

Environmental Law

Expert Analysis

Emerging State-Level Environmental Justice Laws

Environmental justice (EJ) has grown in prominence in the political discourse in the last several years. While most of the attention has gone to federal actions, several states have just adopted their own laws to advance EJ.

The basic idea behind EJ is that disadvantaged communities should not be disproportionately exposed to environmental hazards, that these communities should have a say in the actions that affect their environment, and that the environmental laws should be vigorously enforced there.

During his 2020 campaign Joe Biden highlighted the priority he would give to EJ if elected, and a week after his inauguration as President he issued Executive Order 14008, Tackling the Climate Crisis at Home and Abroad. It states that

MICHAEL B. GERRARD is a professor and director of the Sabin Center for Climate Change Law at Columbia Law School, and Senior Counsel to Arnold & Porter. He is co-editor (with Sheila F. Foster) of *The Law of Environmental Justice* (ABA 2009). EDWARD MCTIERNAN is a partner with Arnold & Porter, and a former General Counsel of the New York State Department of Environmental Conservation.



By
**Michael B.
Gerrard**



And
**Edward
McTiernan**

it is “the policy of my Administration to secure environmental justice and spur economic opportunity for

The basic idea behind EJ is that disadvantaged communities should not be disproportionately exposed to environmental hazards, that these communities should have a say in the actions that affect their environment, and that the environmental laws should be vigorously enforced there.

disadvantaged communities that have been historically marginalized and overburdened by pollution and underinvestment in housing, transportation, water and wastewater infrastructure, and health care.”

This order, amending President Bill Clinton’s EJ Executive Order 12898 of

1994, directed all federal agencies to make achieving EJ part of their missions. It established various EJ councils and directed agencies to elevate EJ in their organizational structures. It established the “Justice40 Initiative,” which aims to direct 40% of the overall benefits of certain federal investments toward disadvantaged communities. The diversity of those appointed by President Biden to his administration further highlights his commitment to EJ.

These and many other actions aim to advance EJ at the federal level. The focus of this column, however, is on the EJ provisions in New York law and those recently enacted by other states.

New York

Some aspects of EJ have been enshrined in New York law since at least 1986, when the Court of Appeals ruled that secondary displacement of low-income persons as a result of a proposed project must be considered under the State Environmental Quality Review Act (SEQRA). *Chinese Staff & Workers Ass’n v. City of New York*, 68 N.Y.2d 359 (1986). In 2000 an administrative

law judge of the state Department of Environmental Conservation (DEC) ruled that EJ impacts must be considered in the SEQRA review of DEC permits for a proposed solid waste transfer station. In re American Marine Rail. In 2003 DEC issued its Commissioner Policy on Environmental Justice and Permitting.

The first entry of EJ into the statute books also came in 2003, when EJ was added to the list of factors for DEC to consider in selecting remedial actions for brownfield sites. E.C.L. §27-1415.3(i)(vii).

The Power NY Act of 2011 modified the procedures for approving major power plants, and it required applications to include “analysis of environmental justice issues...[and] an evaluation of significant and adverse disproportionate impacts of the proposed 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 a half-mile radius.” Pub. Auth. L. §164. DEC issued implementing regulations in 2012. 6 N.Y.C.R.R. Part 487.

Much stronger EJ provisions were included in the Climate Leadership and Community Protection Act of 2019 (CLCPA), which we have written about in a prior column. It declared that “[a]ctions undertaken by New York state to mitigate greenhouse gas emissions should prioritize the safety and health of disadvantaged communities, control potential regressive impacts of future climate mitigation and adaptation policies on these communities, and prioritize the allocation of

public investments in these areas.”

The CLCPA created a Climate Justice Working Group that “will establish criteria to identify disadvantaged communities for the purposes of co-pollutant reductions, greenhouse gas emissions reductions, regulatory impact statements, and the allocation of investments related to this article,” E.C.L. §75-0111, and a Just Transition Working Group to advise on “workforce development and training related to energy efficiency measures, renewable energy and other clean energy technologies, with specific focus on

Most states—arguably led by California—have statutes, regulations, executive orders, or guidance on some aspects of EJ. Some of these merely call for studies or establish advisory committees; others go further. In the last year, four states have passed strong new EJ legislation, while two other states adopted more modest EJ bills.

training and workforce opportunities for disadvantaged communities,” E.C.L. §75-0103.

The CLCPA directed DEC to issue regulations that “ensure that activities undertaken to comply with the regulations do not result in a net increase in co-pollutant emissions or otherwise disproportionately burden disadvantaged communities,” and “prioritize measures to maximize net reductions of greenhouse gas emissions and co-pollutants in disadvantaged communities.” E.C.L. §75-0109. It also told

DEC to prepare “a strategy to reduce emissions of toxic air contaminants and criteria air pollutants in disadvantaged communities affected by a high cumulative exposure burden.” E.C.L. §75-0115.

Perhaps most significantly, and similar to President Biden’s Justice40 Initiative, the CLCPA provides that “State agencies...shall, to the extent practicable, invest or direct available and relevant programmatic resources in a manner designed to achieve a goal for disadvantaged communities to receive forty percent of overall benefits of spending on clean energy and energy efficiency programs, projects or investments in the areas of housing, workforce development, pollution reduction, low income energy assistance, energy, transportation and economic development, provided however, that *disadvantaged communities shall receive no less than thirty-five percent of the overall benefits of spending on clean energy and energy efficiency programs, projects or investments...*” E.C.L. §75-0117 (emphasis added). (The meaning of “overall benefits” is the subject of much discussion today.)

Section 7.3 of the CLCPA dictates, “In considering and issuing permits, licenses, and other administrative approvals and decisions...all state agencies, offices, authorities, and divisions shall not disproportionately burden disadvantaged communities...All state agencies...shall also prioritize reductions of greenhouse gas emissions and co-pollutants in disadvantaged communities.” The legal significance of this provision has yet to be tested in the courts.

The CLCPA directs the Public Service Commission to “design programs in a manner to provide substantial benefits for disadvantaged communities...including low to moderate income consumers,” and to direct at least 20% of investments in residential energy efficiency to go to disadvantaged communities. Pub. Serv. L. §66-p.

In 2019, New York enacted a new Article 48 of the Environmental Conservation Law, focused entirely on EJ. It states, “It is hereby declared to be the policy of this state that all people, regardless of race, color, religion, national origin or income, have a right to fair treatment and meaningful involvement in the development, implementation and enforcement of laws, regulations and policies that affect the quality of the environment.” E.C.L. §48-0101. It creates a Permanent Environmental Justice Advisory Group (whose members have still not been named), and it requires each state agency to adopt and be guided by an environmental justice policy.

The Accelerated Renewable Energy Growth and Community Benefit Act of 2020 (which we have previously covered) partly supplants the Power NY Act of 2011. One of its stated purposes is to “protect environmental justice areas from adverse environmental impacts” in siting new renewable energy facilities. Pub. Auth. L. §1900. It established an Office of Renewable Energy Siting, which has issued regulations that require each permit application to identify and evaluate significant and adverse environmental impacts of a facility on EJ areas, and specific

measures to avoid such impacts. 19 N.Y.C.R.R. §900-2.20.

The statute that would implement the “Restore Mother Nature” environmental bond act, which will be on the ballot this November, requires DEC to “make every effort practicable to ensure that thirty-five percent of the funds...benefit environmental justice communities.” 2021 NY Laws ch. 59 part UU.

On March 3, 2021, the New York State Senate passed a package of bills pertaining to EJ. Each has a counterpart in the State Assembly, whose environmental committee is now considering them. These include bills that would:

- Require fossil-fuel burning power plants located in or near EJ communities and which operate only during peak periods to convert to renewable energy on a set timetable (S.4378A, A.6251)
- Require an environmental impact statement for projects that may affect EJ communities, and prohibit approval of projects that contribute to a disproportionate pollution burden (S.1031B, A.2103-A)
- Require hiring and training for energy efficiency programs for people from EJ communities and the investment of energy efficiency funding there (S.3126A, A.3996)
- Require enhanced public participation for major projects in or adjacent to EJ communities (S.3211A, A.6530)
- Require DEC to promulgate air quality standards for seven toxic air pollutants and require major sources of toxic air pollutants

located in or near EJ communities to install fence line monitoring systems (S.4378A, A.6251).

Further EJ provisions are in the Climate and Community Investment Act (S.4264A, A.6967), which is currently under consideration in both chambers.

Other States

Most states—arguably led by California—have statutes, regulations, executive orders, or guidance on some aspects of EJ. Some of these merely call for studies or establish advisory committees; others go further. In the last year, four states have passed strong new EJ legislation, while two other states adopted more modest EJ bills.

New Jersey: On Sept. 18, 2020, Gov. Phil Murphy signed “An Act Concerning the Disproportionate and Public Health Impacts of Pollution on Overburdened Communities,” Senate No. 232. It may be the strongest EJ law in the country.

The new law requires EJ impact statements for projects in EJ communities that require a permit from the state Department of Environmental Protection (NJDEP). Uniquely, it has a substantive provision that requires NJDEP (subject to various exceptions) to “deny a permit for a new facility...upon a finding that approval of the permit...would, together with other environmental or public health stressors affecting the overburdened community, cause or contribute to adverse cumulative environmental or public health stressors in the overburdened community that are higher than those borne by other communities ...”

Massachusetts: On March 26, 2021, Gov. Charlie Baker signed a major new climate change law, Senate Bill 9. It has several EJ provisions:

- Greenhouse gas reduction “regulations shall achieve required emissions reductions equitably and in a manner that protects low- and moderate-income persons and environmental justice populations.”
- An environmental impact report is required for any project that is likely to cause damage to the environment and is located within one mile of an EJ population (five miles if the project will generate air pollution)
- EJ principles are to be considered in all permitting and policy decisions
- Enhanced public participation is required in EJ communities

Rhode Island: On April 10, 2021, Gov. Daniel McKee signed the 2021 Act on Climate. It empowers a state council to promulgate a state-wide plan for the state to reach net-zero emissions by 2050, along with several intermediate goals. The new law requires an equitable transition for EJ populations; calls for “redress [of] past environmental and public health inequities;” guarantees input by populations most vulnerable to climate change; promotes development of green energy jobs that address economic inequity; and requires that women, people of color, indigenous persons, veterans, formerly incarcerated persons, and people living with disabilities, be recruited for such jobs.

Washington: The Washington legislature passed a major climate

change bill, S.5126, on April 24, 2021, establishing a cap-and-trade program for greenhouse gases. Gov. Jay Inslee is expected to sign it. Washington will become the second state (after California) to adopt an economy-wide cap-and-trade program. It was passed by the state legislature after the failure of two voter referenda for a carbon tax.

The phrase “environmental justice” appears 24 times in the bill. The bill requires extensive analysis of the adverse effects that pollutants (not only greenhouse gases) have on EJ communities, and targeted efforts to reduce them, and an air monitoring network in EJ communities. The bill establishes a “climate investment account” to receive the proceeds of the cap-and-trade program, and a minimum of 35% and a goal of 40% of the funds must “provide direct and meaningful benefits to vulnerable populations within the boundaries of overburdened communities.”

Also passed by the Washington legislature in April and awaiting Governor Inslee’s signature is the Healthy Environment For All Act, S.5141, a comprehensive bill requiring all state agencies to take EJ considerations into account, advancing community participation, and many other items

Two other states adopted more modest EJ laws in 2020. On Oct. 2, 2020, Gov. Ned Lamont of Connecticut signed H.B. No. 7008, which provides that when certain industrial facilities are sited or expanded in EJ communities that already have several such facilities, the applicant must enter into an agreement

with the municipality to provide environmental benefits to the community. The law also increases public participation requirements. On April 22, 2020, Virginia Gov. Ralph Northam signed S.B. 883, which establishes an EJ advisory council.

Conclusion

There is considerable variation among these new state laws in how they define EJ communities (both in terminology and criteria), in the benefits these communities receive, and in other respects. Most of the laws require that polluting facilities in EJ communities receive special scrutiny; some discourage or even ban permits for facilities that would cause disproportionate impacts. Most of the laws require special monitoring of pollutants and mapping of environmental hazards, overlain on demographic information.

Several other states are considering EJ laws, or climate laws with EJ provisions. While there is no federal statute on environmental justice (though many have been introduced into Congress), more regulations or guidance are expected from several federal agencies. All in all, EJ is rapidly rising toward the top of legislative and regulatory agendas.