
Environmental Justice in the Laboratories of Democracy

Steven Bonorris and Nicholas Targ

Environmental Justice (EJ) is a term that captures a civil rights movement, a normative goal of distributional fairness and community empowerment, as well as a broad set of laws, regulations, and initiatives that seek to address disproportionate and adverse environmental conditions in minority and low income communities. In the first half of 2010, the federal government reinvigorated the United States Environmental Protection Agency's (EPA's) EJ civil rights programs with a particular eye toward the states, through efforts such as the State Environmental Justice Cooperative Agreement (SEJCA) program. EPA, STATE ENVIRONMENTAL JUSTICE COOPERATIVE AGREEMENTS, available at www.epa.gov/compliance/ej/grants/ej-sejca-grants.html. SEJCA intends to "promote environmental justice in state government activities and to advance strategies that result in improvements in public health and the environment." *Id.*

The states have been early and consistent innovators in the area of environmental justice policy, beginning with Connecticut's groundbreaking EJ policy in 1993. The recently released fourth edition of the joint ABA/Hastings *Environmental Justice for All* survey reveals that the states continue to embrace the issue of environmental justice. ABA/Hastings Survey, available at www.abanet.org/environ/highlights/docs/Environmental_Justice_for_All.pdf and <http://www.uchastings.edu/cs/lgl>. The 2010 edition is considerably lengthier than previous editions, demonstrating that the states continue to add to and experiment with approaches to tackle environmental justice issues. Indeed, forty-one states presently have statutes, regulations, or other initiatives that further environmental justice, up from thirty-four identified in the 2007 edition. Of the states with formalized environmental justice programs, six have statutes that expressly reference environmental justice, while nineteen (with some overlap) have statutes that may be used to further the aims of environmental justice by, for example, limiting the concentration of landfills or by encouraging community benefit agreements in sensitive areas.

This article takes a look at bellwether states on the Atlantic seaboard (Atlantic Bellwether States), where much of the recent innovation has occurred. These states include New Jer-

sey, where Administrator Lisa Jackson served as Commissioner of the Department of Environmental Protection, and New York, where Lisa Garcia, EPA Counsel to the Administrator on Environmental Justice issues, served as Chief Advocate for Environmental Justice and Equity at the Department of Environmental Conservation.

While the range of state approaches continues to broaden, it is possible to gather the various techniques into coalescing models, including: Internal Management, Public Participation Practices; and Substantive. The initiatives that make up these models tend to be distributed between internal and external processes (e.g., training environmental agency personnel to recognize the environmental justice implications of their actions, as well as creating public outreach protocols), and substantive provisions limiting the range of permissible outcomes (e.g., anticoncentration provisions).

One well-established model of the states' approach to EJ could be termed the "Internal Management" paradigm, familiar from the precepts laid out in President Clinton's 1994 Executive Order 12,898. See 59 Fed. Reg. 32 (Feb. 11, 1994). The Internal Management paradigm aims to prevent potential disproportionate adverse environmental outcomes by changing the way agency policies and programs are conceived, implemented, and enforced. Under this model, environmental justice concerns are integrated into bureaucratic systems through the formation of interagency workgroups, publication of policy guidelines, as well as public participation mechanisms so that decision makers are given the broadest sense of the effect of their actions.

While Executive Order 12,898 imposes internal management obligations on a large number of identified federal agencies, the states have often written Internal Management policies that only direct the operations of state environmental agencies. Examples of Atlantic Bellwether State policies following the Internal Management model include (1) Connecticut's Environmental Equity policy, (2) New York's EJ permit policy with its census block EJ-screening tool, and (3) New Jersey's use of coordinated interagency compliance inspections to address potential enforcement gaps in EJ communities.

The states typically go beyond the federal Internal Management model in two significant conceptual respects, however. For one, many of the Atlantic Bellwether States have adopted enhanced public participation practices. These practices are typically triggered by specific categories of facilities that are proximate to "environmental justice" or other identified

Mr. Bonorris is associate director for Research at the Center for State and Local Government Law and adjunct assistant professor of law at UC Hastings College of the Law in San Francisco. Mr. Targ is a partner with Holland & Knight's San Francisco Office and serves on EPA's National Environmental Justice Advisory Council. They may be reached at bonorris@uchastings.edu and Nicholas.Targ@hkllaw.com.

communities. Public participation is meant to create better informed administrative decisions (and so, supports the Internal Management model). Public participation initiatives are frequently also meant to help communities voice concerns by addressing potential information and political power asymmetries. The initiatives tend to shift the costs of information sharing and capacity building onto the permit seekers. Examples of Atlantic Bellwether States with well-developed, environmental-justice public participation programs include (1) New York's enhanced public participation requirements, binding upon permit applicants, and (2) Connecticut's Community Environmental Benefit Agreement statute, which encourages the agreement upon community benefits or mitigations before a permit is granted.

A second departure from the federal Internal Management Model may be termed the "Substantive Model," which is aimed at avoiding disproportionate impacts in particular communities or geographic areas. Substantive provisions focus on outcomes; historically, these provisions include anticoncentration provisions relating to locally undesirable uses, however, the scope of the Substantive Model is growing. For example, (1) Delaware's Community Environmental Project Fund returns a portion of enforcement penalties to affected communities; (2) Maryland's climate change law is oriented to protect environmental justice communities from potential adverse effects of climate change regulation, and (3) Maryland's Environmental Benefit Districts work to direct government programs and funding to communities disadvantaged by environmental and health problems.

The table on page 46 provides a snapshot of the Atlantic Bellwether States' efforts along the formal axes of statutes, executive orders, policies, and programs.

The Internal Management Model

Among the Atlantic Bellwether States, Connecticut, through its Department of Environmental Protection (Connecticut DEP), was the first to implement an EJ policy. Beyond the general goal that minority and low-income communities should not bear a disproportionate share of environmental degradation, Connecticut's 1993 EJ policy aims to incorporate environmental equity into its program development, policymaking, regulatory activities and staff training. The policy makes public-participation goals explicit, encouraging community participation in "ongoing operations and program development, including but not limited to inclusion on the agency's advisory boards and commissions, regulatory review panels, and planning and permitting activities." CONNECTICUT DEP, ENVIRONMENTAL EQUITY POLICY, available at www.ct.gov/dep/cwp/view.asp?a=2688&q=322376&depNav_GID=1511. A unique aspect of this early EJ policy is a commitment to continue to diversify the racial and ethnic backgrounds of Connecticut DEP staff, to better reflect and represent the Connecticut DEP's diverse constituency.

New York followed in 2003 with its EJ permit policy, closely tracking the structure of the federal executive order, with

some particular and significant differences. The New York policy covers a wide variety of permits (e.g., air pollution and solid-waste management) and requires the state's Department of Environmental Conservation (New York DEC) to conduct a preliminary screen to determine whether the proposed action is in or near a "potential environmental justice community" (i.e., a minority population of 51.1 percent in urban areas, 33.8 percent in rural areas, or 23.59 percent population below the poverty line qualifies a census block group as a potential environmental justice community). NEW YORK DEC, ENVIRONMENTAL JUSTICE AND PERMITTING, DEC POLICY, available at www.dec.ny.gov/docs/permits_ej_operations_pdf/ejpolicy.pdf. The policy then asks whether potential adverse environmental impacts related to the proposed action are likely to affect that community.

A cluster of Atlantic Bellwether States have institutionalized their commitment to furthering environmental justice by creating state EJ offices or full-time positions dedicated to furthering awareness of and sensitivity to EJ within the apparatus of state government. These staff members are usually responsible for training environmental staff in EJ awareness. Again, Connecticut led the way in its 1993 EJ policy; New York created its Office of Environmental Justice in 1999. More recently, Pennsylvania and Delaware have created EJ positions for "ombudsmen" that go well beyond being the internal agency voice setting environmental justice policy. In these states, the ombudsman's role includes providing services directly to affected communities.

The Pennsylvania Office of Environmental Advocate (Pennsylvania OEA) serves as a point of contact for Pennsylvania's residents, with a view towards increasing community awareness of environmental decision points, and supporting community involvement in the process. The Pennsylvania OEA staff includes Regional Advocates charged with ensuring compliance with Title VI of the Civil Rights Act of 1964, and implementing other EJ-oriented efforts.

To achieve its goals, the Pennsylvania OEA notifies residents of proposed permits that may affect their community, reviews existing environmental agency programs and policies to ensure equal protection, and ensures that any EJ concerns raised by residents are responded to in a timely manner. The Pennsylvania OEA works with permit applicants to carry out the public participation process and ensures there are plain language summaries to promote community understanding. The Pennsylvania OEA has also set up several processes to promote community involvement, including an e-mail notification system to apprise interested parties of the status of specific permit applications as they move through the Pennsylvania DEP permitting process.

In 2001, Delaware's legislature created a Community Ombudsman position to serve as a liaison between Delaware's Department of Natural Resources and Environmental Control (Delaware DNREC) and communities statewide. The Community Ombudsman is similarly charged with engaging communities in identifying and understanding environmental issues, addressing or resolving environmental problems, advocating for and assisting communities in obtaining informa-



	Statutes	Policies		EJ Office or FTE	Advisory Council
		Statewide	Environmental Agency		
Connecticut	Public participation (2008)		Environmental Equity Policy (1993)	EJ Complaint Investigator	
Delaware	Community Involvement Advisory Council (2001); Penalty Fund (2004)			Community Ombudsman	CIAC (1999)
New Jersey		EO 96 (2004); EO 131 (2009)		Environmental Justice Coordinator	Yes
New York	Brownfields; SEQRA		Environmental Justice Permit Policy (2003)	Office of Environmental Justice (1999)	EJAG (1999)
Maryland	Advisory Council (1997); Anne Arundel (2003); Minority Participation Task Force (2006); Climate Change (2008)				MACEJ; Children's Health Council
Massachusetts			Environmental Justice Policy (2002)	FTE	
Pennsylvania			Environmental Justice) Public Participation Policy (2004)	Office of Environmental Advocate	EJAB (2003)

tion on environmental issues, as well as serving as a point of contact for the Delaware DNREC with communities and community organizations.

Connecticut DEP employs an EJ Complaint Investigator dedicated to the task of responding to and investigating community complaints related to environmental justice. If the agency receives an EJ complaint, the EJ Complaint Investigator is responsible for referring the issues to the various state, local, and/or federal agencies that have jurisdiction over the subject matter, and thereafter, monitoring the progress of the investigations. The Complaint Investigator also assists EJ

complainants in navigating the state bureaucracy.

An older, but notable, EJ program is New Jersey's use of multi-media "enforcement sweeps." These enforcement sweeps marshal a large New Jersey Department of Environmental Protection (New Jersey DEP) enforcement team from nearly all of its units (e.g., the Bureau of Air Monitoring and the Pesticide Control Program) and orient them toward specific geographic areas. In these areas, New Jersey DEP conducts outreach and compliance education programs, followed by broad inspections, and other enforcement actions, as appropriate. The enforcement sweeps are listed on the agency Web site and have

included diesel engine idling, regulated medical waste, a waterway enforcement team, school integrated pest management, agricultural worker safety, wetlands restoration and truck inspections. NEW JERSEY DEP, SPECIAL PROJECTS, www.nj.gov/dep/enforcement/specialprojects.html. New Jersey DEP has focused on specific sensitive communities as well—Camden City and Paterson are two examples. The enforcement sweeps underscore the role of environmental enforcement in EJ communities.

In addition to agency regulations and policies encouraging agency responsiveness to EJ concerns, some Atlantic Bellwether State courts have interpreted existing state law (including a state constitution) as buttressing the Internal Management model, requiring or supporting consideration of the impacts of agency permitting and regulatory decisions on EJ communities. An administrative law judge held that New York's State Environmental Quality Review Act (SEQRA) required New York DEC to consider and perform analysis of the EJ issues associated with a permit application for a barge-to-rail solid waste transfer station in the Bronx. *In re American Marine Rail*, 2000 N.Y. Env. LEXIS 63 (Aug. 25, 2000), *rev'd in part on other grounds in* Final Decision by Commissioner Cahill, 2001 N.Y. Env. LEXIS 6 (Feb. 14, 2001). SEQRA mandates that agencies consider impacts to the environment including "land, air, water, minerals, flora, fauna, noise, objects of historic or aesthetic significance, existing patterns of population concentration, distribution, or growth, and existing community or neighborhood character." ECL §§ 8-0105(6), 8-0109.

The administrative law judge was persuaded that SEQRA's "broad mandate" encompassed EJ concerns: "[b]y doing a proper analysis under SEQRA, the lead agencies will determine what impacts are to be expected from the project, whom they will affect and what measures must be taken to ensure that these effects are mitigated to the maximum extent practicable. These steps will ensure that environmental justice considerations are addressed." 2000 N.Y. Env. LEXIS 63, at *196–97. Of note, the judge also relied on the penumbra of federal law and policy, specifically Title VI of the Civil Rights Act of 1964 and Executive Order 12,898.

Likewise, the Pennsylvania Supreme Court has interpreted the state constitution as supporting a general regulation balancing environmental harms against social benefits, supporting or requiring procedural safeguards. This interpretation indirectly buttresses administrative efforts to account for, and mitigate, adverse environmental impacts upon EJ communities. A proponent of a landfill project in Pennsylvania challenged the treatment of its permit application under a state regulation's harm/benefit test, which weighs the public benefits of a landfill against its articulated and potential environmental harms (e.g., effects on the environment and public health and safety, including social harms). The Pennsylvania Supreme Court found that the harm/benefit balancing test was a "flexible and effective means to implement and enforce" the authorizing waste management statutes. *Eagle Environmental, L.P. v. Commonwealth of Penn.*, 884 A.2d 867 (Pa. 2005). Furthermore, the court observed that the legitimacy of the regulation was strengthened by the act's reference to the Com-

monwealth's constitutional guarantee of the people's "right to clean air, pure water and to the preservation of the natural, scenic, historic and aesthetic values of the environment." *Id.* at 879, *citing* Pennsylvania Constitution, art. I, § 27.

Eagle Environmental and the landfill regulations themselves do not expressly reference "environmental justice," but exemplify the trend that state constitutional rights to a clean environment are interpreted as supporting or requiring procedural safeguards, benefiting environmental justice communities. This case builds on prior Pennsylvania cases, which had viewed the state constitution as requiring Pennsylvania DEP to balance its responsibilities to protect the environment and to provide needed services to the public.

The Public Participation Practices Model

While the practices of the Internal Management Model primarily look to improving agencies' awareness of and responsiveness to EJ concerns, the initiatives of the Public Participation Model aim squarely at increasing the amount of, and quality of public participation by affected communities. For example, the Massachusetts Executive Office of Energy and Environmental Affairs (Massachusetts EOEEA) Web site contains an interactive Geographic Information Systems (GIS) mapping program that identifies all of the Commonwealth's EJ populations, which EOEEA defines as neighborhoods where (1) median annual household income is at or below 65 percent of the statewide median income for Massachusetts; or (2) 25 percent of the residents are minority; or (3) 25 percent of the residents are foreign born; or (4) 25 percent of the residents lack English language proficiency. ENVIRONMENTAL JUSTICE POLICY OF THE EXECUTIVE OFFICE OF ENVIRONMENTAL AFFAIRS (2002), at 5, *available at* http://www.mass.gov/Eoeea/docs/eea/ej/ej_policy_english.pdf Office of Geographic Information (MassGIS), www.mass.gov/mgis/. EOEEA considers these populations of society "most at risk of being unaware of or unable to participate in environmental decision making or to gain access to state environmental resources." *Id.* at 5. Communities, project proponents, and permitting agencies can pinpoint and review projects submitted to Massachusetts EOEEA to determine whether they involve an EJ population, and consequently, trigger enhanced standards of review.

New York also maintains a Web site; however, the New York program allows the public to search permit applications *before* the application is released as complete, giving early warning to affected communities. NEW YORK DEC, DEC PERMIT APPLICATIONS, www.dec.ny.gov/cfm/extapps/envapps/. The new feature specifies the project manager, the applicant, and other permit related resources. Similar to the Massachusetts Web site, New York DEC's site features a GIS tool for interactive overlays of EJ communities with both proposed and existing facilities.

Some initiatives of the Public Participation Model go further than increasing the likelihood that community groups will be apprised of projects with potentially adverse consequences. As mentioned, New York's 2003 EJ permit policy provides that the New York DEC will use census block level

data to determine whether an EJ community exists during the preliminary screen. If a project in a minority or low-income community carries the potential for at least one significant, adverse environmental impact, the permit applicant must submit a written public participation plan describing how the applicant will identify and notice stakeholders, produce easily understood project information, schedule public meetings, and establish document repositories. NEW YORK DEC, ENVIRONMENTAL JUSTICE AND PERMITTING, DEC POLICY, at 8. The applicant must submit progress reports, as well as a final certification that it has complied with the participation plan, prior to final approval of the permit. This policy has the effect of internalizing the environmental costs of projects on permit applicants, and ensures that permit applicants and stakeholders open a dialog early in the process.

As in the New York permit model, for new facilities and expanded facilities in Connecticut EJ communities, facilities must file a “meaningful” EJ Public Participation Plan, and receive approval for the plan by the Connecticut DEP or the state Siting Council prior to applying for a general siting permit.

Similarly, Connecticut shifts some of the responsibility for increasing public participation upon the project proponents. Effective January 2009, Connecticut’s Public Act 08-94 (Act) allowed the Connecticut DEP to expand notice requirements to increase public participation opportunities for certain permit applications for new facilities and expanded facilities located in EJ communities. 2008 Conn. Acts 08-94 (Reg. Sess.); CONNECTICUT DEP, THE ENVIRONMENTAL JUSTICE PUBLIC PARTICIPATION GUIDELINES, at 3, (Jan. 6, 2009), available at www.ct.gov/dep/lib/dep/environmental_justice/EJ_Guid.pdf.

Facilities covered under the Act include electric generating facilities, sludge and solid waste incinerators, sewage treatment plants, landfills, and major sources of air pollution as defined by the federal Clean Air Act.

As in the New York permit model, these facilities must file a “meaningful” Environmental Justice Public Participation Plan, and receive approval for the plan by the Connecticut DEP or the state Siting Council prior to applying for a general siting permit. 2008 Conn. Acts 08-94 (Reg. Sess.). The Public Participation Plan must list a time and location for an informal public participation meeting that is convenient for the residents of the affected EJ community. At this meeting, representatives from the facility are required to make a reasonable and good-faith effort to provide clear, accurate, and complete information about the proposed facility or expansion of a facility and the potential environmental and health impacts.

The Act further requires that applicants consult with officials in the town or towns in which the facility is to be located or expanded, so to consider a Community Environmental Benefit Agreement (CEBA). A CEBA is a written agreement between project proponents and municipalities whereby the project proponent agrees to provide financial resources for the purpose of the mitigation of impacts reasonably related to the facility. CEBA projects may include environmental education, diesel pollution reduction, construction of biking and walking trails, staffing for parks, urban forestry, support for community gardens, or any other negotiated benefit to the environment in the EJ community. Although community groups are not party to these agreements, the Act requires that the municipality shall provide a reasonable opportunity for residents of the potentially affected EJ community to comment on the need for, and terms of, the agreements.

In parallel to the public participation enhancing activities of Atlantic Bellwether State legislatures and agencies, at least one state court has ruled in favor of public participatory rights in environmental permit decisions, directly supporting the inclusion of an EJ community in the planning process. Plaintiffs challenged the conduct of the Rhode Island Department of Environmental Management (Rhode Island DEM) in issuing a permit for a school to be sited on a former landfill near a predominantly African American and Latino, low-income population. *Hartford Park Tenants Ass’n v. R.I. Dep’t of Envtl. Mgmt.*, 2005 R.I. Super. Lexis 148 (Sup. Ct. R.I. 2005). Specifically, plaintiffs contended that Rhode Island DEM failed to consider EJ issues and did not provide an opportunity for effective public participation as required by the Rhode Island Industrial Property Remediation and Reuse Act (IPRARA). The court agreed, stating that while the site investigation was thorough and the site remedy exceeded that which could have been required by law or regulation, Rhode Island DEM failed “to develop and implement a process that ensured community involvement.” *Id.* at 174. Specifically, Rhode Island DEM did not ensure that abutters received notice of the impending actions, and failed to provide access to the relevant public records near the site. In addition, Rhode Island DEM did not heed the requirements of IPRARA, in failing to consider environmental equity in the conducting the site investigation of the former landfill.

The Substantive Model

The substantive model can be readily differentiated by its focus on environmental outcomes and project funding, in contrast to the previous two models, which may be viewed as helping to ensure adequate consideration of community impacts and participation in the decision-making process. In 2000, the Maryland legislature passed House Joint Resolution 6, which addressed EJ concerns within Anne Arundel County. H.R.J. Res. 6, 2000 Leg., 414th Sess. (Md. 2000). The resolution required the Maryland Department of the Environment (MDE), in consultation with the Maryland Advisory Council on Environmental Justice, to develop a plan to promote EJ in Anne Arundel County because of its high cancer mortality rate. The resolution also mandated that no additional industrial activity be allowed to proceed in the county, and that no further environmental permits be issued in designated areas of concern.

In 2003, MDE established Environmental Benefit Districts (EBDs), communities identified as disadvantaged based on environmental, health, or economic factors. The agency Web site explains that the EBD concept “acknowledges that many of the needed programs to protect and revitalize communities are in existence, albeit not focused or coordinated in some cases. EBDs provide the geographic focus and needs identification to make some existing programs more successful.” MDE, ENVIRONMENTAL JUSTICE IN MARYLAND, www.mde.state.md.us/Programs/MultimediaPrograms/Environmental_Justice/implementation/details.asp#calendar. Communities designated as EBDs may be entitled to some MDE resources and other state resources. Examples of EBD projects include the retrofitting and installation of pollution control devices on buses and trucks in Montgomery and Prince George’s counties.

The Delaware ombudsman mentioned above plays a role in another innovative program, the Community Environmental Project Fund (CEPF). DEL. CODE ANN. tit. 7 § 6042. The CEPF receives funding from state agency enforcement actions (25 percent of environmental penalties collected) and finances projects that mitigate or eliminate pollution; remove risks to human health in the environment; or improve native habitats or recreational opportunities. All CEPF projects must benefit the community in which the underlying violation occurred (geographic nexus). Importantly, Delaware civic and community organizations, including environmental justice groups, may receive CEPF funds for projects that benefit local communities. Typical projects include school bus retrofitting to reduce emissions.

In contrast to the CEPF mechanism, Connecticut’s Supplemental Environmental Projects (SEP) program is more typical of state SEP policies. Under this program, Connecticut DEP reduces the cash penalties amount resulting from environmental enforcement actions offsetting the cost of the SEP agreed to be performed by the environmental defendant. The agency’s SEP policy states that after threshold concerns are met (e.g., that the project does not further degrade the environment), the SEP should fit into one of eight categories, such as environmental assessment, public health, and environmental restoration. Of the eight categories, “pollution prevention projects are preferred, especially a pollution prevention project that positively impacts

communities where environmental equity may be an issue.” Connecticut DEP, “POLICY ON SUPPLEMENTAL ENVIRONMENTAL PROJECTS” (1996), at 6, *available at* www.ct.gov/dep/lib/dep/enforcement/policies/seppolicy.pdf. The agency envisions its SEP policy as falling within its longstanding commitment that “no segment of the population should, because of racial or economic makeup, bear a disproportionate share of the risks and consequences of environmental pollution or be denied equal access to environmental benefits.” *Id.* at fn. 4.

Delaware and New Jersey require that a portion of cap-and-trade allowance auction revenue, obtained from their participation in the Regional Greenhouse Gas Initiative, be devoted to reducing the cost of electricity to minority and low-income populations.

A fresh example of the Substantive Model is seen in state implementation of climate change regimes, aimed at reducing the possibility that these new environmental laws will adversely affect EJ communities. In 2009, Maryland’s governor signed a bill requiring that the MDE, after holding public forums, formulate a plan to cut greenhouse gas emissions by 25 percent from 2006 levels by 2020, and a total of 80 percent to 95 percent from 1996 levels by 2050. MD. CODE ANN., ENVIR. §§ 2-1202, *et seq.* In implementing the plan, MDE is required to ensure that the plan does not disproportionately impact any specific subset of the population, including the rural, low-income, low to moderate-income, and minority communities, mirroring aspects of legislation established under California’s landmark climate change legislation (AB 32).

In a related vein, Delaware and New Jersey require that a portion of cap-and-trade allowance auction revenue, obtained from their respective participation in the Regional Greenhouse Gas Initiative (RGGI), be devoted to reducing the cost of electricity to minority and low-income populations.

This brief discussion of the efforts of the Atlantic Bellwether States demonstrates the vitality of EJ while sketching out the surprisingly distinct strains of EJ policy within the halls of government, even as advocates outside of government continue to pursue community mobilization and novel litigation strategies in parallel. 🌱