedent of comprehensive environmental review for all proposed new energy facilities. *The same comprehensive and in-depth environmental review would have occurred with or without the proximity of the identified EJ communities in Milford and Franklin.* It is the Siting Board’s view that the comprehensiveness of its established level of environmental review meets the enhanced review requirement and goals of the EJ Policy.⁸⁹

C. Federal Nondiscrimination Requirements (Title VI)

Since 2002, the EJ Policy has incorporated by reference Title VI of the federal Civil Rights Act of 1964 and the U.S. Environmental Protection Agency’s implementing regulations in 40 C.F.R. Part 7. Title VI generally bars recipients of federal funding from discriminating against people on the basis of race, color, or national origin. While the law prohibits intentional discrimination,

⁸⁴ See, e.g., EFSB 14-04, at 145 (Dec. 1, 2017); EFSB 19-03, at 102 (July 2, 2021); EFSB 19-04, at 113–115 (Oct. 8, 2021); EFSB 18-04, at 198 (Oct. 22, 2021).

⁸⁵ Final Decision, *Petition of NSTAR Electric Company*, EFSB 14-04 (Dec. 1, 2017).

⁸⁶ See Final Decision, *Petition of Exelon West Medway*, EFSB 15-01 (2016).

⁸⁷ *Id.* at 129.

⁸⁸ *Id.* at 130.

⁸⁹ *Id.* at 131 (emphasis added).

it also bars so-called “disparate impact” discrimination—*i.e.*, unjustified, adverse disproportionate impacts on protected groups.⁹⁰

The EJ Policy is “intended to reinforce and enhance EEA efforts to comply with the existing legal mandates in Title VI of the federal Civil Rights Act of 1964, which apply to all recipients of federal financial assistance, including all EEA agencies.”⁹¹ Further, as the EJ Policy explains, Title VI “preclude[s] any EEA agency or program from deeming a site suitable or locating a facility where it will have discriminatory effects on the basis of race, color, or national origin.”⁹² This language barring “discriminatory effects” resembles language in MEPA, as amended by the Climate Roadmap Act, concerning “disproportionate adverse effects” on EJ populations.⁹³

In the Title VI context, although it has been a contested issue, EPA has reasoned that compliance with environmental laws does not necessarily constitute compliance with civil rights laws.⁹⁴ In other words, as relevant here, whether pollution is below levels set by environmental laws may not determine, in itself, whether that pollution amounts to an unjustified, adverse disproportionate effect on an EJ population—or in the EJ Policy’s terms, an inequitable distribution of environmental burdens.

V. EFSB OBLIGATIONS & OPPORTUNITIES

Two key statutory obligations discussed above govern the Board’s implementation of the Commonwealth’s environmental justice principles. As amended by the Climate Roadmap Act, MEPA requires the Board⁹⁵ to “consider the environmental justice principles in making any policy, determination or taking any other action related to a project review . . . that is likely to

⁹⁰ Specifically, disparate impact discrimination is prohibited by EPA’s regulations. 40 C.F.R. § 7.35(b)–(c); *see generally* U.S. Dep’t of Justice, Civil Rights Division, *Title VI Legal Manual*, Section VII: Proving Discrimination – Disparate Impact, available at <https://www.justice.gov/crt/book/file/1364106/download>.

⁹¹ EJ Policy *supra* note 2, at 6.

⁹² *Id.* (citing 42 U.S.C. § 2000d, and 40 C.F.R. § 7.35(c)).

⁹³ *See* M.G.L. c. 30 § 62B.

⁹⁴ *See* EPA, *External Civil Rights Compliance Office Compliance Toolkit* at 13 (Jan. 18, 2017), available at https://www.epa.gov/sites/default/files/2017-01/documents/toolkit-chapter1-transmittal_letter-faqs.pdf (“environmental laws does not necessarily constitute compliance with federal civil rights laws”); Marianne Engelman Lado, *No More Excuses: Building A New Vision of Civil Rights Enforcement in the Context of Environmental Justice*, 22 U. PA. J.L. & SOC. CHANGE 281, 291–94 (2019) (recognizing that “EPA has struggled with the question whether environmental health standards . . . are sufficiently protective of human health as to serve as a defense to a claim [of] adverse impact on the basis of race or ethnicity,” and then arguing it is inadequate to rely on “environmental laws as a means of ensuring racial equality and, particularly, achieving procedural and distributional justice in the environmental context”); *cf. Friends of Buckingham v. State Air Pollution Control Bd.*, 947 F.3d 68, 93 (4th Cir. 2020) (“[B]lindly relying on ambient air standards is not a sufficiently searching analysis of air quality standards for an EJ community.”).

⁹⁵ As discussed above, while M.G.L. c. 30, § 62K requires EEA to direct the Board and other agencies under its purview to consider the EJ principles, this provision effectively requires the Board itself and the other agencies to consider those principles.

affect environmental justice populations.”⁹⁶ In addition, the Board must ensure that projects it approves are consistent with the EJ Policy; in this way, the Board’s application of that policy is judicially reviewable.

The EFSB should proactively and meaningfully engage with the public and EJ communities in fleshing out how it will comply with these requirements, through development of the EJ strategy mandated by the EJ Policy and in issuing rulemakings to interpret important phrases in its statutory authorities that relate to EJ principles. Overall, the EFSB can do much more than it has historically done to further the EJ Policy’s purpose of making the now-codified environmental justice principles an “integral consideration” in the project review process.

A. Make a Senior-Level Commitment

Under a section titled “Senior-Level Commitment,” the EJ Policy provides as follows:

All EEA agencies shall designate EJ points-of-contact to actively support the Director of Environmental Justice and the Interagency Environmental Justice Working Group. EJ points-of-contact will be posted on EEA’s EJ webpage, in newsletters, in funding requests for proposals, and other appropriate places.⁹⁷

Currently, EEA’s web page titled “Environmental Justice Contacts”⁹⁸ lists members of EEA’s Environmental Justice Task Force, which it describes as follows:

EEA’s Environmental Justice (EJ) Task Force is composed of staff that serve as EJ points of contact representing each EEA agency and office, in accordance with the requirements of EEA’s Environmental Justice Policy. The Task Force is developing a Secretariat-wide EJ Strategy to promote environmental, energy and climate justice across the Commonwealth in ways that are tailored to each EEA Agency’s mission. The EJ Strategy will guide EEA agencies and offices in how to appropriately integrate environmental, energy and climate justice considerations into policies, programs and strategies.⁹⁹

The EJ contacts page lists representatives from several named EEA agencies, but the Board is not among them. However, one of the two contacts listed for the DPU is “Wayne Wang, Energy Facilities Siting Analyst.”

As a threshold matter, the EEA and the EFSB should follow through on the idea, indicated in the EJ Policy, that environmental justice should be a “senior-level commitment” at EEA and its

⁹⁶ Although the MEPA Office has interpreted “likely to cause damage to the environment” to mean that a project exceeds one or more regulatory MEPA thresholds, see *supra* part III, the phrase “likely to affect environmental justice populations” in M.G.L. c. 30, § 62K need not be limited in that way.

⁹⁷ EJ Policy *supra* note 2, at 10.

⁹⁸ *Environmental Justice Contacts*, EEA, <https://www.mass.gov/service-details/environmental-justice-contacts> (last visited June 30, 2022).

⁹⁹ *About the EEA Environmental Justice Task Force*, EEA, <https://www.mass.gov/service-details/about-the-eea-environmental-justice-task-force> (last visited June 30, 2022).

agencies. Specifically, in terms of the people leading the effort to formulate an EEA-wide EJ strategy and to guide all EEA agencies in crafting their own strategies, these people should be high-level officials within each agency. In particular, the EFSB should have its own lead and point persons included in EEA's Task Force.

For any policy to be widely accepted within an organization and integrated into its core processes—rather than being adopted as window dressing—it is necessary that senior management commit to it and assign senior, dedicated staff to its achievement. Therefore, to make meaningful progress on an issue like environmental justice, leadership from the top is essential.¹⁰⁰ As a first step towards advancing substantive environmental justice in its decision making, the EFSB should have at least one senior staff person focused on environmental justice.

B. Develop an EJ Strategy, as Required by the EJ Policy

Since 2007, the EFSB has been obligated under the EJ Policy to develop an EJ strategy. The Supreme Judicial Court recognized this obligation in *Brockton*.¹⁰¹ The Board stated in 2021 that it is developing its EJ strategy, but this paper's authors did not identify any other information about the Board's process for crafting its EJ strategy.

In the spirit of ensuring public participation and, in particular, meaningful involvement of environmental justice communities, the Board could conduct a community engagement process to solicit input on the content of its EJ Strategy. Examples include Massachusetts DEP's stakeholder and community engagement process in development of its plans for including cumulative impact analysis in the issuance of certain air permits,¹⁰² and the New Jersey DEP's process to develop regulations under that state's 2020 EJ law (mentioned in the appendix).¹⁰³

As for the strategy's content, a recent EEA presentation provides some guidance. It states that EEA agencies' EJ strategies will advance EJ through three main pathways: improving public participation in government decision-making; policy review and revision—including how to better address disproportionality and cumulative effects; and metrics and tracking.¹⁰⁴ The authors support this focus on disproportionality and cumulative effects, which is consistent with developments in environmental justice policies at the federal level and in other states, as indicated below and in the appendix.

¹⁰⁰ See, e.g., Robert W. Collin, *Environmental Justice in Oregon: It's the Law*, 38 ENVTL. L. 413, 451 (2008); Marianne Engelman Lado, *No More Excuses: Building A New Vision of Civil Rights Enforcement in the Context of Environmental Justice*, 22 U. PA. J.L. & SOC. CHANGE 281, 307 (2019).

¹⁰¹ 469 Mass. at 204 n.17.

¹⁰² See *Cumulative Impact Analysis in Air Quality Permitting*, DEP, <https://www.mass.gov/info-details/cumulative-impact-analysis-in-air-quality-permitting> (last visited June 30, 2022).

¹⁰³ *Take Action*, New Jersey DEP Office of Environmental Justice, <https://www.nj.gov/dep/ej/action.html> (last visited June 30, 2022).

¹⁰⁴ *Environmental Justice at EEA*, Presentation to DCR Stewardship Council, at 13 (updated Feb. 2021), available at <https://www.mass.gov/doc/dcr-environmental-justice-presentation/download>.

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An important aspect of the Board's EJ strategy could be to identify which of the Board's authorities it can leverage to improve its consideration and implementation of environmental justice principles. An analogous effort is embodied in EPA's recent *Legal Tools to Advance Environmental Justice*, which surveys EPA's legal authorities, identifying methods for promoting environmental justice in each program.¹⁰⁵

For the EFSB, given that its review hinges on reviews and permitting processes administered by other agencies, such as the MEPA Office and DEP, the Board could also consider how to leverage those related authorities in its own consideration of the EJ implications of proposed projects. For instance, for proposed projects near EJ populations, where the EIR addresses existing "unfair or inequitable environmental burden and related public health consequences" as well as "disproportionate adverse effects" on the nearby EJ communities,¹⁰⁶ the Board's EJ strategy could address how to include this information in its evaluation of whether the project is consistent with the EJ Policy.

C. Issue Impact Review "Guidelines" for Review of Project Impacts

As discussed above, sections 69J¹⁰⁷ and 69J¼¹⁰⁸ each authorize the Board to issue guidelines, after notice and comment, regarding the information project proponents must submit about various kinds of impacts. As with the EJ strategy, the Board has never issued such guidelines. At the same time, the Board is generally empowered to "adopt and publish rules and regulations¹⁰⁹ consistent with the purposes of [§§ 69H–69Q], and to amend the same from time to time."¹¹⁰ Given that the rulemaking process includes notice and a public comment period, the Board could issue its review guidelines in the form of regulations. M.G.L. c. 30, § 62K would require the Board to consider the codified environmental justice principles in crafting such regulations.

In deciding what information to require in the guidelines, the Board would not be limited to the impacts named in the statute. As noted above, the *Brockton* Court upheld the Board's consideration of traffic impacts, although they are not explicitly listed in the statute. Indeed, the

¹⁰⁵ EPA Office of General Counsel, *EPA Legal Tools to Advance Environmental Justice* (May 2022), <https://www.epa.gov/system/files/documents/2022-05/EJ%20Legal%20Tools%20May%202022%20FINAL.pdf>.

¹⁰⁶ M.G.L. c. 30, § 62B.

¹⁰⁷ "The board shall be empowered to issue and revise *filing guidelines* after public notice and a period for comment. A minimum of data shall be required by these guidelines from the applicant for review concerning land use impact, water resource impact, air quality impact, solid waste impact, radiation impact and noise impact." M.G.L. c. 164, § 69J, third par. (emphasis added).

¹⁰⁸ "The board shall, after public notice and a period for comment, be authorized to issue and revise its own list of *guidelines*. Sufficient data shall be required from the applicant by these guidelines to enable the board to review the local and regional land use impact, local and regional cumulative health impact, water resource impact, wetlands impact, air quality impact, solid waste impact, radiation impact, visual impact, and noise impact of the proposed generating facility." *Id.* § 69J¼, fourth par. (emphasis added).

¹⁰⁹ The Board's existing regulations are in 980 CMR 1.00–12.00.

¹¹⁰ M.G.L. c. 164, § 69H, fifth par.

statutory language is in the nature of a floor, rather than a ceiling. Section 69J provides that the guidelines shall require a “minimum of data” to inform the Board’s review of certain impacts (on land use, water resources, air, solid waste, radiation, and noise). Similarly, section 69J¼ provides that the guidelines for generating facilities must require “sufficient” data to assess certain impacts—the same list as for non-generating facilities, plus visual impacts, wetlands impacts, and local and regional cumulative health impacts.

Given that environmental justice entails the “equitable distribution of energy and environmental benefits and environmental burdens,”¹¹¹ the Board could also shape these review guideline regulations to include an explicit evaluation of the distributive effects of proposed projects—*i.e.*, a comparative assessment of benefits and burdens between EJ populations near the proposed facility and non-EJ, comparator communities. As already mentioned, MEPA now requires this kind of assessment in EIRs for projects near EJ populations.

D. Issue Regulations on “Consistency” with the EJ Policy, Cumulative Impacts, and Other Subjects

In addition to review guidelines, a rulemaking by the Board could draw on other provisions in its statutory authorities to advance environmental justice, including but not limited to the concept of “consistency” with the EJ Policy as well as cumulative impacts (which were highlighted in EEA’s presentation mentioned above). Indeed, again, M.G.L. c. 30, § 62K would require the Board to consider EJ principles in issuing such regulations. And, as with an EJ strategy and review guidelines, the Board could engage with the public, and EJ communities in particular, to seek input on any regulations before proposing them.

Although the Board can establish its standards and policies via adjudication,¹¹² doing so through the rulemaking process would allow for far greater public input. Rulemaking would also provide more predictability both to the public and to the regulated community, as opposed to *ad hoc* policy making in adjudicatory proceedings. The promulgation of regulations would allow the Board to hear the views of a broad spectrum of stakeholders on—and then expand the Board’s interpretation of—other undefined statutory terms such as “environmental impacts,” “surrounding area,” and “cumulative health impacts.” Before and during a rulemaking process, the Board could also consult with EEA, the MEPA Office, DEP, and perhaps other state entities.

I. *Consistency with the EJ Policy*

The approval criteria in M.G.L. c. 164, §§ 69J and 69J¼ require consistency between a project and state health, environmental protection, and other policies. As noted above, Board’s application of the EJ policy is subject to judicial review as part of a court’s analysis of whether the Board’s decision satisfies these provisions requiring consistency.¹¹³

¹¹¹ M.G.L. c. 30, § 62.

¹¹² *Brockton*, 469 Mass. at 201 n.11 (the Board “may establish rules and agency policy through adjudication as well as rulemaking”).

¹¹³ *See Brockton*, 469 Mass. at 203; *supra* part II.C.

A natural and fundamental question is what it means for project construction to be “consistent” with the EJ Policy—this is a question on which the Board should seek a wide variety of input. In general, the Board could consider that consistency with the EJ Policy entails more than checking whether a project exceeds MEPA thresholds. In addition, when those thresholds are exceeded, the Board should give independent meaning to the EJ Policy’s enhanced participation and analysis requirements, contrary to its statement in the 2016 Exelon West Medway decision that it conducts the same level of review regardless of a project’s proximity to an EJ community.

Perhaps the most critical question is what it means for a project to be sufficiently *inconsistent* with the EJ Policy that the Board would deny siting approval. Given analogous analysis under Title VI and in other states’ EJ laws (see the appendix), one possible answer is that projects are inconsistent with the EJ Policy if they would unjustifiably cause disproportionate, adverse cumulative impact on environmental justice communities. The Board could scrutinize these impacts even more closely for communities that meet all of the EJ population criteria (income, minority proportion, and English language proficiency), or for “vulnerable health EJ populations” as defined in the EJ Policy. To avoid rendering the EJ Policy “merely a box to be checked,”¹¹⁴ the Board should work with EJ communities, other EEA agencies, and additional stakeholders to produce a meaningful interpretation of what it means to be consistent—and *inconsistent*—with the EJ Policy.

2. *Cumulative Impacts*

In a rulemaking, the Board could flesh out how it will analyze cumulative impacts in its review of proposed projects. M.G.L. c. 164, § 69J¼ expressly directs the Board to consider the “local and regional cumulative health impacts” of proposed generating facilities. But the Board could also consider cumulative impacts of various types for both generating and non-generating facilities. The Appendix includes some examples of how some federal agencies and states are addressing cumulative impacts, but we highlight two examples here.

First, guidance recently proposed by the Federal Energy Regulatory Commission (“FERC”) emphasizes the importance of cumulative impacts analysis in the context of environmental justice:

The consideration of cumulative impacts is particularly important when it comes to conducting an environmental justice analysis. An environmental analysis that, for example, considers incremental impacts of a project in isolation will, almost by definition, fail to adequately consider the project’s impact on a community that already experiences elevated levels of pollution or other adverse impacts. To adequately capture the effects of cumulative impacts, it is essential that [FERC]

¹¹⁴ *Friends of Buckingham v. State Air Pollution Control Bd.*, 947 F.3d 68, 92 (4th Cir. 2020).

consider those pre-existing conditions and how the adverse impacts of a proposed project may interact with and potentially exacerbate them.¹¹⁵

As FERC here suggests, the cumulative impacts of a proposed facility in combination with nearby pollution sources—as opposed to the incremental pollution from the proposed facility in isolation—represents the facility’s real-world effects. Environmental justice advocates have long called for permitting and siting agencies to address cumulative impacts, and EPA is currently engaged in a process to decide how the agency will address them.¹¹⁶

Similarly, the Massachusetts DEP is in the midst of an “initiative to incorporate cumulative impact analysis into the agency’s review of applications for certain air permits and approvals,”¹¹⁷ as required by the Climate Roadmap Act. Specifically, the Act directed DEP to seek public comment on how to incorporate cumulative impact analyses into its permitting process and then to propose regulations on cumulative impacts analyses for categories of air quality permits selected through the public engagement process.¹¹⁸ The Board could look to DEP’s cumulative impacts analysis as part of its own process to interpret the meaning of “cumulative health impacts” under section 69J¼.

E. Treat EJ as Separate from Environmental Compliance

As discussed above, EPA has recently expressed the view that compliance with the federal environmental laws does not necessarily constitute compliance with the federal antidiscrimination prohibitions in Title VI. The EFSB, however, has often relied on environmental compliance—say, that a facility’s air emissions do not result in air pollution levels in excess of the National Ambient Air Quality Standards (NAAQS)—in finding that environmental impacts will be minimized.¹¹⁹

While the Board’s requirements of “minimizing” environmental impacts or ensuring consistency with the EJ Policy may be distinguishable from the requirements of Title VI, the Board could nonetheless implement the idea that environmental compliance does not necessarily preclude disproportionate harms on environmental justice communities. In the air context, for example, even regions that satisfy the NAAQS can include so-called “hot spots”—areas with high and harmful levels of pollution that are not captured in the monitoring system that evaluates NAAQS compliance.¹²⁰

¹¹⁵ FERC, *Certification of New Interstate Natural Gas Facilities*, Docket No. PL18-1-000 (Feb. 18, 2022), available at <https://www.ferc.gov/sites/default/files/2021-02/C-1-PL18-1-000.pdf>.

¹¹⁶ *Cumulative Impacts Research*, EPA, <https://www.epa.gov/healthresearch/cumulative-impacts-research> (last visited June 30, 2022).

¹¹⁷ *Cumulative Impact Analysis in Air Quality Permitting*, DEP, <https://www.mass.gov/info-details/cumulative-impact-analysis-in-air-quality-permitting> (last visited June 30, 2022).

¹¹⁸ Climate Roadmap Act, § 102C.

¹¹⁹ See, e.g., EFSB 15-01, at 124; EFSB 18-04, at 147 (Oct. 22, 2021).

¹²⁰ See, e.g., Al Shaw & Lylla Younes, *The Most Detailed Map of Cancer-Causing Industrial Air Pollution in the U.S.*, ProPublica (2022), <https://projects.propublica.org/toxmap>.

VI. CONCLUSION

This paper has discussed the Board's obligation to consider the now-codified environmental justice principles as it decides whether to approve projects, and in particular, its requirement to assess whether projects are consistent with the EJ Policy. Moreover, after the Climate Roadmap Act of 2021, the Board must consider the EJ principles in any regulatory process to expound on its statutory authorities. To meaningfully put the environmental justice principles into practice, the Board should prioritize EJ by dedicating top-level officials to the developing of an EJ strategy and regulations that expand on the meaning of consistency with the EJ policy, cumulative impacts, and other key issues.

DEFINITIONS¹²¹

M.G.L. c. 30 § 62

“Environmental benefits”, the access to clean natural resources, including air, water resources, open space, constructed playgrounds and other outdoor recreational facilities and venues, clean renewable energy sources, environmental enforcement, training and funding disbursed or administered by the executive office of energy and environmental affairs.

“Environmental burdens”, any destruction, damage or impairment of natural resources that is not insignificant, resulting from intentional or reasonably foreseeable causes, including but not limited to, climate change, air pollution, water pollution, improper sewage disposal, dumping of solid wastes and other noxious substances, excessive noise, activities that limit access to natural resources and constructed outdoor recreational facilities and venues, inadequate remediation of pollution, reduction of ground water levels, impairment of water quality, increased flooding or storm water flows, and damage to inland waterways and waterbodies, wetlands, marine shores and waters, forests, open spaces, and playgrounds from private industrial, commercial or government operations or other activity that contaminates or alters the quality of the environment and poses a risk to public health.

“Environmental justice population”, a neighborhood that meets 1 or more of the following criteria: (i) the annual median household income is not more than 65 per cent of the statewide annual median household income; (ii) minorities comprise 40 per cent or more of the population; (iii) 25 per cent or more of households lack English language proficiency; or (iv) minorities comprise 25 per cent or more of the population and the annual median household income of the municipality in which the neighborhood is located does not exceed 150 per cent of the statewide annual median household income; provided, however, that for a neighborhood that does not meet said criteria, but a geographic portion of that neighborhood meets at least 1 criterion, the secretary may designate that geographic portion as an environmental justice population upon the petition of at least 10 residents of the geographic portion of that neighborhood meeting any such criteria; provided further, that the secretary may determine that a neighborhood, including any geographic portion thereof, shall not be designated an environmental justice population upon finding that: (A) the annual median household income of that neighborhood is greater than 125 per cent of the statewide median household income; (B) a majority of persons age 25 and older in that neighborhood have a college education; (C) the neighborhood does not bear an unfair burden of environmental pollution; and (D) the neighborhood has more than limited access to natural resources, including open spaces and water resources, playgrounds and other constructed outdoor recreational facilities and venues.

“Environmental justice principles”, principles that support protection from environmental pollution and the ability to live in and enjoy a clean and healthy environment, regardless of race, color, income, class, handicap, gender identity, sexual orientation, national origin, ethnicity or ancestry, religious belief or English language proficiency, which includes: (i) the meaningful involvement of all people with respect to the development, implementation and enforcement of

¹²¹ The language in this section is the statutory definitions quoted directly.

environmental laws, regulations and policies, including climate change policies; and (ii) the equitable distribution of energy and environmental benefits and environmental burdens.

“Neighborhood”, a census block group as defined by the United States Census Bureau, excluding people who live in college dormitories and people who are under formally authorized, supervised care or custody, including federal, state or county prisons.

M.G.L. c. 164, § 69G

“Facility”, (1) a generating facility; (2) a new electric transmission line having a design rating of 69 kilovolts or more and which is one mile or more in length on a new transmission corridor; (3) a new electric transmission line having a design rating of 115 kilovolts or more which is 10 miles or more in length on an existing transmission corridor except reconductoring or rebuilding of transmission lines at the same voltage; (4) an ancillary structure which is an integral part of the operation of any transmission line which is a facility; (5) a unit, including associated buildings and structures, designed for or capable of the manufacture or storage of gas, except such units below a minimum threshold size as established by regulation; and (6) a new pipeline for the transmission of gas having a normal operating pressure in excess of 100 pounds per square inch gauge which is greater than one mile in length except restructuring, rebuilding, or relaying of existing transmission lines of the same capacity.

“Generating facility”, any generating unit designed for or capable of operating at a gross capacity of 100 megawatts or more, including associated buildings, ancillary structures, transmission and pipeline interconnections that are not otherwise facilities, and fuel storage facilities.

“Oil facility”, any new unit, including associated buildings and structures, designed for, or capable of, the refining, storage of more than five hundred thousand barrels or transshipment of oil or refined oil products and any new pipeline for the transportation of oil or refined oil products which is greater than one mile in length except restructuring, rebuilding, or relaying of existing pipelines of the same capacity; provided, however, that this oil facility shall not include any facility covered by a long-range forecast or supplement thereto under section sixty-nine I.

APPENDIX: OTHER AGENCIES AND JURISDICTIONS

This Appendix provides some examples from other states and from the federal energy facility siting agency, the Federal Energy Regulatory Commission (“FERC”). FERC and these states are increasingly acting on the idea that “environmental justice is not merely a box to be checked,”¹²² but rather something that deserves robust consideration and analysis. In one form or another, many jurisdictions are recognizing the importance of detailed analysis of the communities surrounding proposed facilities, the cumulative impacts on those communities of projects in combination with other stressors, and the need to avoid disproportionate, adverse impacts on these populations. Two states—New York and New Jersey—have also embraced authorizing state agencies to disapprove facilities that will cause unjustified, disproportionate harms on overburdened communities. Finally, with respect to expediting renewables, New York has created a separate siting agency dedicated to clean energy facilities.

These examples are presented here primarily with an eye towards potential legislative reform in Massachusetts, and also for the sake of considering what the EFSB could implement even under existing law.

A. Identifying EJ Communities and Performing Comparative Analyses

New York law requires, among other components, that applicants include “an evaluation of significant and adverse disproportionate environmental impacts” for a proposed electric generating facility, “a cumulative impact analysis of air quality within a half-mile of the facility,” and “a comprehensive demographic, economic and physical description of the community within which the facility is located . . . compared and contrasted with the county in which the facility is proposed and with adjacent communities within such county[.]”¹²³

FERC has issued proposed guidance stating its intention to “promptly and properly identify” environmental justice communities using demographic screening tools such as the federal EJ SCREEN.¹²⁴ FERC issued this policy statement, at least in part, because courts had been critical of FERC’s attempts to incorporate environmental justice considerations into its administrative processes as the result of litigation.¹²⁵

A recent D.C. Circuit decision highlights FERC’s duty to consider EJ impacts. In *Vecinos para el Bienestar de la Comunidad Costera v. FERC*,¹²⁶ petitioners challenged FERC’s authorization of the construction and operation of three liquified natural gas facilities in Texas and their

¹²² *Friends of Buckingham v. State Air Pollution Control Bd.*, 947 F.3d 68, 92 (4th Cir. 2020).

¹²³ N.Y. Pub. Serv. Law, Art. 10, § 164(1)(f)–(h).

¹²⁴ See *Press Release: FERC Updates Policies to Guide Natural Gas Project Certifications*, FERC (Feb. 17, 2022); FERC, *Certification of New Interstate Natural Gas Facilities*, Docket No. PL18-1-000, at 58–59 (2022). Even if finalized, this guidance will not be binding.

¹²⁵ Available at <https://www.ferc.gov/news-events/news/ferc-updates-policies-guide-natural-gas-project-certifications> (last visited June 30, 2022).

¹²⁶ 6 F.4th 1321 (D.C. Cir. 2021).

associated pipelines as violating the National Environmental Policy Act and Administrative Procedure Act. These statutes together authorize courts to reject environmental justice analyses that are “arbitrary and capricious.” In this case, the D.C. Circuit stated that FERC’s environmental justice analyses must include “a rational connection between the facts found and the decision made.” *Vecinos*, 6 F.4th at 1330 (quoting *Motor Vehicle Mfrs. Ass’n, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). That connection was missing in this case. Specifically, the court held that FERC acted arbitrarily in finding that the project’s impacts would stretch as many as 31 miles from its location while identifying the potentially affected area in its analysis as just those census blocks within two miles of the project site.¹²⁷

The California Energy Commission (“CEC”), which reviews proposed thermal power plants with a generating capacity greater than fifty megawatts,¹²⁸ must prepare an integrated energy policy report every two years that assesses, among other updates, “[t]he geographic distribution of statewide environmental, efficiency, and socioeconomic benefits and drawbacks of existing generation facilities” and “describe[s] the socioeconomic and demographic factors that existed when the facilities were constructed and the current status of these factors.”¹²⁹

B. Cumulative Impacts Analysis

FERC’s recent guidance proposal acknowledges the importance of analyzing cumulative impacts as part of an EJ analysis:

The consideration of cumulative impacts is particularly important when it comes to conducting an environmental justice analysis. An environmental analysis that, for example, considers incremental impacts of a project in isolation will, almost by definition, fail to adequately consider the project’s impact on a community that already experiences elevated levels of pollution or other adverse impacts. To adequately capture the effects of cumulative impacts, it is essential that the Commission consider those pre-existing conditions and how the adverse impacts of a proposed project may interact with and potentially exacerbate them.¹³⁰

Similarly, recently enacted legislation in Vermont has also emphasized cumulative impacts, and requires state agencies to “consider cumulative environmental burdens . . . when making decisions about . . . facilities and infrastructure.”¹³¹

¹²⁷ *Vecinos*, 6 F.4th at 1330–31.

¹²⁸ Cal. Pub. Res. Code. § 25500; Cal. Pub. Res. Code § 25120 (incorporating fifty-megawatt threshold in definition of “thermal power plant”).

¹²⁹ Cal. Pub. Res. Code § 25303(b)(2).

¹³⁰ FERC, Certification of New Interstate Natural Gas Facilities, Docket No. PL18-1-000, at 60–61.

¹³¹ Vt. Act 154, § 2 (2022) (to be codified at V.S.A. c. 72, § 6004(b)).

C. Fast-tracking Renewable Energy

In addition to mitigating harm to local communities from proposed polluting facilities, another way to help achieve substantive environmental justice outcomes is to accelerate the siting of renewable, non-polluting energy facilities. The following states have wrestled with how to protect overburdened communities while speeding up the pace of what are traditionally multi-year proceedings.¹³²

Some states promote renewable energy facility development by ***excluding them from statutory definitions of the facilities subject to a siting agency’s review***. In Connecticut, for example, environmental justice legislation requiring extensive project review applies to “affecting facilities,” a statutorily defined term that encompasses energy facilities with a generating capacity 10 megawatts or greater but *excludes* renewable energy sources.¹³³

Another way to account for the differences in sources of energy is by ***providing a different agency with authority over siting renewable energy facilities***. In New York, for example, traditional power plants are sited according to New York’s Article 10 law, which consists of a comprehensive but complex review process overseen by the New York State Board on Electric Generation Siting and the Environment. Renewable energy facilities are diverted from the Article 10 process and instead undergo review according to N.Y. Executive Law § 94-c, under the newly created Office of Renewable Energy Siting (“ORES”).¹³⁴ ORES considers “all pertinent social, economic, and environmental factors” in the siting decision and requires some outreach to the local community.¹³⁵ Additionally, ORES must, under state law, develop a set of “uniform standards and conditions” for renewable energy facility siting, design, construction, and operation.¹³⁶

D. Decreasing the Size Threshold for Generating Facilities

Another strategy for advancing environmental justice is to decrease the minimum megawatt capacity that makes a generating facility subject to the Siting Board review process, thus requiring more facilities to undergo review. Other jurisdictions surveyed had thresholds lower

¹³² For more on the discussion of requisite renewable energy facilities, *see, e.g.*, Uma Outka, *Siting Renewable Energy: Land Use and Regulatory Context*, 37 *ECOLOGY L.Q.* 1041 (2010) (using Florida as a case study); Shelley Welton & Joel Eisen, *Clean Energy Justice: Charting an Emerging Agenda*, 43 *HARV. ENVTL. L. REV.* 307 (2019); Shalanda H. Baker, *Anti-Resilience: A Roadmap for Transformational Justice Within the Energy System*, 54 *HARV. C.R.-C.L. L. REV.* 1 (2019); Andrew Askland, *Breaking Up Is Hard to Do: American Exceptionalism and the Transition to A Renewable Energy Future*, 27 *NOTRE DAME J.L. ETHICS & PUB. POL’Y* 105 (2013).

¹³³ Conn. Gen. Stat. § 22a-22a(a)(2) (emphasis added). Renewable energy facilities, which include electric generating or storage facility using renewable sources including solar photovoltaic, solar thermal, wind, fuel cells, ocean thermal, wave or tidal, geothermal, landfill gas, hydropower, or biomass, are subject to a different, less burdensome permitting process. Conn. Gen. Stat. § 16-50i(a)(3); Conn. Gen. State § 16-245n(a).

¹³⁴ For a brief overview of the differences between requirements under Art. 10 and § 94-c, *see Siting Generating Facilities in the Section 94-c Era*, 9A *N.Y. PRAC., ENV’T LAW & REG. IN NEW YORK* § 15:7.50 (2d ed.).

¹³⁵ N.Y. Exec. Law, Art. 6, § 94-c(3).

¹³⁶ *Id.*

than Massachusetts' 100 megawatts: New York's Siting Board reviews all facilities 25 megawatts or greater, Connecticut reviews any facilities with a generating capacity greater than or equal to 10 megawatts, and New Jersey does not have a minimum threshold in its statutory definitions.¹³⁷ To be sure, this solution produces little change without real environmental justice considerations being built into the review process, but drawing a petition into the permit review process creates otherwise unavailable opportunities to challenge a facility's location.

E. Substantive EJ Standards for Limiting or Rejecting Projects

New Jersey enacted a groundbreaking EJ law in 2020, under which the New Jersey Department of Environmental Protection must reject a permit application for new facilities that would "cause or contribute to adverse cumulative environmental or public health stressors in the overburdened community that are higher than those borne by other communities," unless the "facility will serve a compelling public interest in the community where it is to be located."¹³⁸ In June 2022, the Department of Environmental Protection proposed regulations to implement this law.¹³⁹

New York's legislature has passed—though the governor has not yet signed—legislation that also requires the denial of a permit application based on EJ impacts: "No permit shall be approved or renewed by the department if it may cause or contribute to, either directly or indirectly, a disproportionate or inequitable or both disproportionate and inequitable pollution burden on a disadvantaged community."¹⁴⁰

¹³⁷ See N.Y. Pub. Serv. Law Art. 10, § 160(2) (New York); Conn. Gen. Stat. § 22a-20a (Connecticut); N.J. Stat. § 48:3-51 (New Jersey).

¹³⁸ N.J. Stat § 13:1D-160(c).

¹³⁹ 54 N.J. Reg. 971(a) (June 6, 2022).

¹⁴⁰ Senate Bill S8830, § 7, 2021–22 New York Legislative Session, *available at* <https://www.nysenate.gov/legislation/bills/2021/S8830>.