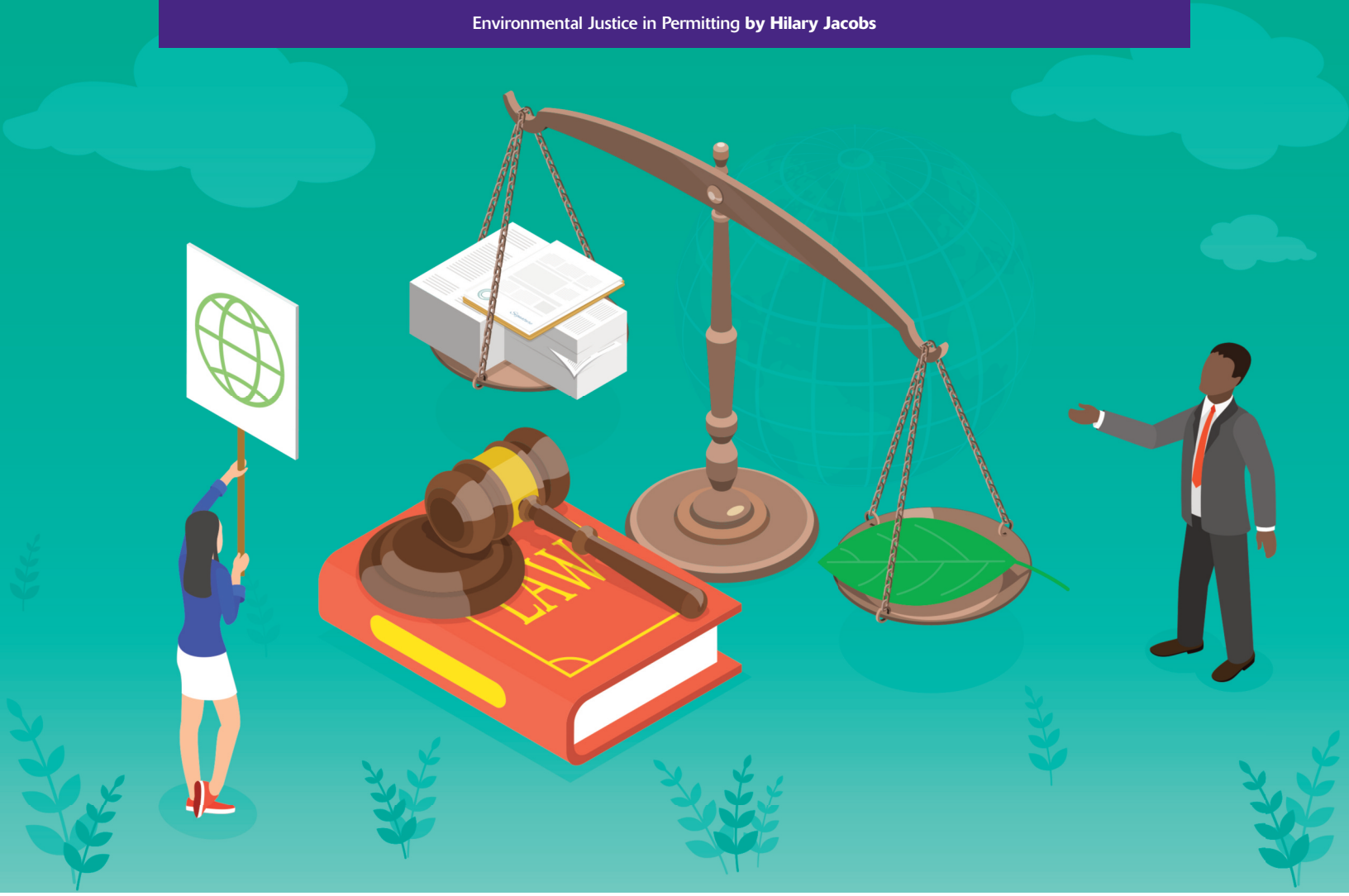

Evolving State Approaches to

Environmental Justice in Permitting

by Hilary Jacobs

A look at the recent history of states choosing to incorporate environmental justice considerations into environmental permitting decisions.

States have long been referred to as the "laboratories of democracy," devising and testing creative law and policy approaches on the state level, which often ultimately are used on the federal level.[1] Over the last several years, states have continued to live up to this reputation, particularly with respect to environmental justice (EJ) laws and policies; increasing numbers of states have been introducing, advancing, and adopting laws addressing EJ. Although this trend started, in part, due to a lack of federal EJ activity, we are now seeing both occur simultaneously—with the federal government devoting unprecedented resources a whole-of-government approach to advancing EJ, while states continue to adopt novel and, sometimes, far-reaching, EJ laws. According to the National Conference of State Legislatures, states considered at least 150 bills related to EJ in 2021.[2] The past few years indicate that even a potential future change in administration is unlikely to stem this tide: EJ-proactive states will either continue to compensate for a federal void or continue to align with and inform increased federal EJ activity.

State methods of addressing EJ have varied widely—from establishing EJ advisory committees and task forces composed of representatives from state agencies, EJ communities, and other constituencies, to requiring enhanced public participation in state actions. One key approach, however, has been to require state environmental agencies to assess a proposed facility's impacts on EJ communities and, in some instances, forbid the agency from approving permits for facilities that will disproportionately impact EJ communities. Naturally, the scope of the laws enacted vary, in terms of everything from the types of permits affected, the scope of the requisite EJ assessments, and how the state agencies are required to use the data obtained from such assessments. Differences aside, the recent history of states choosing to incorporate EJ considerations into environmental permitting decisions has established a clear pattern, one that is likely to continue into the next several years.

New Jersey's 2020 Landmark Law

New Jersey became the first state to adopt broad EJ permitting legislation when it signed the nation's most sweeping EJ legislation into law in 2020, declaring that "no community should bear a disproportionate share of the adverse environmental and public health consequences that accompany the State's economic growth."[3] Under the law, the New Jersey Department of Environmental Protection (NJDEP) may only grant or renew certain environmental permits after determining that there are no disproportionate and cumulative environmental impacts on EJ communities (referred to in the law as "overburdened communities").[4] The law specifically mandates that NJDEP deny permit applications upon finding that approval of the permit "would, together with other environmental or public health stressors affecting the overburdened community, cause or contribute to adverse umulative environmental or public health stressors in the overburdened community that are higher than those borne by other communities . . . ."[5]

NJDEP is also required to publish and continuously update a list of the state's "overburdened communities," defined as any Census block group with low-income, minority, or non-English speaking populations exceeding specified thresholds.[6] NJDEP's initial list designates 3,447 Census block groups—representing over 4 million residents—out of 6,320 total block groups in the state[7] as "overburdened."[8] NJDEP's June 2022 draft regulations outline the agency's vision for implementation of the law, requiring applicants for covered permits to model the facility's operational impacts to determine how operations would impact specifically enumerated environmental and public health existing stressors.[9]

Other States Follow Suit

Several states have since introduced similar legislation introducing EJ considerations into environmental permitting decisions. For instance, in 2021, the Georgia legislature considered, but ultimately did not pass, legislation that would have required applicants for many types of permits to assess the potential impacts of its proposed or renewed facility on overburdened communities, taking into account existing environmental and public health stressors.[10] Comparable legislation—much of which was not enacted—was considered in several states, including Maryland, Texas, and Virginia legislatures around the same time.[11]

Some states, however, have succeeded in enacting EJ permitting legislation of varying scopes. In 2021, Washington State enacted the Health Environment for All Act, requiring several state agencies, including the Washington Department of Ecology to develop a process for conducting EJ assessments for "significant agency actions," which includes programmatic activities such as rulemakings and grant programs, and enables agencies to include additional actions, such as permitting decisions.[12] Depending on the EJ assessments' results, agencies must attempt to minimize or avoid environmental harm and maximize environmental benefits for overburdened communities and vulnerable populations.[13] Agencies must start conducting these assessments in July 2023, so the full impact of the law remains to be seen.

2021 also saw the passage of an Act Creating a Next-Generation Roadmap for Massachusetts Climate Policy, which among establishing sweeping greenhouse gas reduction goals and implementation strategies, also requires state agencies to conduct environmental impact reports for certain projects undertaken in proximity to an EJ community.[14] Oregon's 2021 climate legislation for retail electricity generation requires regulated utilities to collaborate with representatives from EJ communities in developing plans to decarbonize.[15]

Although states passed fewer pieces of expansive EJ

permitting legislation in 2022, a few are worth noting: Maryland passed a law requiring certain permit applicants to include in permit applications environmental justice mapping data.[16] Most recently, after much negotiation, New York signed into law the Cumulative Impacts Bill, which builds on both existing environmental review procedures under the state's analog to the National Environmental Policy Act, and the EJ foundation defined by the 2019 Community Leadership and Climate Protection Act.[17] Under the law, all New York government agencies—not just environmental permitting agencies—must consider many proposed agency actions' EJ consequences. In some instances, state agencies must also assess a proposed action's effects on EJ communities, in addition to evaluating a host of other potential environmental consequences already required by existing state law. Included in this analysis is an assessment of "existing burdens" affected EJ communities face, and the proposed action's implications in light of those existing burdens.

Notably, under the law as it currently stands, "[n]o 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." As currently drafted, New York's new law represents the most aggressive EJ permitting law in the country, as it includes no exclusions or exemptions for any type of facilities, unlike New Jersey's law. New Jersey's law does not apply to facilities that serve a "compelling public interest" in an EJ community,[18] tentatively defined under the draft regulations as facilities that primarily serve "an essential environmental, health, or safety need of the individuals of an overburdened community" where there are no other reasonably available means to satisfy that need are available.[19]

Under unique New York procedures, however, the legislature and the Governor have agreed to amend the law post-passage to narrow its scope. For instance, as currently written, a draft of the amendment reduces the types of permits the EJ requirements apply to and permits the exclusion of certain permit modifications or renewals from the law's scope.[20]

Looking Ahead

While the true meaning of these laws will be determined by each's state's implementing regulations, the legislation enacted to date establishes potential frameworks for other states to follow. Though the laws vary in scope—variations that likely reflects the realities of the legislative negotiation that occurs behind the scenes—at the end of the day, the emergent approach is the fundamentally same: requiring applicants and state agencies to assess EJ impacts of environmental permits.

Moving into 2023, expect additional legislation following New Jersey, New York, and others' leads. Legislators in Connecticut have already introduced legislation that would amend existing law to require permit applicants to consider existing burdens on EJ communities,[21] and more in other states is likely to come. **em**

Hilary Jacobs is an Associate with Beveridge & Diamond, PC. Email: **hjacobs@bdlaw.com.**

References

1. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; try novel social and economic experiments without risk to the rest of the country.")
2. *National Conference of State Legislatures - State and Federal Environmental Justice Efforts.* See https://www.ncsl.org/environment-and-natural-resources/state-and-federal-environmental-justice-efforts.
3. N.J. Stat. Ann. § 13:1D-157, *et seq.* See also https://www.bdlaw.com/publications/new-jersey-governor-signs-landmark-environmental-justice-legislation-into-law/; https://www.bdlaw.com/publications/groundtruth-implementing-new-jerseys-environmental-justice-law/.
4. *Id.* at § 13:1D-160.
5. *Id.*
6. *Id.* at § 13:1D-158.
7. *U.S. Census - New Jersey*. See https://www.census.gov/geographies/reference-files/2010/geo/state-local-geo-guides-2010/new-jersey.html#:~:text=Census%20Tracts%2FBlock%20Groups%2FBlocks,groups%2C%20and%20169%2C588%20census%20blocks.
8. *New Jersey Department of Environmental Protection - What are Overburdened Communities (OBC)?* See https://dep.nj.gov/ej/communities/.
9. Proposed New Rules: N.J. Admin. Code § 7:1C. See https://www.nj.gov/dep/rules/proposals/proposal-20220606a.pdf. See also https://www.bdlaw.com/publications/three-key-takeaways-of-new-jersey-deps-proposed-ej-rules/.
10. H.B. 431, 2021 Leg., 156th Sess. (Ga. 2021): https://www.legis.ga.gov/legislation/59612.
11. H.B. 0111, 2021 Leg., 442nd Sess. (Md. 2021): https://mgaleg.maryland.gov/mgawebsite/Legislation/Details/HB0111?ys=2021RS; S.B. 365, 2021 Leg., 87th Sess. (Tx. 2021): https://capitol.texas.gov/BillLookup/History.aspx?LegSess=87R&Bill=SB365; S.B. 1373, 161st Sess. (Va. 2021): https://lis.virginia.gov/cgi-bin/legp604.exe?211+sum+SB1373.
12. S.B. 5141, 2021 Leg., 67th Sess (Wa. 2021): https://app.leg.wa.gov/billsummary?billnumber=5141&year=2021&initiative=False.
13. Wash. Rev. Code Ann. § 70A.02.060.
14. S.B. 9, 2021 Leg., 192nd Sess. (Ma. 2021): https://malegislature.gov/bills/192/S9.
15. H.B. 2021, 2021 Leg., 81st Sess. (Or. 2021): https://olis.oregonlegislature.gov/liz/2021R1/Downloads/MeasureDocument/HB2021/Enrolled.
16. H.B. 1200, 2022 Leg., 444th Sess. (Md. 2022): https://mgaleg.maryland.gov/mgawebsite/Legislation/Details/HB1200?ys=2022RS.
17. S. 8830, 2022 Leg., 204th Sess. (NY 2023). See https://legislation.nysenate.gov/pdf/bills/2021/S8830. See also https://www.bdlaw.com/publications/new-york-enacts-environmental-justice-permitting-law/.
18. N.J.S.A. § 13:1D-160.
19. Proposed New Rules: N.J. Admin. Code § 7:1C. See https://www.nj.gov/dep/rules/proposals/proposal-20220606a.pdf.
20. S. 1317, 2023 Leg., 204th Sess. (NY 2023): https://www.nysenate.gov/legislation/bills/2023/S1317.
21. H.B. 5106, 2023 Leg. (Ct. 2023).