

Harvard Law School  
**Emmett Environmental  
Law & Policy Clinic**

6 Everett Street  
Suite 4119  
Cambridge, MA 02138  
T: 617-496-2058  
F: 617-384-7633

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

*By Electronic Submission to Michelle.A.Reid@state.ma.us*

Dear Secretary Beaton,

Harvard Law School's Emmett Environmental Law and Policy Clinic (the "Clinic")<sup>1</sup> respectfully submits these comments on the proposed revisions to the Executive Office of Energy and Environmental Affairs' ("EOEEA") Environmental Justice Policy (the "Policy"). We appreciate EOEEA's continued implementation of Executive Order 552 and view the Policy as an opportunity to provide additional guidance as to when and how agencies can and must integrate environmental justice considerations into their actions, both procedurally, *e.g.*, enabling public engagement, and substantively, *e.g.*, performing enhanced review and analysis.

Although these comments focus primarily on several of the Policy's provisions regarding enhanced substantive review for projects in and/or affecting environmental justice communities, we briefly note here several revisions to the Policy that we support and offer suggestions for clarifications.

- Energy and Climate Change as a Part of Environmental Justice: Including energy and climate change laws and policies, as well as distribution of energy benefits, in the definition of environmental justice ("EJ") reflects the increasing importance of, and focus on, energy and climate change issues in the Commonwealth. The often disproportionate impacts of energy production facilities and climate change on EJ communities underscore the importance of clarifying that EJ encompasses decisions relevant to energy and climate change issues.<sup>2</sup> We appreciate that this

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<sup>1</sup> The Clinic works on a broad range of local, national, and international projects covering the spectrum of environmental law and policy issues under the direction of Wendy B. Jacobs, a Clinical Professor at Harvard Law School and Director of the Clinic.

<sup>2</sup> See *e.g.*, NAACP, "Just Energy Policies: Reducing Pollution and Creating Jobs," pgs. 5-7 available at <http://action.naacp.org/page/-/finalJustEnergyPolicyCompendium%20FINAL%20DECEMBER%202013%20UPDATED%20%200.pdf>

focus is iterated throughout the Policy, including in the definition of “meaningful involvement,” the Statement of Purpose, and the discussion of agency public involvement and community engagement programs (§ 12) and climate change adaptation (§ 32).

- Expanded Scope of Policy: We support the revisions to the Policy that extend enhanced environmental review to “new or expanding significant sources of environmental burdens,” as opposed to “new or expanding large sources of air emissions and regional waste facilities.” (*See e.g.*, Statement of Purpose and section titled “Serving EJ Populations.”) This change better reflects the reality that environmental burdens and health risks can stem from a wide range of projects.
- Agency Public Involvement and Community Engagement Programs (§ 12): We recommend that, in addition to considering the availability of public transportation when selecting locations for public meetings or hearings, agencies also consider whether locations are child-friendly and culturally appropriate.<sup>3</sup> To the extent feasible, meetings should be held in places that community members already routinely use and feel comfortable visiting.

Meaningful community engagement may at times be hampered by a lack of general knowledge about environmental and public health conditions, which could make it difficult to assess how a proposed policy or project would impact a neighborhood. Outreach efforts, therefore, may need to include an education component. For instance, “local information repositories” or online resources could include broader educational resources to ensure that communities have the information necessary to evaluate a policy’s or project’s potential impacts.

- Health Conditions as a Criteria of EJ Populations: Conceptually, including health conditions to define EJ populations could be a useful tool for identifying communities that are more vulnerable to environmental, energy and climate change impacts. As currently drafted, however, the Policy is too vague and should provide additional guidance, including sources for the relevant health data and under what conditions, if any, private studies may be used. In addition, we recommend that, rather than considering whether a community’s health conditions are “statistically significantly higher” than statewide averages, the conditions be compared to the health conditions of the top quartile of Massachusetts communities.

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<sup>3</sup> *See e.g.*, Institute for Local Government, “Ten Ideas to Encourage Immigrant Engagement,” available at [http://www.ca-ilg.org/sites/main/files/file-attachments/ten\\_ideas\\_to\\_encourage\\_immigrant\\_engagement-jan\\_2012\\_0.pdf](http://www.ca-ilg.org/sites/main/files/file-attachments/ten_ideas_to_encourage_immigrant_engagement-jan_2012_0.pdf); Seattle Office for Civil Rights, “Inclusive Outreach and Public Engagement Guide” (2012), available at <http://www.seattle.gov/Documents/Departments/RSJI/GRE/IOPEguide01-11-12.pdf>.

## Substantive Requirements for Enhanced Review

In addition to procedural requirements, the EJ Policy explicitly provides for enhanced substantive analysis and review of projects that trigger specified thresholds in the Massachusetts Environmental Policy Act (“MEPA”) review process. We recommend expanding the list of thresholds in ¶ 14 of the Policy to include the mandatory Environmental Impact Report thresholds for Transportation (301 CMR 11.03(6)(a)) and Energy (301 CMR 11.03(7)(a)). Furthermore, we urge EOEEA to clarify that agency actions can require application of substantive EJ principles even when a project does not trigger a MEPA threshold for enhanced analysis.

While each EOEEA agency must develop its own EJ strategy (¶ 10), it would be helpful if the Policy provided additional examples of actions agencies can take, beyond procedural measures, to promote EJ. The suggestions relating to enhanced analysis of impacts and mitigation under MEPA (¶ 14) are a useful starting point, but further guidance could be helpful to ensure that the EJ Policy’s equal protection goals are met. Any such guidance or example would not need to be binding, nor would it by any means be exhaustive, but it would nonetheless be a useful reference point. In particular, because the Policy now includes a section specifically addressing the Energy Facilities Siting Board (“EFSB”) (¶ 17), we recommend providing examples of steps that the EFSB could take in its proceedings.

While the Policy links EFSB’s use of enhanced public participation procedures with the triggering of a MEPA threshold,<sup>4</sup> it does not tie EFSB’s performance of enhanced EJ review to the triggering of a MEPA threshold. Because EFSB determines where an energy project can be located, it has a unique opportunity to consider the environmental justice impacts for possible alternative sites at a very early stage in the application process, and its application of enhanced EJ analysis should not be limited to situations in which a MEPA threshold is triggered.

As drafted, the Policy describes EFSB’s current statutory requirements to assess a wide range of environmental impacts, including cumulative health effects on a community. (¶ 17). However, this says nothing specifically about EFSB’s consideration of environmental justice. To improve clarity, we suggest adding language to the effect that EFSB must conduct an enhanced analysis when needed to determine whether a particular project will cause an unfair share of environmental burdens to fall on an EJ population. For example, in addition to considering cumulative health impacts, EFSB should conduct comparative assessments when proposed projects could affect EJ communities. Such an assessment would evaluate the potential EJ implications of a project at its preferred or alternative locations, and between potentially impacted EJ communities and other non-EJ

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<sup>4</sup> As drafted, the Policy links EFSB’s use of enhanced public participation procedures to the MEPA project parameters outlined in ¶ 14. However, ¶ 14 relates to enhanced analysis of impacts and mitigation; we suggest that the reference in ¶ 17 be amended to reflect the MEPA thresholds set out in ¶ 13, relative to enhanced public participation under MEPA.


communities. The importance of this type of comparative analysis has been recognized by other Massachusetts agencies,<sup>5</sup> states,<sup>6</sup> and at the federal level.<sup>7</sup>

The use of comparative analyses may be relevant to agencies other than the EFSB, and the Policy should promote tools like this broadly.

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The Clinic appreciates the opportunity to submit these comments and welcomes the opportunity to participate further in efforts to promote environmental justice in Massachusetts.

Sincerely,



Claire Horan, JD '18  
Cassandra Mitchell, JD '17  
Aladdine Joroff  
Emmett Environmental Law & Policy Clinic

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<sup>5</sup> For example, the Massachusetts Department of Transportation has considered EJ concerns of a project by examining the distribution of benefits and burdens among EJ and non-EJ populations. *See e.g.*, Central Transportation Planning Staff, "Environmental Justice Analysis for Casey Overpass Project" (Dec. 20, 2011), <http://www.massdot.state.ma.us/Portals/24/docs/EnvJusticeRpt20111220.pdf>.

<sup>6</sup> In siting major electric generating facilities, New York requires applicants to "compare and contrast the physical conditions of the impact study area that would result from construction and operation of the proposed facility. . . with the physical conditions in each of the comparison areas to evaluate whether the proposed facility results in or contributes to any significant and adverse disproportionate environmental impacts." 6 CCR-NY 487.10(b).

<sup>7</sup> The United States Environmental Protection Agency's Draft Technical Guidance for Assessing Environmental Justice in Regulatory Analysis speaks at length to analyzing EJ impacts, including the importance of comparative analysis: "To assess whether a potential EJ concern exists, an analyst should compare impacts experienced by the population groups of concern to those of a comparison group." [http://yosemite.epa.gov/sab/sabproduct.nsf/0/0F7D1A0D7D15001B8525783000673AC3/\\$File/EPA-HQ-OA-2013-0320-0002\[1\].pdf](http://yosemite.epa.gov/sab/sabproduct.nsf/0/0F7D1A0D7D15001B8525783000673AC3/$File/EPA-HQ-OA-2013-0320-0002[1].pdf).