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August 25, 2015

Matthew A. Beaton, Secretary
Massachusetts Executive Office of Energy and Environmental Affairs
251 Causeway St
Boston, MA 02114

Dear Secretary Beaton,

Alternatives for Community & Environment (“ACE”) represents the interests of Environmental Justice (“EJ”) populations throughout the Commonwealth. Our members and allied organizations were central to the development of Executive Order 552, which gives rise to the current work on EEA’s EJ Policy.

We thank EEA for its careful consideration of Executive Order 552. Having now reviewed the draft Policy, we propose the following changes, below and attached. Our shared goals are to strengthen the Commonwealth’s commitment to environmental justice and the protection of EJ populations.

The Policy is discussed below according to its major sections. A redlined draft is attached for clarification.

PREAMBLE

We recommend the following clarifications in the third paragraph (additions in italics):

- “This Policy reinforces that all communities must have a strong voice in environmental decision-making regardless of race, income, national origin or English language proficiency, *that such voices can influence environmental decision-making . . .*”
- “In addition, increased attention must be focused on communities that are built in and around the state’s oldest areas with a legacy of environmental pollution, particularly in areas *with residents who have elevated rates of disease and health burdens. that may already have a status of vulnerable health.*”

The policy states that having a strong voice in environmental decision-making is important. However, environmental justice is more likely to be achieved when all communities have a meaningful ability to influence the decisions made by EEA and its agencies. We recommend that EEA expressly commit to providing affected communities the meaningful ability to influence decisions.

We further recommend that EEA commit to accuracy, specificity, and thoroughness when identifying and addressing the health needs of EJ populations. This commitment should be reflected throughout the Policy.

DEFINITIONS

We recommend that this policy add definitions for enhanced public participation and enhanced environmental review with the following core criteria in mind:

- Enhanced public participation, defined, at a minimum, as increased interaction between EEA agency staff and community stakeholders, as well as a documentation of community conversations and how they factored into final decisions.
- A definition for enhanced environmental review should be provided in order to establish a common set of expectations for EEA agency staff, proponents, and community stakeholders.
- Any future definition of enhanced environmental review should include climate change considerations, as authorized (see, Legal Authority).

We recommend the following revisions to the definitions provided in the current draft:

- Environmental justice: The term “pollution” should be changed to “hazards” since not all environmental injustices are related to pollution. Most climate change impacts, for example, are not sources of pollution.
- Equal Protection: The term “handicap” should be changed to “disability” to be consistent with federal and state laws. For the reasons stated above, the “pollution” should be changed to “hazards”.
- Lacking English Proficiency:
 - The term, here and throughout the Policy, should be changed to “Limited English Speaking” in order to be consistent with the terminology used by the US Census Bureau. The definition should specify that the data source is the American Community Survey, since the Decennial Census does not capture this information.

- Environmental Justice (EJ) Population: Please see attached redlined draft for proposed revisions.

STATEMENT OF PURPOSE

We recommend the following clarifications:

- The reference to “health impacts” in the third sentence of the second paragraph is confusing as used. We recommend the term “exhibit vulnerable health” instead.
- The second bullet in the list refers to “significant sources of environmental burdens.” We recommend express clarification of what “significant” means, including but not limited to consideration of climate change impacts. We believe that this term is used with mandatory Environmental Impact Report (EIR) thresholds in mind. However, since this Policy will also be used to address climate change (as per the Legal Authority section), providing guidance on what “significant” means beyond pre-existing regulatory thresholds for the MEPA process would provide better guidance to all agencies in the development of their individual EJ Strategies.

We recommend the following additional bullet points:

- “Encouraging training of residents in renewable energy and climate change jobs.”
- “Subsidizing small scale community based renewable energy projects including solar gardens.”¹

Positive economic development that is consistent with environmental protection is a chief priority for EJ populations throughout the Commonwealth.

EJ POPULATIONS

We recommend that the definition of EJ Populations be revised to read:

- “EJ populations are those segments of the population that EEA has determined to be most at risk of being unaware of or unable to participate in environmental decision-making, to gain access to state environmental resources, or are

¹ A Solar Garden is a community shared solar array that allows lower income homeowners and renters to benefit from solar power. Solar Gardens, <http://www.solargardens.org> (last visited June 17, 2015).

especially vulnerable.”

We recommend incorporating the following criteria, data sources, and processes:

- It should be explicitly stated that this data will come from the American Community Survey since the Decennial Census does not collect data on any of the proposed criteria except race/ ethnicity.
- The EJ maps should be revised every five years to accommodate rapid demographic changes currently occurring and because demographic data is available through the American Community Survey.
- We recommend adding the following criteria and thresholds:
 - Disability: 20% or greater of the population between the ages of 18-64 is disabled. This would be consistent with the definition of “Equal Protection” in this policy and with existing federal and state laws. Further, in an analysis conducted for the Environmental Justice Alliance, we found that disability is a unique indicator of vulnerability. Physical and cognitive disabilities can prevent meaningful involvement in public deliberation and put individuals and households at increased risk when exposed to environmental hazards.
 - Single parents: 25% or greater of the population is comprised of families with an unmarried head of household with related children under the age of 18. Massachusetts already prohibits discrimination on the basis of family status in housing, employment, and other areas. Being a single parent also can prevent meaningful involvement in public deliberation. In addition, research has found that single parents are at high risk for social isolation, which subsequently increases risk to the entire household when exposed to environmental hazards.

The following comments regard the use of health variables:

- The proposed health variables are vague and likely to be unhelpful. We recommend that the childhood cancer be removed entirely. Childhood cancers are statistically quite rare. At the level of the Census block group, it is very unlikely that meaningful patterns will be detectable. Moreover, the incidence numbers are likely to be so small that they will prevent meaningful statistical analysis or comparison. This problem of low incidence has been a perennial stumbling block in epidemiological research on cancer.
- More broadly, cancer is a problematic proxy for health vulnerability since it actually refers to a broad family of diseases, whose causes include infectious diseases, genetics, personal health behavior (e.g. tobacco and food

consumption), and chemical or radiation exposures. Including “cancer” as a health variable would necessitate identifying all the specific forms of cancer that are relevant and then justifying those choices.

- We are very concerned that a finding of statistical significance would be a difficult hurdle to meet with health indicators, especially at small geographic units of analysis and with small populations. If health criteria are established, thresholds defined as some percentage greater than some benchmark would be easier to understand and use.

Accordingly, the use of health variables to define EJ Populations would strengthen the definition only under the following conditions:

- The criteria is measured using the same geographic unit of analysis as the rest of the criteria. This would be the only way to make the criteria comparable and consistent. Currently, school reported asthma is only available at the level of towns and cities. Lead and cancer rates go down to the level of Census Tracts. None of this data (as it is distributed) can be comfortably (or defensibly) downscaled to Block Groups, which would make it hard to set complementary thresholds for both demographics and health variables at the Block Group scale. If the health variables are measured at the Census Tract level while the demographic variables are measured at the Census Block Group level, you would be essentially comparing different communities.
- The criteria is measured using the same time period as the rest of the criteria. Otherwise, the criteria would not be comparable.
- The proposed demographic criteria are measures of vulnerability. Environmental injustice does not cause, nor is it caused by, low income, non-white race/ethnicity, or the lack of English proficiency. Similarly, the health criteria should be measures of vulnerability. Of the proposed criteria, only asthma (only if measured as asthma hospitalization, since this measures uncontrolled asthma) is a measure of vulnerability. Based on previous work investigating the health conditions prevalent in EJ communities, we suggest that if health conditions are included as criteria, the following should be considered:
 - Hospitalization rates for heart disease and/or stroke (10% or more than the statewide average), and
 - Premature mortality rates (25% or more than the statewide average).

If health criteria are to be included, it is critically important that DPH publicly report this data at the geographic scale used in defining the criteria (i.e., at the Census Tract or Census Block Group level). This would also serve to provide better information for an enhanced environmental review process. At this time, health data is not publicly available at the Census Tract level.

We recommend development of an opt-in process for small isolated communities to be protected as EJ populations:

The Environmental Justice Alliance has long supported developing a mechanism by which very small or isolated communities which would not meet the EJ Populations criteria can “opt-in.” We, too, support this in principle. However, developing this mechanism must be done with care. We believe that a successful process would involve the following:

- Delineating the evidence required and the geographic standards (i.e. minimum unit of area or population).
- Assistance in either accessing data at small scales (i.e., Census Block Group or Census Block) or creating such data through community surveys.
- Preventing municipal officials from blocking the designation of a small community as an EJ Population.

A recent analysis of the criteria for defining EJ populations revealed that known smaller geographic clusters with high percentages of people of color, limited English language proficiency, and/or lower income residents do not necessarily show up in EJ populations under the current criteria and thresholds.² An opt-in provision should be added to account for census blocks or other geographic designations that would meet the EJ population criteria if data were available for smaller geographic areas such as Census blocks.

Accordingly, we propose an opt-in provision modeled on the MEPA Fail-Safe Provision:

“Such an opt-in provision may be triggered upon:

- written petition of ten or more persons residing in the affected community
- written petition by one or more Agencies, or
- upon the Secretary’s initiative.

“A written petition shall

- identify with specificity the affected community and
- provide a reason why the community should be recognized as an EJ Population, with regard to the definition of an EJ Population found in this policy.

“Upon such written petition or initiative, the Secretary shall grant EJ Population status to the community if

² See Marco Luna, Environmental Justice Populations (2015).

- the community meets one or more of the criteria for an EJ Population in this policy, or
- the community has geographic, political, demographic and other characteristics that render it a distinct and identifiable community in a manner reasonably similar to other established EJ Populations.

“Petitioners who are denied such status shall have the right to the administrative and judicial review of that denial.”

We recommend that the definition of “EJ Populations” be reviewed simultaneous with EEA’s required 5-year review of the EJ Policy generally. Consistent with our comments above, the definition of EJ Populations should reflect up-to-date research and demographic information.

SERVING EJ POPULATIONS

General Recommendations:

- We observe that the primary focus in this section is on preventing exposure to pollution. There is little to no discussion on access to environmental benefits or resources. We recommend that the Policy explicitly identify services that would increase access to natural resources, open space, and clean water, and improve resilience to climate change impacts.
- Many of the services in the Policy are focused on communication. Accordingly, we suggest that the Secretariat include social media strategy as part of its communication toolkit. Recent research by Pew Research Center shows that low income and non-white communities rely on social media for much of their communication. Furthermore, contrary to popular belief, more than half of people over the age of 65 use Facebook regularly.

Regarding Fact Sheets, EJ Organizations, and Mailing Lists:

- The section titled Fact Sheets should include references to program related to climate change preparation or adaptation.
- Fact sheets, mailing lists and other outreach materials should be automatically translated in the top five non-English languages spoken in Massachusetts: Spanish, Haitian-Creole, Portuguese, Mandarin Chinese and Vietnamese.

EJ Maps should be updated every 5 years. The American Community Survey reports data in five-year increments. Additionally, Health data is best reported in multiple years in order address both statistical and privacy concerns related to small numbers.

For the EJ Website, we recommend that EEA include maps and statistical data on EJ populations through the online EJ repository. Executive Order 552 requires EEA make an online environmental justice repository with publicly accessible maps and statistics about the location of EJ populations. EEA is required to update these maps and statistical data at least every five years.

EEA AGENCY SERVICES

Regarding Secretariat EJ Strategy: We recommend EEA agencies be required to expressly incorporate environmental justice population considerations and protections into siting and permitting processes.

Regarding Senior-level commitment:

- A list of the EJ points-of-contact at each EEA agency should be posted on the EJ website.
- We recommend that the Director of Environmental Justice be required to meet with the Governor's Environmental Justice Advisory Council at least annually in order to better ensure that the objectives of Executive Order 552 are accomplished.
- With regard to permitting, siting and related processes, particularly where enhanced review or enhanced participation are concerned, we recommend that the Director of Environmental Justice actively facilitate communication between project proponents and EJ organizations in a project's designated area. Facilitation by the Director of Environmental Justice will ensure that project proponents are aware of and accountable to the concerns of EJ populations.
- We recommend that the Interagency Environmental Justice Working Group convene at least semi-annually, consistent with the existing requirement that Governor's Environmental Justice Advisory Council meet at least semi-annually. Coordination between the guidance given to the Governor and the work of the Secretariats will be essential to furthering the goals Executive Order 552.

Regarding Agency Public Involvement and Community Engagement Programs:

- Translation and interpretation should be available by default and not by request. Agency staff should not assume that translation and interpretation during public participation processes is not needed. However, if the policy retains this requirement that translation and interpretation be provided only by request, it should also explicitly state from whom this request must come from. Our experience in previous MEPA processes has been that some staff require the request come from municipal officials while other staff work more collaboratively with community based organizations to determine translation and interpretation needs.
- We suggest that you remove the reference to “alternative dispute resolution techniques” and replace it with “public deliberation techniques.” Alternative dispute resolution techniques are not structured to support a transparent and accountable public process. Public deliberation techniques, on the other hand, are aimed not only at achieving transparency and accountability, but generating greater public support for the final decisions.
- Current regulations mandate that MEPA and DEP staff be available for pre-application meetings with project proponents. We suggest that, in addition to encouraging proponents to have pre-application meetings with community stakeholders, that EEA agency staff similarly meet with community stakeholders. These meetings should be independent of meetings held by proponents. The aim of these conversations should be better understanding of community concerns and promoting more effective engagement by community stakeholders.

Regarding Enhanced Public Participation Under MEPA:

- We suggest the following thresholds be added to bullet point (1):
Transportation; Energy.
- Consistent with our recommendations above, the policy should explicitly define the minimum standards for enhanced public participation.
- We recommend that any project site located within five miles of an EJ population (or in the case of projects exceeding an ENF threshold for air, within ten miles of an EJ population) be subject to enhanced public participation.

Enhanced Analysis of Impacts and Mitigation Under MEPA:

We suggest the following thresholds be added to bullet point (1): Transportation; Energy.

Consistent with our recommendations above, the Policy should define at least the minimum standards for enhanced analysis. These standards should not be optional but should be consistent with the project under review. For example, a project for which there is no possible air quality impact at any stage of the development project (i.e., construction through operation) would not be required to do enhanced air modeling or other air impact analysis.

Translation of the EIR should be required in EJ communities where such a translation is requested and in which at least 5% of the population does not speak English proficiently (defined as percent of households in which no one in the household over the age of 14 speaks English “well” or “very well”).

We recommend the enhanced analysis apply to Transportation for the following mandatory EIR thresholds in 301 CMR 11.03(6)(a)(3, 4, 5):

- Construction of a new airport.
- Construction of a new runway or terminal at an existing airport.
- Construction of a new rail or rapid transit line along a new, unused or abandoned right-of-way for transportation of passengers or freight (not including sidings, spurs or other lines not leading to an ultimate destination).

This threshold will ensure enhanced review for construction at airports and address projects that require new rail construction for transportation of freight.

We recommend the enhanced analysis apply to Energy for the following mandatory EIR thresholds in 301 CMR 11.03(7)(a)(1, 2, 3):

- Construction of a new electric generating facility with a Capacity of 100 or more MW.
- Expansion of an existing electric generating facility by 100 or more MW.
- Construction of a new fuel pipeline ten or more miles in length.

This threshold will ensure enhanced review for power plants, which may be missed by the air threshold. EEA has acknowledged the importance of enhanced public participation and analysis of impacts and mitigation under the Energy Facilities Siting Board and should apply enhanced analysis to energy in this section as well. Further, two of Massachusetts’ neighbors, Connecticut and New York, require some type of enhanced analysis for the siting of energy facilities within EJ communities.³

³ See R.I. GEN. LAWS § 23-19.14-5(a)(4)(i)(2015); N.Y. PUB. SERV. LAW § 164 (f) (McKinney 2015).

We recommend that any project located within five miles of an EJ population that triggers the MEPA thresholds for solid waste, energy, and/or transportation (or within ten miles for projects that exceed a mandatory EIR threshold for air) is subject to enhanced analysis. Other states have recognized the health issues associated with the proximity to solid and hazardous waste facilities by passing anti-concentration laws that limit the number of facilities allowed within a specific distance.⁴ EEA should increase the distance a project is located from an EJ population from one to five miles (or from five to ten miles for projects exceeding an EIR threshold for air) for enhanced analysis to ensure EJ populations are protected from all environmental health effects.

Enhanced Public Participation and Analysis of Impacts and Mitigation Under the Energy Facilities Siting Board:

- We recommend the siting of energy facilities be included for enhanced analysis of impacts and mitigation under MEPA. The Siting Board may consider “cumulative health impacts” but it does not consider EJ communities directly. In order to fully protect EJ communities, enhanced analysis should apply to energy facilities.

Consistent with the goals of EJ population protections, public participation, and transparency we further recommend that:

- EEA set a specific procedure for when the “Secretary So Requires” thresholds will be subject to enhanced public participation and/or enhanced analysis.
- EEA make an express and detailed finding regarding whether there will be a disproportionate impact on EJ populations following an enhanced analysis of impacts and mitigation under MEPA.
- The term “jurisdictional generation facility” should be defined for greater understanding by the public and community stakeholders.

⁴ See ALA. CODE § 22-30-5.1(d)(1) (2015) Restricting the siting of hazardous waste facilities to one per county; N.C. GEN. STAT. § 153A-136(c)(West 2015) Requiring the consideration of socioeconomic data prior to the approval of any solid waste facility located within one mile of another. ARK. CODE. ANN. § 8-6-1504 (West 2014). Notably Arkansas’ Environmental Equity Act contains a rebuttable presumption against siting solid waste facilities within twelve miles of another.

Investments in the Economy and Open Space:

- The goals of public participation and transparency would be strengthened by mandating annual reporting of the ways in which environmental justice criteria were used for awarding grants and prioritizing program funding. These reports should report, at the Census Block Group level, the amount of public funds, or publicly leveraged funds, used and for what projects.
- The policy would provide better guidance for EEA agencies, and clearer expectations by the public, if it defined how it measured a fair distribution of environmental benefits.
- We suggest that EEA expressly commit to working with DHCD to promote the growth and development of affordable housing in EJ communities.

Regarding Adaptation:

- This subsection should be titled “Climate Change Adaption” for clarity.
- It would strengthen this provision if it listed agencies that would be most likely involved (e.g., Office of Coastal Zone Management). We suggest that DHCD also play a role in proactively addressing climate change impacts and improving resiliency in EJ communities, especially in terms of supporting access to safe and affordable housing.
- We suggest that EEA consider collaborating with the Board of Building Regulations and Standards in educating developers and contractors about ways in which they can support the goals of this policy.

Regarding Individual Agency EJ Strategies:

- A timeline should be set out each of the EEA agencies to develop their individual EJ Strategies and identify how individuals and organizations can participate in and influence the development of these strategies.
- The role of EEA’s Policy in the development of individual agency EJ Strategies should be expressly stated. It would provide guidance to all stakeholders to know whether, for example, the Policy represents a “floor” to which agencies may add and to what extent and under what conditions may an agency deviate from the policy when it develops its strategy.
- The strategies developed by EEA agencies should specify the way in which environmental justice is used as a criterion in decision-making.

- EEA agency Environmental Justice strategies should identify program specific thresholds or goals for benefits for EJ communities. For example, agencies could set the goal that no less than 10% of a program's grants be awarded to programs or activities taking place in or benefitting EJ Census Block Groups.

Thank you for your consideration of these comments and proposals. ACE looks forward to continuing our positive work with EEA. Please do not hesitate to contact staff attorney Richard Juang at (617) 442-3343 ext 236 / richard@ace-ej.org or myself if you have questions or for further discussions.

Sincerely,

Kalila Barnett, Executive Director

& Richard Juang, Interim Staff Attorney
Neenah Estrella Luna, MPH, Ph.D, Board Chair.
Marcos Luna, Ph.D.