

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

No. SJC-11406

CITY OF BROCKTON
Appellant,

v.

ENERGY FACILITIES SITING BOARD,
Appellee.

FRANK J. BABBIN, et al.,
Appellants,

v.

ENERGY FACILITIES SITING BOARD,
Appellee.

TOWN OF WEST BRIDGEWATER,
Appellant,

v.

ENERGY FACILITIES SITING BOARD,
Appellee.

*ON APPEAL FROM A FINAL DECISION OF
THE ENERGY FACILITIES SITING BOARD*

**BRIEF OF AMICUS CURIAE
HANDS ACROSS THE RIVER COALITION**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Judicial Court Rule 1:21, the Hands Across the River Coalition states that it is a nonprofit Massachusetts corporation. The corporation has no parent company and has not issued any stock, so there is no publicly held corporation that owns 10% of its stock.

STATEMENT OF INTEREST OF AMICUS

Organized in 1982, Hands Across the River Coalition ("HARC") is a volunteer-led, grassroots environmental advocacy organization whose members are dedicated to the safe cleanup of legacy pollution in New Bedford, Massachusetts and the pursuit of environmental justice. HARC's work in connection with the New Bedford Harbor is "an example of environmental justice in process."¹ HARC's experience as a New Bedford-based environmental advocacy organization gives it a unique perspective on environmental justice that can inform the Court's consideration of the environmental justice issues raised in this case.

Decades of operation of large industrial facilities in New Bedford severely contaminated the Acushnet River and New Bedford Harbor. Sediments at one location contained the highest contamination of polychlorinated biphenyls ("PCBs") ever documented in a marine environment,² and the U.S. Environmental

¹ William A. Shutkin & Charles P. Lord, *Environmental Law, Environmental Justice, and Democracy*, 96 W. Va. L. Rev. 1117, 1120 (1994).

² National Oceanic and Atmospheric Administration (NOAA), *Case Study: New Bedford Harbor, MA*, [hereinafter "NOAA Case Study"] http://www.darrp.noaa.gov/northeast/new_bedford/ (last visited Feb. 12, 2014).

Protection Agency ("EPA") determined that the contamination posed an imminent and substantial endangerment to public health.³ HARC works to push this and other cleanups forward in a manner that protects the residents of New Bedford.

HARC also advocates for toxic waste remediation in several communities and coordinates with other organizations in Massachusetts that are addressing the impacts of power plants, landfills, and municipal water supplies on neighborhoods and communities. In particular, HARC educates people about the disproportionate impact of pollution on low-income and minority communities. HARC's work primarily focuses on communities with significant populations of low-income and minority individuals, known as "environmental justice" populations. New Bedford and Brockton both have large environmental justice neighborhoods.

Nearly 70% of New Bedford's population lives in an environmental justice neighborhood, as defined by the Massachusetts Executive Office of Environmental and Energy Affairs ("EOEEA") based on 2010 census data. Only Brockton and eleven other municipalities in

³ U.S. Environmental Protection Agency, Region I, Record of Decision Summary, New Bedford Harbor/Hot Spot Operable Unit, New Bedford, MA 2-4 (Apr. 1990).

the Commonwealth have a higher percentage of their population living in environmental justice neighborhoods. Indeed, unlike most municipalities with environmental justice populations, New Bedford and Brockton have neighborhoods that meet all of EOEEA's characteristics of environmental justice communities: low-income households, threshold levels of minority residents, specified percentages of households lacking English language proficiency, and/or threshold levels of foreign-born individuals. Years of research have demonstrated that lower-income and minority communities like New Bedford and Brockton suffer from a disproportionately high share of environmental burdens and the attendant impacts on public health. EOEEA's Environmental Justice Policy (the "EJ Policy") aims to address such disparities. A. 2933-2944.⁴

As a Massachusetts environmental advocacy organization working to protect the environment and public health in environmental justice communities, HARC has a significant interest in proper application of the EJ Policy and in ensuring that the Energy

⁴ References to the Record Appendix will be cited as A. __, according to page.

Facilities Siting Board ("EFSB") approves the construction of only those power plants that are consistent with the EJ Policy, as required by G.L. c. 164, § 69J^{1/4}.

SUMMARY OF THE ARGUMENT

This case raises important issues about the right of all people in the Commonwealth, regardless of their ethnicity, race, or socio-economic status, to equal protection from an unfair share of environmental pollution from industrial operations. The low-income, high-minority demographics of cities like Brockton, the affected community in this case, and New Bedford, where amicus HARC is based, are representative of communities that bear disparately severe environmental and public health impacts from pollution.⁵ (pgs. 10-14) Residents of Brockton have baseline health conditions that are worse than those in most other Massachusetts towns and cities, making them more susceptible to impacts from new sources of pollution. (pgs. 14-19) The

⁵ For example, the PCB contamination in the New Bedford Harbor continues to cause severe environmental and economic impacts, including: long-term closures of fisheries in the harbor, home to one of the largest commercial fishing fleets in the country; lost beaches; diminished property values; and reduced opportunities for recreation and coastal development. NOAA Case Study, *supra* note 2.

Brockton Power Company LLC's ("Brockton Power") proposal to site a new power plant (the "Project") threatens to exacerbate the environmental and health burdens in Brockton. See, e.g., A. 609-640. Yet the Project received siting approval from the EFSB without the benefit of the proper and complete application of the EJ Policy.

The EFSB misconstrued the scope of the EJ Policy when it described the policy's requirements as "largely procedural in nature" and interpreted such "procedural" obligations as relating primarily to public outreach and participation efforts. A. 180-181. When projects have the potential to impact environmental justice neighborhoods, the EJ Policy requires both enhanced opportunities for participation (such as publishing notices in multiple languages) and equal protection against environmental burdens, including thorough and carefully-considered enhanced analyses of impacts on environmental justice communities. Such analyses must take into account information provided through public participation; an agency cannot elicit input and then disregard it. Whether this review is termed a procedural or substantive requirement is a matter of semantics.

Regardless of the terminology used, the EJ Policy explicitly requires that the EFSB and other EOEEA agencies each separately and carefully consider the impacts of projects on environmental justice communities.

The EFSB acknowledged that it did not conduct an enhanced analysis of environmental justice impacts, concluding that, because the Massachusetts Environmental Protection Act ("MEPA") office was not required to perform such an analysis, neither was the EFSB. A. 181. The EJ Policy, however, imposes independent duties on *each* EOEEA agency. Nothing in the EJ Policy suggests that the EFSB can forego its obligations under the policy by relying on the actions of another agency. This is particularly relevant with respect to the EFSB, whose core role is to decide whether a power plant may be located in a community. This core function directly implicates the equal protection objectives of the EJ Policy. (pgs 19-27)

That other agencies in Massachusetts have made efforts to incorporate both enhanced opportunities for participation and strategies for making environmental justice an integral consideration in the implementation of their programs, confirms the

feasibility of the EFSB taking steps to implement the equal protection component of the EJ Policy, including via review of impacts on environmental justice populations. (pgs 28-32)

The implications of this case extend beyond the Project, which is representative of large scale developments whose nature and long-term impacts pose risks to environmental justice communities throughout Massachusetts. While environmental justice implications may not ultimately be determinative in an agency's decision-making, they cannot be ignored. As a result of EFSB's failure to assess the Project's compliance with the equal protection component of the EJ Policy, its decision must be reversed.

ARGUMENT

Environmental justice neighborhoods are areas in the Commonwealth, designated by EOEEA, that are burdened by a disproportionate share of environmental impacts. Brockton and New Bedford are examples of communities that historically have borne disparate environmental burdens, arising from both historic industrial and land use activities (legacy pollution) and current development and operations.

To protect poor and minority populations, in 2002 the EOEEA adopted the EJ Policy to: (i) "enhance[] environmental review of new or expanding large sources of air emissions and regional waste facilities" in environmental justice neighborhoods; and (ii) increase opportunities for environmental justice populations to participate in environmental decision-making. A. 2936. The EJ Policy is based on the principle that "all people have a right to be protected from environmental pollution and to live in and enjoy a clean and healthful environment," and requires that environmental justice be an "integral consideration" in decisions by all EOEEA agencies. A. 2934. The EFSB has been an EOEEA agency since 2007.⁶

The rights reflected by the EJ Policy are particularly important to communities like Brockton and New Bedford, which EOEEA has classified as environmental justice communities, i.e., areas most at risk of suffering from an inequitable pollution burden.

⁶ The EFSB was brought within the jurisdiction of EOEEA pursuant to the Acts and Resolves of 2007, Chapter 19, entitled, "An Act reorganizing the Governor's Cabinet and certain agencies of the Executive Department."

The EFSB failed to comply with the plain language of the EJ Policy by disregarding the equal protection aspects of the policy, including by failing to conduct a review of the Project's impacts on environmental justice neighborhoods and populations. Its decision cannot be affirmed.⁷

1. Brockton is an Environmental Justice Community with a Disparate Burden of Environmental Pollution and Poor Health.

Over 96% of Brockton's population lives in an environmental justice neighborhood, according to EOEEA's most recent calculations.⁸ EOEEA, 2010

⁷ As a threshold matter, HARC notes that the EJ Policy includes a disclaimer that it does not create any right to judicial review regarding an agency's compliance with the policy. A. 2944. Notwithstanding this language, EFSB's environmental justice analysis is clearly subject to the Court's scrutiny in this action. For instance, in *Allen v. NIH* the court found that, even though the federal environmental justice Executive Order "'shall not be construed to create any right to judicial review,'" environmental justice claims can be brought before a court if they arise under a statute that allows for judicial review, such as the National Environmental Policy Act and the Administrative Procedures Act. *Allen v. NIH*, -- F. Supp. 2d --, No. 1:06-CV-10877-PBS, 2013 WL 5434817, at *25 (D. Mass. Sept. 30, 2013) (internal citations omitted). Drawing a parallel to the EOEEA's EJ Policy, a claim can be raised under EFSB's statutory authority, which requires it to consider a project's compliance with the EJ Policy, because the pertinent statute provides for judicial review of EFSB decisions. G.L. c. 164, §§ 69J¹/₄, 69P.

⁸ EOEEA's most recent designations of environmental justice communities are based on 2010 census data. At

Environmental Justice Populations, available at <http://www.mass.gov/anf/docs/itd/services/massgis/ej-2010-communitystatistics.pdf> (last visited Feb. 13, 2014). Environmental justice neighborhoods are defined in the EJ Policy as United States census block groups that meet at least one of the following criteria:

- a median household income below 65% of the statewide median income;
- 25% or more minority residents;
- 25% or more foreign born residents; or
- 25% or more households that do not have an adult proficient in English.

A. 2937.

Although a neighborhood or collection of neighborhoods is considered an environmental justice area by satisfying any one of the EJ Policy's criteria, there are a relatively small number of municipalities in Massachusetts with neighborhoods that meet all the criteria. A. 2945-2947. Of the 351

the time EFSB issued the Final Decision that is now before this Court, EOEEA was using 2000 census data to designate environmental justice communities. The rest of this brief will refer to 2000-based data and the criteria applied by EOEEA at that time.

municipalities in Massachusetts, Brockton and New Bedford are two of only twenty with neighborhoods meeting all four environmental justice criteria.⁹ *Id.*

Environmental justice communities experience greater environmental impacts and health risks associated with degraded natural resources and sources of air emissions than do other communities that are predominantly white and have higher median incomes.

According to the EJ Policy:

EJ Populations encompass approximately 5% of the land area of the Commonwealth and are home to about 29% of the population. . . . These high-minority/low-income neighborhoods encompass only a small portion of the land area of the Commonwealth but they host, or are in close proximity to, many of the state's contaminated and abandoned sites and large sources of air emissions.

A. 2937. See also generally, e.g., A. 609-640, 2291-2300.

Several environmental justice neighborhoods are located within a few hundred yards of the Project's proposed location. A. 689, 693, 695, 2301, 2927.

⁹ The EOEEA currently uses three criteria to define an environmental justice neighborhood (having removed the foreign-born criteria). Under this approach, Brockton and New Bedford continue to be part of a very small subset of towns and cities that meet all the remaining criteria (two out of 31 of the 351 municipalities in Massachusetts). EOEEA, *2010 Environmental Justice Populations*.

a. Brockton is disproportionately burdened by pollution-generating facilities.

Residents in cities like Brockton and New Bedford are exposed to a greater share of pollution as compared to the Massachusetts statewide average. See, e.g., A. 2294-3000, 610-611 ("Brockton is one of the most environmentally overburdened communities in the state"). For instance:

- There are on average 84 hazardous waste sites per municipality in Massachusetts; Brockton has 347. A. 617.
- On average there were 246,248 pounds of industrial chemical emissions in "high income" Massachusetts communities between 1990-2002 (i.e., areas with a medium household income over approximately \$66,000); in Brockton, there were 341,090 pounds emitted. A. 621.
- Across Massachusetts, there is an average of 2.7 landfill-type operations per municipality; Brockton has six. A. 622. The Thatcher Landfill in Brockton is only 1.5 miles from the Project site. *Id.*

Brockton residents are already exposed to significantly more sources of pollution than residents

of the average Massachusetts municipality.¹⁰ *Id.* at 1. Construction of an additional large industrial facility, such as a new power plant, will exacerbate the undue concentration of pollution sources in Brockton and can be expected to worsen their attendant health consequences. *Id.*

b. Brockton residents are in poorer health than their statewide counterparts.

Not surprisingly, given Brockton's high burden of existing polluting facilities and hazardous waste sites, its residents are in poorer health than their statewide counterparts. This disparity is evidenced across multiple metrics, including the following:

- Brockton has a premature mortality rate of 413.7 per 100,000 people, compared to 317 per 100,000 statewide. This is the fifth-highest premature mortality rate out of the thirty largest communities in Massachusetts. A. 664 (citing

¹⁰ Conditions in cities like Brockton and New Bedford echo findings by studies done at the national level, which found, for example, that: communities with two or more waste sites have triple the percentage of people of color; people of color are 47% more likely than whites to live near hazardous waste sites; toxic waste sites in minority communities are less likely to be listed as Superfund sites; and Superfund toxic waste sites in communities of color are likely to be cleaned up 12%-42% later than sites in white communities. A. 615-616.

Massachusetts Department of Public Health data for 2005, published in 2007).¹¹

- Brockton has an age-adjusted cardiovascular hospital admission rate of 2,302 per 100,000 people, 26% higher than the state average. *Id.* at 7.
- Brockton has a pediatric asthma rate of 13.85%, compared to 10.6% statewide, a difference that the Massachusetts Department of Public Health described as "statistically significantly higher."¹² A. 600.

These health statistics were presented to the EFSB and could have been evaluated by the EFSB in its consideration of environmental justice issues.¹³

Poorer baseline health makes Brockton residents more susceptible to the health impacts of pollution, including particulate matter and other air emissions from power plants such as the Project. See, e.g., A.

¹¹ New Bedford was one of the few communities with a higher premature mortality rate. Massachusetts Department of Public Health, *Massachusetts Deaths 2005*, at 73 (2007) available at <http://www.mass.gov/eohhs/docs/dph/research-epi/death-report-05.pdf> (last visited Feb. 13, 2014).

¹² Like Brockton, New Bedford has a higher pediatric asthma rate than the statewide average, at 14.95%. A. 603.

¹³ More recent statistics and rankings may vary.

2937 (noting health risks associated with the presence of multiple sources of air pollution), 664-665 (noting the association between fine particulate matter and premature mortality and morbidity, including hospital admissions for cardiovascular disease and asthma attacks).

Placing additional stress, in the form of new large sources of pollution, on populations that are already taxed by high rates of asthma, cardiovascular disease and other health problems poses a greater potential health risk than adding the same level of pollution to a healthier community. See, e.g., A. 636 (finding that people with asthma are particularly sensitive to the effects of air pollution and can be expected to experience adverse health consequences at lower levels of exposure compared to healthy individuals).

For instance, studies suggest a nearly linear correlation between fine particulate matter (PM_{2.5}) exposure and deaths, indicating that, even at concentrations below the Clean Air Act's National Ambient Air Quality Standard ("NAAQS"), increased

particulate matter emissions could worsen health impacts. A. 498-499.¹⁴

The combination of lower baseline health and greater exposure to pollution makes Brockton residents particularly susceptible to the health impacts of new pollution sources that would intensify already considerable health disparities. A. 637 ("Large power plants pose significant health threats to nearby residents.").

- c. The Project is located in close proximity to a high concentration of especially sensitive populations.**

In addition to having higher-than-average rates of health problems city-wide, Brockton includes several populations in close proximity to the Project that are especially sensitive to the air pollution that a new power plant will produce. The public health effects of additional pollution sources are exacerbated in populations with sensitive "receptors," such as children and the elderly, who are often more susceptible to harm from air pollution. A. 636; see also EPA, *Fine Particle (PM_{2.5}) Designations, Frequent*

¹⁴ With respect to PM_{2.5}, there may not be an identifiable threshold below which PM_{2.5} is not harmful to human health, and if there is such a threshold, it is significantly below the current NAAQS for PM_{2.5}. A. 660-661, 498.

Questions, <http://www.epa.gov/pmdesignations/faq.htm>
(last visited Feb. 12, 2014) (answering "who is most
at risk" from PM2.5 health effects).

The sensitive populations in Brockton include five schools less than 1.5 miles from the Project, at three of which the asthma rate is nearly double the statewide average, and senior housing centers within a half to two miles of the Project. A. 573-574, 636.

The EJ Policy calls for "increased attention" to communities that "are built in *and around* the state's oldest industrial areas."¹⁵ A. 2933 (emphasis added). This is because the effects of pollution, particularly air emissions, are not contained within a facility's property.¹⁶ Thus, for example, in determining whether an area complies with air pollution limits, EPA and Massachusetts consider both the air quality in that specific area and whether air pollution emissions in

¹⁵ With respect to projects undergoing review under MEPA, the EJ Policy expands the radius in which enhanced analysis of impacts is required from one mile to five miles from an environmental justice population if air emission-related thresholds are triggered. A. 2940.

¹⁶ The dispersion of air emissions, and hence pollution, can be impacted by factors such as emission rates and concentrations, stack heights, weather conditions and topographical features.

that area contribute to other locations exceeding their pollution limits. 42 U.S.C. § 7426.

2. EOEEA's Environmental Justice Policy Includes a Substantive Equal Protection Component that Requires Enhanced Review of Environmental Justice Impacts.

The EJ Policy has a substantive goal of ensuring environmental justice and provides mechanisms for meeting this objective. An agency's inadequate consideration and analysis of the impacts of a decision on environmental justice communities undermines the EJ Policy.

The EFSB and other EOEEA agencies are each required to make environmental justice an integral consideration in their programs and to ensure the equal protection of environmental justice populations from disparate environmental burdens. To help implement these directives, the EJ Policy instructs agencies to (i) adopt an agency-specific environmental justice strategy that is tailored to its mission and (ii) conduct enhanced review of potential impacts on environmental justice communities, including from new sources of air emissions. A. 2936, 2939.

The EFSB erred in interpreting the EJ Policy as largely requiring only enhanced opportunities for

participation. A. 181. The EFSB also erred by concluding that because the MEPA Office did not need to complete an enhanced analysis, no agency was required to complete an enhanced analysis under the EJ Policy. *Id.* To the contrary, the EJ Policy calls generally for enhanced review and then, in a provision specific to MEPA, creates parameters on when such review is required. A. 2936, 2940. By ignoring the equal protection component of the EJ Policy and foregoing any analysis of the impacts of the Project on environmental justice neighborhoods, the EFSB failed to determine whether the Project complies with the EJ Policy, as it was required to do pursuant to G.L. c. 164, § 69J^{1/4}. While the EJ Policy does not mandate a particular outcome, "integral consideration" of environmental justice requires more than a cursory or passing reference to the concept.¹⁷

¹⁷ The EFSB has not adopted an environmental justice strategy since issuing its final decision in this case, nor does it appear that its interpretation or implementation of the EJ Policy has evolved. In its only decision regarding a new power plant since the approval of the Project, the EFSB again described the EJ Policy as "largely procedural in nature, requiring enhanced outreach and public participation." EFSB 12-2, Footprint Power Salem Harbor Development LP, Final Decision, 102 (2013). In that case, the EFSB relied on the distribution of notices for public meetings to

a. The EJ Policy Mandates that the EFSB Take into Account the Environmental and Health Consequences of its Decisions for Environmental Justice Communities.

On its face, the EJ Policy establishes both equal protection (i.e., review of impacts on environmental justice communities) and participation components. It defines "environmental justice" as including both "equal protection" and "meaningful involvement" for all people, including with respect to the implementation of environmental laws, regulations and policies.¹⁸ A. 2934. "Equal protection" is defined in turn as meaning that "no group of people, because of race, ethnicity, class, gender, or handicap bears an unfair share of environmental pollution from industrial, commercial, state and municipal operations or have limited access to natural resources, including greenspace (open space) and water resources." A. 2935.

determine that the applicant had complied with the EJ Policy. *Id.* at 103.

¹⁸ See also EOEEA Smart Growth/Smart Energy Toolkit (describing environmental justice as "not just a procedural problem, but also one of substantive social and economic inequalities"), http://www.mass.gov/envir/smart_growth_toolkit/pages/mod-ej.html (last visited Feb. 12, 2014).

EOEAA agencies are required to promote equal protection by:

- Taking into consideration the environmental and health consequences of their decisions on environmental justice communities; and
- Developing strategies to proactively promote environmental justice in all neighborhoods in ways that are tailored to the specific mission of each agency.

A. 2936, 2939.

Several provisions in the EJ Policy illustrate that it incorporates distinct equal protection and participation prongs. For example, the EJ Policy states that it is "designed to enhance public participation . . . [and] *enhance the review* of new large air sources." A. 2937 (emphasis added). With respect to project reviews, the EJ Policy addresses separately the objectives of "enhanced public participation" and "enhanced analysis of impacts and mitigation." A. 2940.

At the time the EJ Policy was written, the EFSB was not part of the EOEEA; hence, there is no specific reference to the EFSB in the EJ Policy. This silence, however, does not reflect a determination that the

EFSB is "excused" from environmental justice obligations. Indeed, the core of the EFSB's mission, i.e., the siting of power plants with long life-spans, high levels of emissions and benefits delivered outside their host communities, goes to the heart of environmental justice and demands careful consideration and close scrutiny of the impacts of siting decisions on environmental justice communities.

The EFSB's analysis determines at which location a project can occur. The EFSB is therefore better positioned than other Massachusetts agencies to consider the environmental justice impacts of a project, which is inherently a matter of where a project is located, before those options are precluded. This distinction underscores the importance of incorporating an analysis of environmental justice impacts at the siting stage of a project - in other words, during EFSB review, before final site selection is made.

The EFSB cannot forego evaluating whether a project complies with the EJ Policy by relying on the review of another agency. No two agencies fill the same role or have the same mission, and it was the

EFSB - a siting agency, as its name implies - that had a predominant role in reviewing alternative sites for the Project. G.L. c. 164, § 69J^{1/4} (requiring applicants to provide information on their site selection process). The EFSB's consideration of environmental justice issues is different from and cannot be replaced by anything that the MEPA office may have done. This is illustrated by the fact that the project "alternatives" that the MEPA office considered in its review were all located at the same site in Brockton.¹⁹ A. 1287-1299.

It is therefore particularly important, both on the specific facts of this case and in general, that the EFSB take into account local, site-specific concerns, such as environmental justice impacts.

b. Interpreting the EJ Policy as Including a Substantive Equal Protection Component Reflects the History and Goals of the Environmental Movement.

The EOEEA's EJ Policy did not introduce a novel concept. Rather, the adoption of the EJ Policy in 2002 grew out of and reflects issues that were developed over several decades through the growth of

¹⁹ A "no build" alternative was also included for the purpose of establishing a future baseline in relation to which the Project and its alternatives could be analyzed. A. 1287.

the environmental justice movement. A. 2936 ("This policy builds on the national environmental justice framework in ways that reflect the needs and circumstances specific to Massachusetts").

The roots of environmental justice as a separate movement are often traced back to the early 1980s, when a siting dispute over a disposal facility in a minority community in North Carolina brought attention to the issue. See, e.g., Alice Kaswan, *Environmental Justice and Environmental Law*, 24 Fordham Env'tl. L. Rev. 149, 158 (2013). In particular, the dispute brought attention to problems of distributive justice, i.e., whether environmentally-burdensome facilities are disproportionately located in low-income and high-minority communities, and participatory or procedural justice, i.e., whether the decision-making process about these types of facilities is fair and accessible to all people.²⁰ For example, at the First National People of Color Environmental Leadership Summit in 1991, various types of "environmental racism" were

²⁰ Kaswan, *supra*, at 150-51. Less relevant to the issues in this case, was a third prong of the analysis, defined as social or structural justice, which queried how the disproportionate distribution of environmental burdens reflected and/or were the result of broader historical and societal inequalities. *Id.* at 151.

identified, including: (i) siting toxic waste disposal facilities and polluting industries in minority communities, and (ii) excluding minority communities from decision-making processes and regulatory bodies. Michele L. Knorr, *Environmental Injustice: Inequities Between Empirical Data and Federal, State Legislative and Judicial Responses*, 6 U. Baltimore J. of Env'tl. Law. 71, 74-75 (1997). In seeking solutions to the problems of environmental injustice, advocates and government agencies promote mechanisms that address both the distributive and participatory problems.

In 1994, President Clinton issued Executive Order No. 12898, titled "*Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations.*" The Executive Order, which is still in force, is similar to the EJ Policy in that it instructs federal agencies to avoid distributional disparities in environmental justice communities, in addition to directing agencies to develop mechanisms for participation in agency reviews and decision-making. See, e.g., *Allen v. NIH*, -- F. Supp. 2d --, No. 1:06-CV-10877-PBS, 2013 WL 5434817, at *26 (D. Mass. Sept. 30, 2013) ("The purpose of an environmental justice analysis is to determine whether

a project will have a disproportionately adverse effect on minority and low income populations.'") (citation omitted); *Communities Against Runway Expansion, Inc. v. FAA*, 355 F.3d 678, 688 (D.C. Cir. 2004) ("[A]n 'environmental justice' analysis [is] intended to evaluate whether the project would have disproportionately high and adverse human health or environmental effects on low-income or minority populations."); Kaswan, *supra*, at 154 ("The Executive Order . . . instructs federal agencies to avoid distributional disparities that adversely affect low-income and of-color communities, and to develop participatory mechanisms that ensure the engagement of all communities.").

Just as the civil rights movement organized not only to increase African-Americans' participation in government, but also to produce substantive changes in areas like housing, voting, and education policy, the environmental justice movement aims not just to increase participation, but to stop the disproportionate siting of polluting industries in low-income and minority communities. This goal cannot be achieved through participation alone.

3. Implementation of the Environmental Justice Policy's Equal Protection Requirements is Feasible.

The EFSB's claimed difficulty in determining how to apply the requirements of the EJ Policy, beyond providing for enhanced outreach and participation, is puzzling in light of the steps other agencies have taken that demonstrate the feasibility of implementing the equal protection component of the EJ Policy.²¹

An example involving a permitting, as opposed to a siting, decision for a power plant is the Massachusetts Department of Environmental Protection's ("DEP") review of a proposed biomass power plant in Springfield. The permitting process in that instance included what DEP's Office of Appeals and Dispute Resolution termed both "enhanced public participation and enhanced analysis of impacts and mitigation." *In the Matter of Palmer Renewable Energy*, Docket No. 2011-021 & -022, 2012 WL 5377276, at *5 (Mass. DEP 2012). This analysis involved a health risk assessment that included, among other factors: a determination of the baseline health status of the

²¹ HARC cites to the agency actions discussed herein as examples of steps that agencies can take in implementing the EJ Policy, but takes no position regarding the adequacy or outcome of these environmental justice analyses.

community; an evaluation of potential health impacts given the existing background level of pollutants; an assessment of total inhalation cancer and non-cancer health risks associated with stack emissions; an assessment of acute inhalation risks for respiratory irritants; and a review of potential impacts of mercury stack emissions on nearby freshwater fish.²² This precedent provides concrete examples of the kinds of analyses that the EFSB could require its applicants to conduct.

Although not an EOEEA agency, the Massachusetts Department of Transportation ("DOT") has also conducted environmental justice analyses that are useful in envisioning what the EFSB could have done to evaluate whether a proposed power plant location complies with the EJ Policy, as it is required to do by G.L. c. 164, § 69J⁴. For instance, in evaluating a proposal to link two of the MBTA's subway lines, DOT included environmental justice in its alternatives analysis by identifying the environmental justice populations within and surrounding the project area

²² DEP Conditional Approval, Palmer Renewable Energy, LLC, Plan #1-P-08-036 (2011), available at <http://www.mass.gov/eea/docs/dep/public/hearings/precpa-en.pdf> (last visited Feb. 13, 2014).

and considering the potential effects, both direct and indirect, of the project on those populations. DOT Red Line/Blue Line Connector Project, Alternatives Analysis Technical Report Appendix N (Mar. 2010). When DOT identified substantial adverse impacts to resources in environmental justice neighborhoods, it then compared the impacts to those in non-environmental justice neighborhoods to determine if the impacts would be disproportionate. *Id.* at 1-4.

In another case, involving an overpass project, DOT conducted an assessment that examined the distribution of benefits and burdens from the project among environmental justice and non-environmental justice areas and population zones.²³ Notably, in both projects DOT's approach included comparing impacts between environmental justice and non-environmental justice communities; this "apples" to "oranges" comparison is necessary to measure for disproportionate burdens.

New York provides an example of the incorporation of an environmental justice assessment into power

²³ Central Transportation Planning Staff, "Environmental Justice Analysis for Casey Overpass Project" (Dec. 20, 2011), available at <http://www.massdot.state.ma.us/Portals/24/docs/EnvJusticeRpt20111220.pdf> (last visited Feb. 12, 2014).

plant siting. There, parties seeking to site major electric generating facilities must evaluate "significant and adverse disproportionate environmental impacts" from a facility's construction or operation within at least a 0.5 mile radius of the proposed location. This analysis must include cumulative air quality impacts and a comparison of the demographic, economic, and physical data for the area where a power plant would be located versus the county and adjacent communities. 6 NYCRR Part 487.

The EFSB is well-situated to compare environmental justice impacts across potential project sites and, by doing so, could identify risks of creating or increasing disproportionate burdens on environmental justice neighborhoods. Applicants for permission to construct power plants are required by statute to provide the EFSB with information about their site selection process. G.L. c. 164, § 69J¹/₄. To aid its evaluation of applications, the EFSB is authorized to issue guidelines requiring "sufficient data" from applicants to enable the board's review of issues including local and regional land use impacts, local and regional cumulative health impacts, and air quality impacts. *Id.* The EFSB could require

applicants to include in this data information such as: (i) whether there are environmental justice populations within the vicinity of the proposed locations; (ii) the existing environmental and health conditions in the locations; and (iii) projections of the environmental and health impacts on those locations from the project.

However, the EFSB does not currently require applicants to provide or consider information about environmental justice issues in the siting application process. Brockton Power did not even determine if there were any environmental justice communities in the proximity of its alternative sites, let alone compare impacts between environmental justice and non-environmental justice populations. A. 687.

CONCLUSION

Because the EFSB failed to consider, or comply with, the EJ Policy's requirements when it approved the siting of the Project, HARC urges that the Court reverse the EFSB's August 7, 2009 Final Decision regarding Brockton Power's Project.

Respectfully Submitted,

HANDS ACROSS THE RIVER COALITION

By its attorneys:

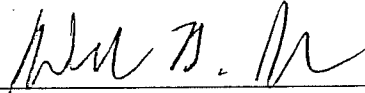


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²⁴ We would like to acknowledge the contributions to this brief by Alexandria Shasteen and Jean Tanis, students in the Emmett Environmental Law & Policy Clinic at Harvard Law School.

CERTIFICATE OF COMPLIANCE


Pursuant to Rule 16(k), Massachusetts Rules of Appellate Procedure, I hereby certify that the foregoing brief complies with the rules of the court that pertain to the filing of briefs, including without limitation Rules 16(a)(6), 16(e), 16(f), 16(h), 18 and 20, Mass. R. App. P.



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CERTIFICATE OF SERVICE

I hereby certify that on February 14, 2014, I served two copies of the foregoing Brief of Amicus Curiae Hands Across the River Coalition on the parties' counsel of record, by mail, as listed below.



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