

**ENVIRONMENTAL JUSTICE IN
PERMITTING: STATE INNOVATIONS TO
ADVANCE ACCOUNTABILITY**

Alexandra Dapolito Dunn & Adam Weiss***

INTRODUCTION.....	747
I. U.S. ENVIRONMENTAL PROTECTION AGENCY'S APPROACH.....	752
II. STATE APPROACHES.....	754
<i>A. A Policy Approach—Illinois</i>	755
<i>B. An EJ Permit Policy—New York</i>	758
<i>C. A Statutory Approach—Connecticut</i>	761
III. MOVING STATES FORWARD	765
CONCLUSION	768

INTRODUCTION

Over the past two decades, significant progress has been made to bring environmental justice (EJ) considerations to the forefront of domestic environmental permitting, siting, and policy-making activities. When the increasingly coordinated voice of

* Executive Director and General Counsel, Association of Clean Water Administrators (ACWA). Lecturer in Law, Columbus School of Law, Catholic University of America and Advisor, Environmental Law Society. J.D., summa cum laude, 1994, Columbus School of Law, Catholic University of America, D.C. B.A., cum laude, 1989, James Madison University, VA. From 2010 to 2011, as Vice Chair of the American Bar Association Section of Environment, Energy, & Resources, I was a chief planner of this Symposium on U.S. Environmental Justice and the Law in conjunction with the University of Mississippi School of Law. From 2007 to 2010, I served as Assistant Dean of Environmental Law Programs at Pace University School of Law, NY, where I taught environmental justice (EJ). My interest in EJ issues began in my early days as a legal practitioner, when from 1997 to 2000, I represented the U.S. chemical industry in Washington, D.C. on EJ issues as part of my responsibilities as Counsel at the American Chemistry Council and while the changes brought about by President Clinton's Executive Order 12898 on EJ were being analyzed and applied by industry groups.

** 2011 Summer Law Clerk, ACWA. Candidate for Juris Doctorate with Certificate in Environmental Law, Pace University School of Law, NY, 2013. B.A., cum laude, 2009, Skidmore College, NY.

community grassroots organizations is combined with more focused EJ-oriented efforts on the part of the U.S. Environmental Protection Agency (EPA), state regulatory agencies, and permitted industries, EJ is no longer an afterthought in the context of most developmental and industrial activities. However, ensuring meaningful consideration of EJ issues in the decision making which surrounds these development and industrial activities—such that outcomes may change and true fairness and equity are promoted—requires accountability on all sides. EJ accountability can be promoted through a variety of mechanisms, including through regulation, policy, and law designed to require or promote environmental health and data reporting, community consultation and outreach, demographic studies, corporate personnel training, community capacity building, relevant combinations of local, state, or federal agency workgroups, and the application of EJ screening tools.

This Article reflects on the important role state agencies play in promoting fairness and transparency via the process of limiting and managing discharges to the environment through permitting or otherwise authorizing industrial and other developmental activities.¹ State authorities recognize the importance of meaningful public involvement in the permitting process for all communities.² However, to increase accountability, EJ concerns

¹ *About Us*, ASS'N OF CLEAN WATER ADM'RS, <http://www.acwa-us.org/#!about-us> (last visited Feb. 5, 2012) (“Founded in 1961, the Association of Clean Water Administrators (ACWA) is a national, nonpartisan professional organization” whose “members are the State, Interstate and Territorial officials . . . responsible for the implementation of surface water protection programs throughout the nation. In addition to serving as a liaison among these officials, ACWA facilitates their communication with the Federal government and promotes public education.”).

² Most EJ challenges appear in the permitting context rather than enforcement, cleanup, and standard setting. CLIFFORD RECHTSCHAFFEN, EILEEN GAUNA, & CATHERINE A. O'NEILL, ENVIRONMENTAL JUSTICE LAW, POLICY & REGULATION 249 (2d ed. 2009). This text is one of the best for teaching the subject of EJ in the law school curriculum. The authors note that permitting challenges are most significant on the state level because of the immediacy of the adverse impacts of permitting decisions. Discharges of toxic pollutants into waterways, air emissions, noise, odors, visual eye sores, and such all occur on the local level. *Id.* Since most often communities are only made aware of incoming facilities once the permitting procedures have been triggered, the need for meaningful public involvement earlier in the process is a critical step to mitigating disparities in environmental protection. *Id.* Stimulating meaningful public involvement early in the process would: “(1) increas[e] the likelihood of tilting substantive outcomes in the direction of more equitable distribution of environmental

must be meaningfully integrated into facility³ siting and permitting activities. If, as a part of this process, the regulated community is required to play a significant role, multiple benefits are achieved. In particular, community members can establish a relationship with the entities operating, or prospective facilities, in their neighborhoods early in the permitting process.⁴

This Article looks specifically at U.S. state policies and procedures that promote the consideration of EJ in environmental siting and permitting. Due to the maturation of the EJ field, today many state environmental agencies have well-established EJ programs and initiatives, which include dedicated EJ offices and staff,⁵ EJ policies,⁶ including those established by executive

risks and rewards; and, 2) improv[e] the functioning of democratic processes in affected communities, the breakdown of which contributed to the disproportionate degradation of those communities in the first place.” AM. BAR ASS’N & HASTINGS COLL. OF THE LAW, ENVIRONMENTAL JUSTICE FOR ALL: A FIFTY STATE SURVEY OF LEGISLATION, POLICIES AND CASES xii (Steven Bonorris ed., 4th ed. 2010) [hereinafter ENVIRONMENTAL JUSTICE FOR ALL].

³ In this Article, the term “facility” is used to refer broadly to industrial facilities as well as other development, such as retail, transportation, highways, and housing—essentially, those activities that can impact, disturb, or otherwise affect a neighborhood through increased traffic, noise, permanent buildings, reduced property values, or result in releases to air, water, and land.

⁴ Early communication with the community benefits the permit applicant as well. It is financially advantageous to address the concerns of the affected citizens early on, rather than undergo costly litigation down the road, which could require changes to a facility already built. Telephone Interview with Dr. Mark Mitchell, Former President, Conn. Coal. for Env’tl. Justice (July 15, 2011) (Dr. Mitchell provided the example of a particular recycling facility that was seeking to locate in Bridgeport, Connecticut and invited the community to the potential locations. The community was keen to not have the facility in a residential neighborhood. Through early meaningful community input, an agreement was reached as to where the facility would be located without having to engage in costly community opposition. Dr. Mitchell estimated the recycling facility saved \$500,000 reaching the agreement early.).

⁵ See, e.g., OFFICE OF ENVTL. JUSTICE, N.Y. STATE DEP’T OF ENVTL. CONSERVATION, <http://www.dec.ny.gov/public/65832.html> (last visited Feb. 5, 2012) (The Office of Environmental Justice was created in October 1999, by the Department of Environmental Conservation to address EJ concerns and ensure community participation in the state’s permitting process.); see also, OFFICE OF ENVTL. ADVOCATE, PA. DEP’T OF ENVTL. PROT., <http://www.depweb.state.pa.us/environadvocate/site/default.asp> (last visited Feb. 5, 2012).

⁶ See, e.g., MINN. POLLUTION CONTROL AGENCY, INCORPORATING ENVIRONMENTAL JUSTICE PRINCIPLES AND PRACTICES INTO MINNESOTA POLLUTION CONTROL AGENCY OPERATIONS (2008), available at <http://www.pca.state.mn.us/publications/p-gen5-01.pdf> (The Minnesota Pollution Control Agency updated its EJ policy in 2008 to ensure that minority and economically disadvantaged communities: (1) do not disproportionately

orders,⁷ and advisory boards.⁸ However, very few states have formal EJ procedures embodied in statute and regulation—which are arguably both the most accountable form of EJ procedure and more appropriate in situations where the matters at issue are highly susceptible to subjective interpretation.⁹

bear environmental burdens; (2) are not denied equal access to environmental benefits; and (3) have opportunities for meaningful input in the development and implementation of environmental policies.); *see also* W. VA. DEP'T OF ENVTL. PROT., ENVIRONMENTAL EQUITY POLICY (2003), *available at* <http://www.dep.wv.gov/environmental-advocate/Documents/EnviroEquityPolicy.pdf> (stating that the DEP will, “within its authority, ensure that no segment of the population, because of its status as low-income or minority community or any other factors relating to its racial or economic makeup, bear a disproportionate share of the risks and consequences of environmental pollution or be denied equal access to environmental benefits”).

⁷ *See, e.g.*, N.J. Exec. Order No. 131 (Feb. 5, 2009) [hereinafter EO 131], *available at* <http://www.state.nj.us/infobank/circular/eojsc131.htm>. EO 131 found the following:

The cumulative exposure to pollution and other hazards from multiple sources in communities whose residents are predominantly low-income and persons of color creates a disproportionate impact on the health, well-being, and quality of life of persons living in those communities and addressing those impacts requires a coordinated response across multiple governmental agencies and a more inclusive process of decision-making.

Id. Therefore, EO 131 directs all New Jersey state executive branch agencies to provide appropriate opportunities for all persons to participate in decision making and requires periodic review of programs that promote and protect the public health and the environment to ensure that they “address disproportionate exposure to environmental hazards.” *Id.*

⁸ *See, e.g.*, GLOBAL ENV'T RES. INC., REPORT OF THE COMMUNITY INVOLVEMENT ADVISORY COMMITTEE TO THE DELAWARE DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL (2001), *available at* <http://www.dnrec.state.de.us/dnrec2000/Admin/BusServ/CIACReport.pdf> (In September 1999, the Delaware Department of Natural Resources and Environmental Control (DNREC) chartered an external advisory committee, the Community Involvement Advisory Council (CIAC), to address barriers to inclusion of under-served populations in environmental decision making.); *see also* MD. CODE ANN., art. 41, § 18-315 (2003) (establishing, in 1997, the Maryland Advisory Council on Environmental Justice which created three subcommittees to focus on (1) public outreach, education and participation; (2) state and local interagency coordination; and (3) environmental health concerns and research).

⁹ EJ procedures have most often been passed as nonlegislative rules—rules adopted as interpretative rules or statements of policy without formal notice and comment periods providing for public input. William Funk, *The Dilemma of Nonlegislative Rules*, JOTWELL (June 3, 2011), <http://adlaw.jotwell.com/the-dilemma-of-nonlegislative-rules> (identifying three limitations raised by nonlegislative rules: first, they are not accompanied with the extensive notice and comment periods that formal rulemakings include; second, the difficulty in determining when nonlegislative rules are ripe for judicial review; and third, what amount of deference a policy or nonlegislative rule should receive from a reviewing court). Therefore, promulgating

This Article reviews U.S. state initiatives that have been put in place to increase the level of EJ accountability, reporting, and process in facility siting and development projects. After a brief overview of the federal approach to EJ, this Article provides case studies of three state EJ approaches and their successes and limitations in implementation.¹⁰ First, this Article reviews Illinois's EJ policy, finding that, while it stimulates public participation, accountability would be better served if the burden was shifted to the applicant to engage the public. Second, this Article assesses New York's EJ policy, which promotes an ongoing dialogue with stakeholders early on in the process and places the costs of ensuring that the public is informed on the permit applicants. Next, this Article examines Connecticut's statutory EJ approach, finding that it provides a process that furthers accountability and offers meaningful opportunities for concerned citizens to be heard. Finally, this Article concludes that these states can lead the way for others in showing how to ensure that EJ considerations are more than a mere check box exercise, and that systems with higher degrees of accountability¹¹ are the most appropriate in an arena so subjective that it is prone to be given inconsistent or ineffective consideration such as EJ.

formal EJ laws allows a state to avoid these issues and provides an avenue for their citizens to hold the permit applicant and agency accountable on a matter open to subjective interpretations. However, passing a formal EJ bill can be difficult, as demonstrated by the Georgia legislature's proposal of an EJ law three times, which failed each time. ENVIRONMENTAL JUSTICE FOR ALL, *supra* note 2, at 65.

¹⁰ This Article's focus on model state approaches does not intend to overlook other model approaches on the local level, as many local EJ initiatives present a ripe topic for further study. For example, in 2009, the City of Cincinnati passed an ordinance that required an "Environmental Justice Permit" for any proposed project which is likely to have a "material, cumulative, adverse impact on the health or environment of any [EJ] community" CINCINNATI, OHIO, ENVTL. CODE § 1041 (2009), *available at* <http://library.municode.com/index.aspx?clientId=19996&stateId=35&stateName=Ohio>. To apply for the EJ permit application, the applicant must submit comprehensive information which will then be mailed at the applicant's expense to any community council, hospital, school, daycare, or other key community stakeholder and ascertainable addresses located within one-mile of the proposed project. *Id.* Additionally, the EJ examiner can impose conditions on the project to mitigate effects of the proposed project including the requirement of a bond or surety to ensure compliance. *Id.* All proposed projects denied an EJ permit will be prohibited. However, due to the number and variety of local EJ initiatives, they are beyond the scope of this Article.

¹¹ See *infra* Section III.

I. U.S. ENVIRONMENTAL PROTECTION AGENCY'S APPROACH

The EPA's policies and procedures largely evolved following the signature of Executive Order (EO) 12898 on EJ.¹² As EO 12898 approaches its twentieth anniversary, the EPA is developing specific plans to revitalize EJ issues through Plan EJ 2014—a roadmap to integrate EJ concerns and meaningful participation¹³ into cross-agency programs and policies.¹⁴ In

¹² See Exec. Order No. 12898, 3 C.F.R. § 859 (1994), *reprinted in* 42 U.S.C. § 4321 (2006). President Clinton's EO 12898, "Federal Actions to Address Environmental Justice In Minority Populations and Low-Income Populations," tasks each federal agency with "achieving [the] environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations." *Id.*

¹³ According to the EPA, "meaningful involvement" in environmental decision making means that:

- (1) potentially affected community residents have an appropriate opportunity to participate in decisions about a proposed activity that will affect their environment and/or health;
- (2) the public's contribution can influence the regulatory agency's decision;
- (3) the concerns of all participants involved will be considered in the decision making process; and
- (4) the decision makers seek out and facilitate the involvement of those potentially affected.

Environmental Justice Program and Civil Rights, EPA.GOV, <http://www.epa.gov/region01/ej/index.html> (last visited Feb. 5, 2012).

¹⁴ Memorandum from Cynthia Giles, Assistant Adm'r for Office of Enforcement and Compliance Assurance, U.S. ENVTL. PROT. AGENCY, Request for Recommendations on Plan EJ 2014 and Permitting Charge to National Environmental Justice Advisory Council Members (July 27, 2010), *available at* <http://www.nleh.org/wp-content/uploads/2010/10/EPA-EJ-Plan-20141.pdf>. The plan outlines five cross-agency focus areas: (1) Incorporating Environmental Justice Into Rulemaking, (2) Considering Environmental Justice Concerns in the EPA's Permitting Process, (3) Accelerating Compliance and Enforcement Initiatives, (4) Supporting Community-Based Action Programs, and (5) Fostering Administration-Wide Action on Environmental Justice. *Id.* Executive Order 12898 also established the Federal Interagency Working Group on Environmental Justice (EJ IWG). The EJ IWG, is comprised of seventeen federal agencies and several White House offices, and tasked with guiding, supporting, and enhancing federal environmental justice and community-based activities. On August 4, 2011, the heads of the seventeen federal agencies took an important step in the administration's effort to support EJ by signing the Memorandum of Understanding on Environmental Justice and Executive Order 12898. See FEDERAL INTERAGENCY WORKING GROUP ON ENVIRONMENTAL JUSTICE, MEMORANDUM OF UNDERSTANDING ON ENVIRONMENTAL JUSTICE AND EXECUTIVE ORDER 12898 (2011), *available at* <http://www.epa.gov/compliance/environmentaljustice/resources/publications/interagency/ej-mou-2011-08.pdf> (broadening the EJ IWG to add additional agencies not named in EO 12898 as participants, and requiring each agency to finalize and publicize an environmental justice strategy, provide the public with annual implementation reports

September 2011, the EPA finalized the plan to, among other goals, specifically consider permitting implications “to ensure that environmental justice concerns are given as full consideration as possible in the decision to issue a permit and the terms of the permits issued under existing federal environmental laws,” and “enable EPA to address the complex issue of cumulative impacts from exposure to multiple sources and existing conditions that are critical to the effective consideration of environmental justice in permitting.”¹⁵ Plan EJ 2014 is not a rule or regulation, but a strategy to help integrate environmental justice into the EPA’s

that discuss progress in carrying out the agency’s EJ commitments, as well as focus on, when appropriate, the implementation of the National Environmental Policy Act, implementation of Title VI of the Civil Rights Act of 1964, impacts from climate change, and impacts from commercial transportation or goods movement). Through the Memorandum of Understanding, the EJ IWG also adopted a charter adding more structure and efficiency to the Workgroup to better coordinate their efforts. *See* CHARTER FOR INTERAGENCY WORKING GROUP ON ENVIRONMENTAL JUSTICE (2011), *available at* <http://www.epa.gov/compliance/environmentaljustice/resources/publications/interagency/iwg-charter-2011.pdf>. For an example of an agency progress report required by the Memorandum of Understanding, see U.S. DEPT OF JUSTICE, DEPARTMENT OF JUSTICE 2011 IMPLEMENTATION PROGRESS REPORT ON ENVIRONMENTAL JUSTICE (2011), *available at* <http://www.justice.gov/ej/docs/doj-ej-impl-prog-rpt.pdf>.

¹⁵ U.S. ENVTL. PROT. AGENCY, PLAN EJ 2014 CONSIDERING ENVIRONMENTAL JUSTICE IN PERMITTING IMPLEMENTATION PLAN (2011), *available at* <http://www.epa.gov/environmentaljustice/resources/policy/plan-ej-2014/plan-ej-permitting-2011-09.pdf>. ACWA commented on the EPA’s Permitting Draft Implementation Plan, encouraging the EPA to facilitate early and ongoing outreach to state environmental departments to obtain success stories and lessons learned in EJ programming generally and in permitting specifically. Furthermore, ACWA recommended that the EPA express in its final plan how it will work with the regulated community to specify how permit applicants will identify and notify EJ stakeholders, distribute readily understandable project information, and arrange public meetings. The letter emphasized the variety of experiences states have involving permittees in the public participation process which the agency should utilize as it develops an EJ toolkit. Comment Letter on Environmental Justice Plan 2014 Draft Implementation Plan—Considering Environmental Justice in Permitting from Alexandra Dunn, Exec. Dir. & Gen. Counsel, ACWA, to Lisa Jackson, Adm’r, U.S. ENVTL. PROT. AGENCY (Apr. 29, 2011), *available at* http://www.asiwpc.org/#!/_letters. In addition, as this Article goes to publication, the EPA just released a new tool to add to its EJ resources in December 2011. *See* U.S. ENVTL. PROT. AGENCY, PLAN EJ 2014: LEGAL TOOLS (2011), *available at* <http://www.epa.gov/environmentaljustice/resources/policy/plan-ej-2014/ej-legal-tools.pdf> (identifying the numerous legal authorities under the environmental statutes administered by the U.S. EPA that may contribute in the effort to advance environmental justice under Plan EJ 2014, specifically by ensuring the agency’s programs, policies, and activities fully protect human health and the environment in minority and low-income communities).

day-to-day activities.¹⁶ It is important to note that the EPA is the permitting authority for several states that have not sought delegation of various environmental programs,¹⁷ and thus the EPA has a real opportunity to lead by example when crafting and putting into place its final EJ permitting approaches.¹⁸

II. STATE APPROACHES

While the EPA continues to develop its roadmap, many states are already implementing their own approaches to consider EJ in permitting. States take a variety of different approaches to remedy disproportionate environmental impacts in the permitting process and promote EJ, each with varying degrees of effectiveness.¹⁹ The first step many states take is to perform an EJ study to determine what types of solutions are necessary. To

¹⁶ While this Article explores state legislative efforts, in part, a natural line of inquiry is the value and possibility of federal EJ legislation. Congress has attempted to enact EJ statutes on a few occasions although none have been successful. *See, e.g.*, H.R. 2105, 103d Cong., (1993); H.R. 1924, 103d Cong., (1993). A detailed analysis of this possibility, however, is beyond the scope of this Article and is fertile ground for future exploration.

¹⁷ The EPA is the permitting authority (PA) under some statutes and programs. For example, under the CWA, the EPA is the National Pollutant Discharge Elimination System (NPDES) PA in six states, on federal lands, and in the majority of Indian territories. *National Pollutant Discharge Elimination System (NPDES): Specific State Program Status*, EPA.GOV, http://cfpub.epa.gov/npdes/statestats.cfm?program_id=45&view=specific (last visited Feb. 5, 2012). As further illustration, the EPA is the permitting authority in two states under Resource Conservation & Recovery Act (hazardous waste), and one state under the Safe Drinking Water Act. *Delegation by Environmental Act*, ENVTL. COUNCIL OF STATES (Sept. 25, 2011, 1:00 PM), http://www.ecos.org/section/states/enviro_actlist.

¹⁸ Notably, the Government Accountability Office released a November 2011 report finding that the EPA still lacks the resources and definitional precision needed to advance EJ issues. GAO also called for greater articulation of the state role. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, ENVIRONMENTAL JUSTICE: EPA NEEDS TO TAKE ADDITIONAL ACTIONS TO HELP ENSURE EFFECTIVE IMPLEMENTATION (2011), available at gao.gov/new.items/d1277.pdf.

¹⁹ *See generally* ENVIRONMENTAL JUSTICE FOR ALL, *supra* note 2. The 2010 edition of the ABA/Hastings fifty state survey is considerably lengthier than previous editions, demonstrating that states continue to add to and experiment with innovative methodologies to address EJ. Steven Bonorris & Nicholas Targ, *Environmental Justice in the Laboratories of Democracy*, 25 A.B.A. SEC. NAT. RES. & ENV'T 44 (2010). Currently forty-one states have statutes, regulations, or other initiatives that further environmental justice, up from thirty-four identified in the 2007 edition. *Id.* This survey discussed these methodologies and provides links to each state's website for further detail.

accomplish this, states often then create an advisory board or commission, which are typically representative of the ethnic and racial makeup of the community to adequately represent the state's EJ concerns.²⁰ However, these commissions typically lack the power to change or implement policy.²¹ Therefore, states also often create dedicated EJ offices and staff within the state environmental agency devoted to the development and implementation of EJ policies. Lastly, some states have passed EJ statutes and regulations that increase public participation, providing critical accountability.²²

A. A Policy Approach—Illinois

Illinois has been called the state that best mirrors the country as a whole²³ based on how closely it matches national levels on twenty-one demographic factors, including: race, age, income, education, industrial mix, immigration, and the share of people living in urban and rural areas.²⁴ As the fifth largest state, Illinois has large urban areas, meaningful industrial concerns, significant agricultural presence, and transitional suburban areas. With many companies, and the state, continuing to invest in Illinois, the state is a prime place for environmental conflict.²⁵

²⁰ See, e.g., *Environmental Justice Advisory Board Bylaws*, PENN DEP'T OF ENVTL. PROT., available at http://www.portal.state.pa.us/portal/server.pt/community/ejab/14051/ejab_bylaws/589422 (last visited Feb. 5, 2012). Pennsylvania DEP created an Environmental Justice Advisory Board comprised of "a broad cross-section of interests," including representatives of low-income and minority communities and affected industries. *Id.*

²¹ See, e.g., Robert W. Collin, *Environmental Justice in Oregon: It's the Law*, 38 ENVTL. 413, 445-48 (2008) (discussing that Oregon similarly had an Environmental Justice Advisory Board that was disbanded because of a lack of authority to make or enforce regulations and a lack of funding).

²² See *infra* notes 55, 59.

²³ Stephen Ohlemacher, *How Average is Your State?*, ASSOCIATED PRESS (2007), http://hosted.ap.org/specials/interactives/wdc/average_state/index.html?SITE=AP.

²⁴ *Id.*

²⁵ See, e.g., Press Release, Ill. Gov't News Network, Governor Quinn Announces Investment to Boost State's Manufacturing Industry, Keep Hundreds of Jobs in Illinois (Apr. 13, 2011), available at <http://www.illinois.gov/PressReleases/ShowPressRelease.cfm?SubjectID=2&RecNum=9334> (announcing a "\$10.3 million business investment package to help Chicago-based steel manufacturer A. Finkl & Sons Co. expand operations. The state's investment will leverage about \$150 million in private investment").

To strengthen the public's involvement in environmental decision-making and ensure communities are not disproportionately impacted by degradation of the environment, Illinois Environmental Protection Agency (IEPA) developed an EJ Public Participation policy.²⁶ The policy is triggered "when proposed Agency permitting activities . . . may significantly and adversely affect EJ areas or when the community has made the Illinois EPA aware of EJ concerns for the proposed Agency action."²⁷ The Public Participation Policy emphasizes early and meaningful public involvement throughout the permitting process.

Each Bureau's permit section is required to review all permit applications to determine which applications trigger this EJ Public Participation Policy. For the purposes of its EJ Policy, Illinois defines a "potential" EJ community as a low-income and/or minority population greater than twice the statewide average.²⁸ In addition, a community may be considered a potential EJ community if the low-income and/or minority population is less than twice the statewide average, but greater than the statewide average, and has identified itself as an EJ community. "If the low-income and/or minority population percentage is equal to or less than the statewide average, the community should not be considered a potential EJ community."²⁹

If the EJ Public Participation policy is triggered, the IEPA will first encourage the permit applicant to engage community stakeholders in open dialogue early in the permitting process. In the course of the dialogue, "the applicant will be encouraged to provide notice to residents of the potential EJ area about the pending permit application and basic information about the project to interested residents."³⁰ The burden then falls on the

²⁶ ILL. ENVTL. PROT. AGENCY, ENVIRONMENTAL JUSTICE PUBLIC PARTICIPATION POLICY, available at <http://www.epa.state.il.us/environmental-justice/public-participation-policy.pdf> [hereinafter Illinois Policy]. A new law has also passed both houses of the Illinois legislature and was signed into law on August 16, 2011. S.B. 2193, 97th Gen. Assemb. (Ill. 2011) (establishing the Commission on Environmental Justice and charging the Commission with advising state entities on EJ issues). Given the recent nature of the new Illinois law, this Article focuses on the state's existing policy.

²⁷ Illinois Policy, *supra* note 26, at 4.

²⁸ *Id.* at 1.

²⁹ *Id.*

³⁰ *Id.* at 5.

IEPA to make fact sheets and plain language summaries of the major aspects of the proposed project, including the purpose and location of the proposed activity and facility, any anticipated environmental impacts, and any controls or work practices that will limit those impacts.³¹ All the public notices will be required to be “written in terminology and languages easily understood by the majority of readers” and when necessary, be made available on the agency’s webpage and placed in local publications.³²

Illinois’s EJ policy puts the majority of the public outreach requirements with their related costs on the IEPA. This raises a question of whether state EJ policies which shift the burden to permit applicants are preferable to the Illinois approach because they allow the state environmental agency to hold the applicants accountable. Illinois’s EJ policy makes the environmental agency responsible for community outreach, perhaps insufficiently holding the permit applicant accountable for explaining the possible disproportionate impacts of the proposed facility. This approach could also lead to uneven enforcement by the environmental agency without regular oversight of its implementation of the EJ policy to promote accountability.³³

Illinois also has a local siting approval process under the Illinois Environmental Protection Act for Pollution Control Facilities (PCFs).³⁴ The local siting approval law is subject to a public participation process that requires providing notice of the application to adjacent property owners, local members of Illinois’s General Assembly from the legislative district in which the facility is to be located, and notice to the general public by newspaper publication.³⁵ Moreover, at least one public hearing must be held and any person may comment on the proposed facility. Once the governing body issues their decision in writing, it may be appealed

³¹ *Id.*

³² *Id.*

³³ However, Illinois’s EJ bill, Pub. Act 097-0391, S.B. 2193, 97th Gen. Assemb. (Ill. 2011), was passed August 16, 2011 and establishes the Commission on Environmental Justice and charges the Commission with advising state entities on environmental justice issues. This law will allow for an oversight body of EJ issues, thereby creating greater accountability in the permitting process.

³⁴ PCFs include landfills, commercial incineration facilities, wastewater treatment plants, and similar waste treatment, storage or disposal facilities.

³⁵ 415 ILL. COMP. STAT. 5/39.2 (2007).

to the Pollution Control Board.³⁶ The IEPA is not a participant in this process, but they do ensure that the project has the requisite siting approval prior to the issuance of any development permits.³⁷ Therefore, while the siting process is not part of Illinois's formal EJ policy, it is an effective tool to hold all parties accountable and empower the affected communities with the ability to comment on and appeal a siting decision.

B. An EJ Permit Policy—New York

In 2003, the New York State Department of Environmental Conservation (NYSDEC) Commissioner issued Commissioner Policy CP-29 providing guidance for incorporating EJ concerns into the NYSDEC's permitting process. The policy requires the NYSDEC to first identify whether potential adverse environmental impacts from the proposed action are likely to affect a potential environmental justice area. This determination will be made using an integrated geographic information system and demographic application (GIS Application) which considers demographic census data of income and ethnicity.³⁸ Where a potential EJ area is identified, the applicant will be required to submit a written public participation plan. At a minimum, the plan must identify stakeholders to the proposed action, including local residents, elected officials, and community-based organizations. The plan must also contain methods of public outreach including information on how they will "[d]istribute and post written information on the proposed action and permit review process" in an easy-to-read, plain language format, and, when appropriate, translated into languages other than English.³⁹

Permit applicants must also hold informational meetings throughout the permit review process at locations and times convenient to project stakeholders to keep information flowing.⁴⁰ In addition, applicants must "[e]stablish easily accessible

³⁶ *Id.*

³⁷ *Id.*

³⁸ N.Y. DEPT OF ENVTL. CONSERVATION, ENVIRONMENTAL JUSTICE & PERMITTING: DEC POLICY 7 (2003), http://www.dec.ny.gov/docs/permits_ej_operations_pdf/ej_policy.pdf.

³⁹ *Id.* at 8.

⁴⁰ *Id.*

document repositories in or near the potential environmental justice area to make” pertinent project information available, “including but not limited to: application material, studies, reports, meeting presentation materials and media releases. The applicant may also establish a repository on the internet.”⁴¹

“As part of the public participation plan submission,” applicants must include a report summarizing: “all progress to-date in implementing the plan; all substantive concerns raised to-date; all resolved and outstanding issues; the components of the plan yet to be implemented and an expected time line for completion of the plan.”⁴² Upon completion of the public participation plan, applicants must submit written certification of compliance with the plan and a revised report detailing all activity subsequent to the initial report submission.⁴³ The applicant or their agent must submit a signed certification to DEC prior to a final application decision.⁴⁴

The South Pier Improvement Project (SPIP) proposed by the Astoria Generating Company (AGC) near the Sunset Park community in Brooklyn, New York provides an example of the ongoing dialogue New York’s EJ policy promotes. The Sunset Park community of approximately 150,000 people is considered a Potential Environmental Justice Area by the NYSDEC.⁴⁵ The SPIP energy project will improve the current Gowanus Generating Station through the addition of an approximately 100 megawatt combustion turbine generator.⁴⁶ The neighborhood is currently the site of multiple existing industrial facilities including a cement plant, warehouse, and utility switchyard, while additional facilities are also being proposed.

Before introducing the SPIP to the general public, AGC met with many community stakeholders, including local public interest groups, political representatives, and community leaders to obtain feedback on potential concerns and issues the community had with previous power generating projects. In

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ ESS GROUP, INC., FINAL ENVIRONMENTAL IMPACT STATEMENT: SOUTH PIER IMPROVEMENT PROJECT 133 (2009) [hereinafter IMPACT STATEMENT].

⁴⁶ *Id.* at i.

addition to the community outreach, AGC also met with the NYSDEC, the NYC Planning Department, and the NYC Department of Economic Development to anticipate all possible concerns.⁴⁷ Consistent with its open communication approach, a Public Participation Plan was prepared to facilitate significant public outreach. All project documents including fact sheets and stakeholder updates were made available through an extensive project website and at local libraries and the community board office. “In addition, comments were encouraged to be provided at public meetings, by mail, through the website, or via the established SPIP hotline.”⁴⁸

Furthermore, AGC performed a comparative assessment of asthma, cancer, heart disease, and mortality rates in Sunset Park compared to Brooklyn and New York City to evaluate the potential for additional adverse environmental and health impacts as a result of the SPIP.⁴⁹ The study found that the EJ community should not anticipate that the SPIP will contribute any additional environmental burden; rather, it will actually reduce the contribution of air quality components that may contribute to environmental and health impacts.⁵⁰

During the community outreach efforts, the Sunset Park community expressed significant concern for a long-term commitment not to increase emissions.⁵¹ As such, AGC voluntarily proposed a condition on each of their modified permits to waive their rights (or the rights of any successor) to increase emissions at the facilities. Additionally, through the SPIP, AGC promised to reduce operations of its existing facilities by approximately fifty percent and achieve approximately forty-nine percent actual overall emission reduction from current conditions, while adding to the overall capacity of the local electrical grid.⁵²

The SPIP project offers a strong example of a proposed facility that engaged an EJ community according to New York’s policy and took actions to balance industrial expansion, protection

⁴⁷ *Id.* at iii.

⁴⁸ *Id.*

⁴⁹ *Id.* at 132-43.

⁵⁰ *Id.*

⁵¹ *Id.* at iv.

⁵² *Id.* at v.

of the environment, and the need to accommodate social and economic considerations. The final permit was granted in October 2009 and Astoria Generating Company continued to meet with community leaders, public officials, and interested stakeholders as the project came to fruition.

C. A Statutory Approach—Connecticut

Connecticut is a state of economic prosperity and disparity, ranking first in per capita income in the nation⁵³ yet having many cities at per capita incomes below \$20,000.⁵⁴ Connecticut's EJ statute creates a transparent process by which the permit applicant must identify measures to facilitate meaningful public participation in the regulatory process and certify that they will undertake their proposed public outreach efforts.⁵⁵ While Connecticut's EJ statute does not cure the possibility of institutional bias from the siting process,⁵⁶ it provides an effective

⁵³ *State Personal Income 2008*, U.S. BUREAU OF ECON. ANALYSIS (2009), <http://www.bea.gov/newsreleases/regional/spi/2009/spi0309.htm>.

⁵⁴ *2008 American Community Survey*, U.S. CENSUS BUREAU (2009), http://www2.census.gov/acs2008_1yr/summaryfile/ACS_2008_SF_Tech_Doc.pdf.

⁵⁵ An Act Concerning Environmental Justice Communities and the Storage of Asbestos-Containing Material, CONN. GEN. STAT. § 22a-20a (2009).

⁵⁶ The term "institutional racism" describes a pattern of society to impose in a covert manner oppressive or otherwise negative conditions against identifiable groups on the basis of race or ethnicity. *See generally* LUKE W. COLE & SHEILA R. FOSTER, FROM THE GROUND UP: ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT 167 app. (2001). Furthermore, environmental pollution laws may be unevenly enforced in poorer communities with little political power. Studies have found that higher penalties accrue and more rapid and thorough cleanups occur for environmental violations in non-minority communities. *See, e.g.*, Marianne Lavelle & Marcia Coyle, *Unequal Protection: The Racial Divide in Environmental Law, A Special Investigation*, 15 NAT'L L.J. S2 (1992) (penalties substantially higher in communities with predominantly higher Caucasian demography); *see also* Rachel Morello-Frosch, Manuel Pastor, Jr., Carlos Porras & James Sadd, *Environmental Justice and Regional Inequality in Southern California: Implications for Future Research*, ENVTL. HEALTH PERSPS. (Apr. 2002), at 149, available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1241158/pdf/ehp110s-000149.pdf> (finding that Latinos are twice as likely as whites to live within one mile of an EPA Toxic Release Inventory listed facility, and Latinos, African Americans, and Asian populations in the region face fifty percent higher cancer risks than Anglo-Americans in the region). The evidence of institutional environmental racism that these studies illustrate are not new findings. In 1987, the United Church of Christ's Commission for Racial Justice released an influential study which found the following:

process for informing Connecticut citizens of new and expanding facilities in their neighborhoods, and provides meaningful opportunities for engagement.⁵⁷

Applicants seeking a permit from the Connecticut Department of Environmental Protection (DEP) or Siting Council,⁵⁸ for a facility that will be located or expanded in an EJ community, are required to file a “meaningful public participation plan” (MPPP) with the appropriate agency; consult with the elected official of the town or towns in which the facility would be located to evaluate the need for a Community Environmental Benefit Agreement (CEBA);⁵⁹ to develop accountability; and designate within the MPPP a convenient time and place to hold an informal public meeting with the residents of the affected EJ community.⁶⁰ The MPPP must also identify the methods by which the applicant will publicize the date, time, and nature of the

The proportion of minority members in communities with commercial hazardous waste facilities is double that of communities without such facilities. Where two or more such facilities are found, the proportion of minority members is nearly triple that in otherwise comparable communities. In fact, the best predictor of where to find hazardous waste is to classify communities by race, not income or real estate values.

COMMISSION FOR RACIAL JUSTICE, UNITED CHURCH OF CHRIST, TOXIC WASTES AND RACE IN THE UNITED STATES: A NATIONAL REPORT ON THE RACIAL AND SOCIO-ECONOMIC CHARACTERISTICS OF COMMUNITIES WITH HAZARDOUS WASTE SITES (1987).

⁵⁷ As mapping that draws on Connecticut’s census data indicates, Connecticut’s pollution sources are heavily concentrated in minority and economically depressed communities. *Environmental Justice Maps of Connecticut*, CONN. COALITION FOR ENVTL. JUSTICE, http://www.environmental-justice.org/ej_maps/index.html (last visited Feb. 5, 2012). Connecticut also burns more trash than any other state. Telephone Interview with Dr. Mark Mitchell, Former President, Conn. Coalition for Env’tl. Justice (July 15, 2011). The majority of the burning occurs outside affluent communities. *Id.*

⁵⁸ The Connecticut Siting Council is responsible for, *inter alia*:

1) balancing the need for adequate and reliable public utility services . . . with the need to protect the environment and ecology of the state and to minimize damage to scenic, historic, and recreational values; 2) providing environmental standards for the location, design, construction, and operation of public utility facilities . . . that are sufficient to assure the welfare and protection of the people of Connecticut.

About Us, CONN. SITING COUNCIL, <http://www.ct.gov/csc/cwp/view.asp?a=895&q=248310> (last visited Feb. 5, 2012).

⁵⁹ CONN. GEN. STAT. § 22a-20a (2009).

⁶⁰ *Id.*

informal public meeting using a variety of methods.⁶¹ At the informal public meeting, the applicant is required to make reasonable and good faith efforts to provide clear, accurate, and complete information about the proposed facility and the potential environmental and health impacts.⁶² The DEP or the Siting Council is not allowed to take any action on the applicant's permit, certificate, or approval earlier than sixty days after the informal public meeting.⁶³ Therefore, both the applicant and environmental agency are held accountable for stimulating public participation prior to beginning the permit application process.

In addition to the MPPP, applicants must consult with the chief elected official of the towns in which the affecting facility is proposed to be located or expanded so that the need for a CEBA can be evaluated.⁶⁴ A written agreement between a host town and developer to mitigate the environmental impacts of the proposed facility, entered into voluntarily, a CEBA is an effective tool for incorporating community concerns expressed during the required public participation meetings. By coming to a voluntary agreement with the city and community to mitigate the health concerns and protect neighborhoods from additional pollution before the formal hearing procedures, applicants can often save considerable expense and time as well as avoid political pressure from the community. Early cooperation with communities helps to avoid both the economic and social costs associated with facility opposition, while simultaneously increasing public involvement and perhaps also gaining the benefit of community support.

A proposal by the energy company, PSEG, to build three new natural gas peaking turbines on the site of its existing oil burning

⁶¹ These include: posting a reasonably visible sign on the proposed or existing facility property, posting a reasonably visible sign printed in all languages spoken by at least twenty percent of the population that reside within a one-half of a mile radius of the proposed or existing facility, notifying neighborhood and environmental groups, in writing, in a language appropriate for the target audience, and notifying local and state elected officials, in writing. *Id.* The applicant must also publish the date, time, and nature of the informal public meeting with a minimum one-quarter page advertisement in a newspaper having general circulation in the affected area not less than ten days and not more than thirty days prior to such meeting. Additionally, the applicant shall post a similar notification of the informal public meeting on the applicant's web site. *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

power plant (which would continue to operate) was the first project falling under the new EJ Act.⁶⁵ Diesel ships in the New Haven Harbor, the existing Harbor Station oil burning plant, and Interstate 95 already burdened the adjacent neighborhood with enormous amounts of pollution causing high rates of respiratory and cardiac disease.⁶⁶ The existing oil burning plant produced enough energy, so the \$135 million project to build “peaking” generators was simply to help PSEG at times of maximum demand on the grid.⁶⁷ Concerns regarding the 130-foot exhaust stack and additional pollution in their already burdened neighborhood caused the community to begin to rise up against the proposal.⁶⁸

As part of the MPPP under the EJ Act, an initial meeting took place where PSEG informed the public of their plan and the accompanying potential health and environmental impacts, and the public responded with their concerns. While the early exchange between the company, the neighborhood, environmental groups, and the city was unfruitful, it stimulated a series of negotiations and additional public meetings.⁶⁹ The parties ultimately agreed upon terms that were incorporated into a CEBA. PSEG agreed to reduce the maximum number of hours its current plants in New Haven will operate from fourteen to twelve hours per day and to contribute \$500,000 to reduce air pollution in the neighborhoods surrounding the New Haven power plants.⁷⁰ The funds will be used to retrofit city garbage trucks servicing the area with diesel filters; to then install similar filters on equipment in the port district including cranes, payloaders, and bulldozers; and finally, to install power outlets in New Haven harbor to allow docked tugboats to receive cleaner power without using their

⁶⁵ Roger Reynolds, *Land Use and Environmental Law: Law Helps Environmental Justice Take Step Forward*, CONN. L. TRIB. (Oct. 4, 2010), <http://www.ctlawtribune.com/getarticle.aspx?ID=38461>.

⁶⁶ *Id.*

⁶⁷ Allan Appel, *E. Shore Gas Turbines OK'd*, NEW HAVEN INDEP. (May 20, 2010), http://www.newhavenindependent.org/index.php/archives/entry/gas_turbines_on_the_way.

⁶⁸ *Id.*

⁶⁹ Reynolds, *supra* note 65.

⁷⁰ Thomas MacMillan, *Peaking Plant to “Green” Port*, NEW HAVEN INDEP. (Aug. 27, 2010), http://www.newhavenindependent.org/index.php/archives/entry/peaking_plant_to_green_port/id_28728.

polluting diesel generators.⁷¹ Even with an additional three natural gas peaking turbines, these initiatives together result in a net decrease in pollution—a result with which the community can be satisfied.

In return for PSEG's commitment to no new added pollution, the community groups and their allies agreed to not oppose the company's request for permits to build its new peaking units in the city. All of the public outreach and negotiations occurred prior to PSEG submitting permit applications to the Siting Council or the DEP. With the community on their side as they submitted their permit applications, the DEP had a much easier decision to make. On May 19, 2011, as workers broke ground on the installation of new electricity generators in the harbor, the community was not only informed about the process, but also contributed significantly to mitigating the environmental and health impacts of another facility in their area.⁷²

III. MOVING STATES FORWARD

In our system of cooperative federalism for environmental law and regulation, the federal government sets guidelines and baselines, and states carry out those functions and adapt them as needed to specific problems and challenges in their geographic area.⁷³ In the area of EJ, the federal government is leading by example through policy, plan, and actual permitting,⁷⁴ but because states are closer to EJ concerns, they have gone farther. The elements of accountability built into the Illinois, New York, and Connecticut programs are ripe for emulation by other states.

⁷¹ *Id.*

⁷² Thomas MacMillan, *At Hearing, Peak Plant Plan Piques Neighbors*, NEW HAVEN INDEP. (Aug. 5, 2009), http://www.newhavenindependent.org/archives/2009/08/peaking_plant_p.php.

⁷³ Robert L. Fischman, *Cooperative Federalism and Natural Resources Law*, 14 N.Y.U. ENVTL. L.J. 179, 188 (2005) (finding that the field of environmental law has proven the most fertile ground for creating variations on the theme of cooperative federalism); see also Amy Widman, *Advancing Federalism Concerns in Administrative Law Through A Revitalization of State Enforcement Powers: A Case Study of the Consumer Product Safety and Improvement Act of 2008*, 29 YALE L. & POL'Y REV. 165, 177-78 (2010) (“[B]enefits of cooperative federalism are described as allowing for local, targeted solutions within a common regulatory framework; increasing manpower; and allowing for policy experimentation.”).

⁷⁴ See *supra* Section I.

When looked at together, these state programs, through a variety of approaches, hold all parties accountable—state environmental agencies ensure the public is well-informed prior to issuing a permit, the permit applicants meaningfully engage the public on the effects of their proposed facility, and the affected communities must actively voice their concerns and desires.

While these public participation statutes and policies are important methods to mitigate environmental injustice, EJ policies would be even more successful if government and the courts addressed the distributional inequalities in the siting process. Solely relying on public participation policies places too heavy a responsibility on individual communities to protect themselves.⁷⁵

Although many states have made great progress on EJ issues, the current economic downturn could potentially threaten these efforts as state environmental agencies are reducing staff, and state EJ offices are operating with fewer human and capital resources. Pressures to reduce the size of state government, and states operating in deficits,⁷⁶ will open the door to a risk of EJ becoming an afterthought rather than a forethought. Furthermore, these difficult economic times have prevented other states from developing their own EJ policies.⁷⁷ This means that states with a proven track record in this area must share with one

⁷⁵ Uma Outka, *Environmental Injustice and the Problem of the Law*, 57 ME. L. REV. 209, 237 (2005).

⁷⁶ For example, on July 11, 2011, Massachusetts Governor Deval Patrick signed into law the 2012 state budget, which included significant cuts to environmental agencies. Mathew Todaro, *Environmental Budget Cuts: Passing the Financial Burden to Future Generations*, RAPPAPORT BRIEFING (Sept. 15, 2011), <http://rappaportbriefing.net/2011/09/15/environmental-budget-cuts-passing-the-financial-burden-to-future-generations/>. In 2001, Massachusetts spent \$245 million of its \$22 billion total budget on the budgets for the Departments of Environmental Protection, Conservation and Recreation, and Fish and Game (slightly more than one percent of its total budget). *Id.* Today, the state plans to spend \$160 million of its \$30.6 billion budget on the same environmental programs (roughly 0.5 percent of its total budget). *Id.* That is nearly a fifty percent cut in just over ten years. *Id.*

⁷⁷ See, e.g., ENVIRONMENTAL JUSTICE FOR ALL, *supra* note 2, at 158 (“While North Carolina does have an Environmental Justice Coordinator position, the General Counsel of the North Carolina Department of Natural Resources serves in that position. Due to a lack of funding, one person cannot be assigned to concentrate on EJ issues. Also due to a lack of funding, NC DENR has not had the opportunity to build upon their policies and programs to promote environmental justice.”).

another the successes and failures of their EJ initiatives. States can use webinar and conference-call technology to exchange with one another experiences to benefit both the environment and communities when considering EJ early in the permitting process.

EJ is not a luxury that can be shifted to a lower priority status during difficult economic times. Communities of reduced socioeconomic status and of color deserve fair treatment and equitable consideration when it comes to impacts on their environment and health, regardless of the economy. In fact, times when even community groups are operating under budget constraints, making it potentially less likely that they will have the ability to vigorously engage in the permitting process, are exactly the times that more formal procedures are needed to ensure their consideration.

Communities in need of paying jobs may be drawn into accepting a downgrade in their physical, mental, and environmental health of the community. The phenomenon of “environmental blackmail,”⁷⁸ or “environmental jobmail,”⁷⁹ can lead to disparate exposure to environmental hazards. A community in need of work might not oppose a proposed facility in their neighborhood or participate in the public outreach activities threatening future employment opportunities.⁸⁰ The immediate

⁷⁸ Robert Bullard, *Environmental Blackmail in Minority Communities*, in RACE AND THE INCIDENCE OF ENVIRONMENTAL HAZARDS 83-85 (Bunyan Bryant & Paul Mohai eds., 1992). Bullard discusses environmental elitism and job blackmail. He states: “The public is led to believe there is no alternative to ‘business as usual’ operation. If workers want to keep their jobs, they must work under conditions which may be hazardous to them, their families, and their community.” *Id.* In addition, Bullard notes that “[t]he offer of a job (any job) to an unemployed inner city worker appears to have served a more immediate need than the promise of a clean environment.” *Id.*

⁷⁹ Eileen Gauna, *Federal Environmental Citizen Provisions: Obstacles and Incentives on the Road to Environmental Justice*, 22 *ECOLOGY L.Q.* 1, 38-39 (1995) (“Accepting the jobs-for-environment tradeoff presents a tragic predicament for those living in low income and minority communities: risk one’s job (and the economic viability of the community) if environmentally harmful activities are challenged; or risk one’s health (and the community’s health) if environmentally harmful activities are not challenged.”).

⁸⁰ See, e.g., Sheila Foster, *Justice from the Ground Up: Distributive Inequities, Grassroots Resistance, and the Transformative Politics of the Environmental Justice Movement*, 86 *CALIF. L. REV.* 775, 820-21 (1998) (examining the EJ movement from the perspective of the residents of Chester, Pennsylvania). Foster notes that early in a public hearing to challenge yet another industrial facility, a young man from the community stood up and said, “I don’t care what they do, I need a job.” *Id.* at 820.

need to provide for one's family will almost always prevail over a future possible detrimental health or ecosystem effect. Lean economic times make it all the more important that state permitting authorities incorporate EJ into their operations and promote accountability, thereby helping to insulate against "environmental jobmail."

CONCLUSION

When our nation's cities developed, there was little consideration for creating a balance between industrial space and living communities. Soot on windowsills was ordinary, and if employment led to adverse health later in life, it was unfortunate but not unexpected. Over time, a large number of industrial facilities became concentrated in communities of lower socioeconomic status, leading to proved disproportionate health and environmental outcomes across the U.S. The advent of the civil rights movement, and subsequent study and mobilization, as well as the growing effectiveness of citizen advocates, brought on the modern domestic EJ movement in the 1970s and 1980s. The federal government brought EJ even further forward with the adoption of EO 12898. As true laboratories, states followed the federal lead, developing their own programs and initiatives to address EJ. Today, both federal and state programs continue to mature, expand, and increase effectiveness.

When subjective considerations like fairness and equity are at issue, accountability is key. The states with EJ policies and even statutes with a variety of accountable and required steps will be more successful than those with softer approaches. Given the economic downturn, the best interests of EJ communities can be most reliably considered through clear and non-optional processes. In the end, such accountable approaches enhance certainty and successful outcomes for all parties involved—government, business, and the communities they serve.

Foster explains that this man was paid off and promised employment. She explains, "the facilities were following the time-honored practice of businesses hoping to move into financially ailing communities, and offering financial incentives and increased employment opportunities." *Id.* at 820-21.