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This memorandum relates to the **MODEL STATUTE ESTABLISHING AN ENVIRONMENTAL ADVISORY BOARD**.

Introduction

This model bill addresses the issue of cumulative impacts, or the potential for multiple sources of pollution and other environmental and public health stressors to exist in a community, affecting the health and well-being of residents in ways that may not be identifiable when examining the effects of a single stressor or source of pollution.¹ Pollution from even a single source in isolation can have detrimental health effects for those who live, work, attend school, or recreate nearby.² Exposure to common pollutants has a number of serious negative health effects, including cancer, cardiovascular and respiratory disease, infertility, asthma, and neurological and developmental disorders.³ These effects can be compounded when a person is exposed to multiple sources and types of environmental pollution.⁴

These overlapping burdens are more likely to exist in low-income communities and communities of color and are exacerbated by existing inequities caused by discrimination, marginalization and overburdening.⁵ A combination of environmental, social, and socioeconomic factors can limit the ability of some communities to engage fully in public decision-making processes that can influence where environmental hazards are located.⁶ While these communities are more likely to be burdened with pollution, residents are more likely to suffer from cardiovascular disease, diabetes, and other medical conditions that leave them more susceptible to the negative health effects of pollution.⁷ The legacy of racism, income inequality, and marginalization exacerbates these effects. Limited access to essential services like affordable housing, quality healthcare, clean water, and reliable home heating and energy, combined with obstacles to social and economic mobility, increase a community's susceptibility to environmental harms and toxins.⁸ While existing environmental laws at the state and federal level often assess the impacts of individual facilities in isolation, the cumulative impacts framework requires an assessment of how multiple environmental stressors interact to create

¹ Rachel Morello-Frosch et al., *Understanding the Cumulative Impacts of Inequalities in Environmental Health: Implications for Policy*, Health Affairs (May 2011), at 879, <https://www.healthaffairs.org/doi/10.1377/hlthaff.2011.0153>.

² See, e.g., Sarah Penney et al., *Environmental Defense Fund, Estimating the Health Impacts of Coal-Fired Power Plants Receiving International Financing* (2009).

³ California Office of Environmental Health Hazard Assessment, *Cumulative Impacts: Building a Scientific Foundation* 7 (2010), <https://oehha.ca.gov/media/downloads/calenviroscreen/report/cireport123110.pdf>.

⁴ *Id.*

⁵ *Id.* at 7-10.

⁶ Morello-Frosch et al., *supra*, at 883.

⁷ Morello-Frosch et al., *supra*, at 882.

⁸ Equitable and Just National Climate Platform, September 2021,
<https://www.weact.org/wp-content/uploads/2023/05/Defining-EJ-Community-for-Mandatory-Emissions-Reduction-Policy.pdf>.

additional environmental and public health burdens for the surrounding community and its residents.⁹

To help address the issue of cumulative impacts in disadvantaged communities, this bill establishes a statewide Environmental Advisory Board, which serves as an advocate for consideration of environmental justice in historically marginalized and overburdened communities, as well as a resource for government officials and policymakers. The Environmental Advisory Board is intended to provide insight and accountability as the state moves to incorporate environmental justice considerations into its decision-making processes. The Board is designed to improve the engagement of impacted communities in relevant state processes and programs, provide expertise and perspective to government decision-makers, identify areas of improvement in public processes, and improve identification and mitigation of environmental justice concerns in the state.

Functions of the Bill

This bill establishes a statewide Environmental Advisory Board (EAB) with members appointed by the governor and leading members of the state legislature. Space on the EAB is specifically allocated to include representatives from a variety of groups with unique and valuable perspectives on environmental justice issues. Membership of the EAB includes residents of environmental justice areas, advocates and community groups dedicated to environmental justice, representatives of industries and organizations regulated by the state's environmental laws, academics specializing in environmental and public health, and representatives of local and tribal governments within the state. Legislators may consider adjusting the allocation of seats on the EAB to increase the weight given to residents and advocates for environmental justice areas.

Environmental justice advocates and frontline community members are the foremost experts on their communities' needs and interests. This allocation of membership is intended to ensure that the EAB is representative of and well-connected to the communities that it advocates for, while also having technical expertise and experience with relevant regulatory processes to be able to craft well-rounded and pragmatic solutions. Appointees should also represent the racial, ethnic, cultural, gender, and geographic diversity of the state.

The EAB is structured to promote continuity, independence, and transparency in its work. Members of the Board serve staggered four-year terms, allowing them the time and stability to

⁹ U.S. Environmental Protection Agency, Cumulative Impacts Research: Recommendations for EPA's Office of Research and Development 2 (2022), https://www.epa.gov/system/files/documents/2022-09/Cumulative%20Impacts%20Research%20Final%20Report_FINAL-EPA%20600-R-22-014a.pdf ("Solving longstanding, recalcitrant environmental health problems, including health disparities exacerbated by racial and social injustices, requires an accurate and realistic assessment of the effects from the combined exposures to chemical and non-chemical stressors (i.e., cumulative impacts) that inform decision-making at all levels."); Amy J. Dunn & George V. Alexeeff, Beyond Risk Assessment: Principles for Assessing Community Impacts, *Int. J. Toxicology* 78-87 (Jan.-Feb. 2010), <https://pubmed.ncbi.nlm.nih.gov/19959838/>.

thoroughly investigate issues and craft long-term advocacy strategies. The Board is required to meet regularly, and any vacancies that arise must be quickly filled to ensure that the Board's work can continue as seamlessly as possible. Although Board members are not compensated under the bill, they may be reimbursed for expenses incurred in the course of their work to prevent the cost of participation from limiting any member's involvement with the Board. This provision can be construed broadly to include costs associated with the time commitment of Board membership, including childcare and lost income from wages, tips, and gig work. The Board will receive administrative support from the state environmental protection agency¹⁰ and is permitted to fundraise from outside sources, but any sources of funding must be publicly disclosed on the Board's website.

The EAB's duties and powers are intended to cover a variety of forms of research and advocacy. The Board should identify and amplify the voices of residents that are disproportionately impacted by environmental stressors and should support their interests, concerns, and plans. A critical component of the Board's work is to create accessible opportunities for communities to directly provide their perspectives and participate in decision-making. The members of the Board cannot and should not be expected to fully represent the concerns and needs of all residents of environmental justice areas, so it's important that the Board also cultivate opportunities for these residents to participate in public discussion by holding public meetings and advocating for policies that support public awareness, engagement, and advocacy within the impacted community.

The EAB also serves as a resource to government officials and decision-makers who lack the place-based knowledge, lived experiences, and expertise in environmental justice issues that affected community members possess. By providing informal guidance to policymakers and formal comments in ongoing proceedings, the Board can leverage the on-the-ground expertise of community members and the knowledge and insights of academics and government officials to incorporate environmental justice considerations more thoroughly into decision-making processes. At the same time, the EAB is empowered to develop and advocate for its own policy and project recommendations.

Environmental Justice Area Definition

This bill uses the term "environmental justice area" to designate areas that are known to experience or are likely to experience disproportionate environmental hazards, as well as communities that may face increased obstacles to participating in public decision-making

¹⁰ The bill and this memo both use the generic "state environmental protection agency" to refer to the state agency tasked with overseeing environmental conservation, quality, and protection.

processes.¹¹ Under this bill, designated seats on the Board are dedicated to residents of these areas, and the Board is tasked with, among other things, proposing solutions that address environmental justice concerns in these areas. The bill’s definition of “environmental justice area” is critical to ensuring that the benefits of the bill flow to the communities most likely to be affected by cumulative impacts. To that end, the definition uses four criteria to identify qualifying areas: 1) areas that qualify based on a single demographic factor that is closely tied to increased risk or decreased public participation; 2) areas ranking highly on national indices of susceptibility to environmental pollution; 3) lands of federally recognized tribes; and 4) specially designated areas.

1. Demographics

First, an area may be designated as an environmental justice area based on the demographics of its residents, as determined by the most recent U.S. Census or American Community Survey. Communities with more low-income households, households with limited English proficiency, or limited formal education are included, as these demographics correspond to increased vulnerability to environmental hazards¹² or decreased ability to participate in public decision-making processes.¹³ Information on these demographics is widely available, regularly updated, and fairly high-resolution, making these neighborhood characteristics well-suited to use in statewide legislation, particularly in jurisdictions that do not have resources to conduct additional data collection.¹⁴

¹¹ The language used in cumulative impacts legislation can vary, but this bill uses the term “environmental justice area” rather than “overburdened” or “disadvantaged community” because it intends to capture communities that are most likely to be affected by cumulative impacts, therefore warranting additional attention in decision-making processes. It does not assume that all communities that meet these criteria are necessarily overburdened or disproportionately impacted by environmental stressors. Similarly, the word “area” is used in place of “community” to acknowledge that the boundaries used by the definition do not necessarily correspond with organic community boundaries and that multiple communities may overlap or intersect within a single qualifying area.

¹² Lori M. Hunter, *The Spatial Association Between U.S. Immigrant Residential Concentration and Environmental Hazards*, *Int. Migration Rev.* 460 (2000), <https://doi.org/10.2307/2675910>; California Office of Environmental Health Hazard Assessment, *Cumulative Impacts: Building a Scientific Foundation* 7 (2010), <https://oehha.ca.gov/media/downloads/calenviroscreen/report/cireport123110.pdf>.

¹³ Janet A. Phoenix, *Anti-Resilience Factors of Environmental Justice Communities*, in *Environmental Justice and Resiliency in an Age of Uncertainty* 72, 74 (2022) (“This has the potential to reduce the number of residents in environmental justice communities who are able to interpret what data exists documenting exposures, leaving communities more vulnerable. ... Reports that are released for public comment may be written in technical language and/or at a high reading level or in language that cannot be understood by affected community members.”).

¹⁴ EPA, *Cumulative Impacts Research*, *supra*, at 31 (“Cumulative impact assessments to inform local and site-specific decisions often need environmental and socioeconomic data at high-resolution temporal and spatial scales, such as the census block or finer. The costs of monitoring equipment and the lack of data collection infrastructure make it challenging to collect reliable data at fine spatial and temporal scales.”).

The demographic category also incorporates racial demographics¹⁵ based on the close correlation between race and exposure to environmental hazards.¹⁶ Racial demographics are a significant predictor of the distribution of environmental burdens because of the legacy of racial segregation and discrimination, and the “spatially concentrated disproportionate pollution burdens in communities of color” that increase their risk of exposure to environmental harms.¹⁷ More information about this designation, including an analysis of the potential legal implications of including this factor, is included below in the section titled “Use of race in designation of environmental justice area.”

2. Susceptibility metrics

In addition to the single demographic metrics, the bill includes areas that have been designated as highly susceptible to environmental pollution by the United States Environmental Protection Agency’s demographic indices.¹⁸ While these indices rely on much of the same demographic data included in the demographic definition, a high overall score on these susceptibility metrics may help to identify additional communities that fall slightly below the demographic thresholds identified but that are nevertheless still at heightened risk of cumulative impacts. As discussed in the section below on the use of race in designating environmental justice areas, the United States Environmental Protection Agency EJSCREEN demographic index relies in part on racial demographics.

3. Tribal land

The designation of lands of federally recognized tribes as “environmental justice areas” serves two purposes. First, it recognizes that Indigenous communities bear a disproportionate share of pollution.¹⁹ Second, it recognizes the unique status and sovereignty of tribal nations by ensuring that they are included and adequately consulted in decisions impacting their land.

4. Agency approval

Lastly, the state environmental protection agency may designate additional areas as “environmental justice areas” if they are particularly vulnerable to environmental or public

¹⁵ Although the Census and American Community Survey do not currently include Middle Eastern or North African as a racial status option, it is included in the bill due to the U.S. EEOC’s recent listing of this status and in anticipation of its inclusion in future surveys.

¹⁶ Bullard, R. D., Mohai, P., Saha, R., & Wright, B., *Toxic Wastes and Race at Twenty 1987–2007: Grassroots Struggles to Dismantle Environmental Racism in the United States* (2007); Anderton, D. L., Anderson, A. B., Oakes, J. M., & Fraser, M. R., *Environmental Equity: The Demographics of Dumping*, *Demography*, 31(2), 229–248 (1994).

¹⁷ Equitable & Just National Climate Platform, *Approaches to Defining Environmental Justice Community for Mandatory Emissions Reduction Policy* (Sept. 2021), <https://www.weact.org/wp-content/uploads/2023/05/Defining-EJ-Community-for-Mandatory-Emissions-Reduction-Policy.pdf>.

¹⁸ U.S. Environmental Protection Agency, *EJSCREEN Technical Documentation 24-30* (2022), <https://www.epa.gov/system/files/documents/2023-01/EJScreen%20Technical%20Documentation%20October%202022.pdf>.

¹⁹ Maggie Li et al., *Air Pollution in American Indian Versus Non-American Indian Communities, 2000-2018*, *112 American Journal of Public Health* 615 (2022), <https://doi.org/10.2105/AJPH.2021.306650>.

health hazards, have a history of disproportionate environmental burdens, or have a diminished capacity for public participation. This category gives the agency some discretion to identify additional areas that may benefit from the designation, and encourages flexibility in recognizing the input of community organizations, residents, and advocates who are closely connected to the issue of cumulative impacts.²⁰ By doing so, it gives communities an opportunity to identify themselves for further consideration and ensures that no overburdened community is categorically excluded from being designated an environmental justice area.

Additional Issues to Consider

Use of race in designation of environmental justice area:

This model bill utilizes racial demographics in its definition of “environmental justice area,” a term that is used to identify areas that are more likely to be burdened by environmental hazards or associated health problems. These demographics are a strong predictor of an area’s exposure to environmental hazards,²¹ making them a particularly salient metric for this bill.²² However, their inclusion in this definition may increase the risk of litigation under state or federal equal protection law, which could delay or completely prevent implementation of the bill. Federal courts in multiple states have recently halted federal programs that contain racial classifications on the grounds that these classifications violate the Constitution’s Equal Protection Clause.²³

While the use of race-conscious metrics carries a risk of litigation, legislators might reduce this risk by ensuring that the use of race in their bill is narrowly tailored to achieve a compelling government interest, such as remedying past discrimination.²⁴ The Supreme Court's recent decision in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*²⁵ affirmed this standard for the consideration of race in government decision-making. Legislators wishing to further minimize the risk of an equal protection challenge can modify the definition of “environmental justice area” to eliminate the use of racial demographics. To do so, provision [2.3(a)(ii)] should be removed, as well as the reference to “United States Environmental Protection Agency EJSCREEN demographic index” in [2.3(b)]. Legislators should also consider the extent to which state constitutional law may limit the use of race.

²⁰ Kiana Courtney, Environmental Law & Policy Center, #DenyThePermit? A Call for Cumulative Impacts Legislation by Frontline Communities (Dec. 8, 2021), <https://elpc.org/blog/deny-the-permit-a-call-for-cumulative-impacts-legislation-by-frontline-communities>.

²¹ Letter from Sacoby Wilson, Professor, University of Maryland, to White House Council on Environmental Quality (Apr. 8, 2022), available at https://downloads.regulations.gov/CEQ-2022-0002-0012/attachment_1.pdf.

²² Both New Jersey and New York utilize race-based criteria for identifying impacted communities in environmental justice laws. See 13 NJ ST Ch. 1D-158; NY Enviro. Conserv. Law § 75-0111).

²³ See, e.g., *Vitolo v. Guzman*, 999 F.3d 353, 360 (6th Cir., 2021) (enjoining a program that prioritized minority-owned businesses, among others, for coronavirus relief grants); *Faust v. Vilsack*, 519 F.Supp.3d 470 (E.D. Wis. 2021) (enjoining a program that provided loan relief to “socially disadvantaged” farmers, a category defined in part based on race).

²⁴ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995).

²⁵ 600 U.S. ____ (2023).

Jurisdictions Implementing Similar Laws

A number of state and local governments have created environmental justice advisory boards or other structures to provide recommendations or guidance to governments in addressing environmental justice issues. For example, the New Jersey Department of Environmental Protection has an Environmental Justice and Advisory Council,²⁶ the city of Newark, New Jersey, has the Newark Environmental Commission,²⁷ the North Carolina Department of Environmental Quality has the Secretary's Environmental Justice and Equity Advisory Board,²⁸ and the Connecticut Department of Energy & Environmental Protection has the Equity and Environmental Justice Advisory Council established via Executive Order No. 21-3.²⁹ Though it is at a federal level, the White House Environmental Justice Advisory Council is yet another example of community leaders and advocates gathering to advance equity.³⁰

In drafting this model legislation, the structure of Colorado's Environmental Justice Act was particularly informative.³¹ This bill also draws from functions and structures in place in the environmental justice bills passed in Pennsylvania,³² New York,³³ and New York City.³⁴

²⁶ New Jersey Department of Environmental Protection, Environmental Justice Advisory Council (EJAC), <https://dep.nj.gov/ej/ej-council/>.

²⁷ City of Newark, Newark Environmental Commission, <https://www.newarknj.gov/card/newark-environmental-commission>.

²⁸ North Carolina Department of Environmental Quality, Secretary's Environmental Justice and Equity Advisory Board, <https://www.deq.nc.gov/outreach-education/environmental-justice/secretarys-environmental-justice-and-equity-advisory-board#UpcomingMeetings-1951>.

²⁹ Connecticut Department of Energy & Environmental Protection, Connecticut Equity and Environmental Justice Advisory Council (CEEJAC), <https://portal.ct.gov/DEEP/Environmental-Justice/Connecticut-Equity-and-Environmental-Justice-Advisory-Council>.

³⁰ U.S. EPA, White House Environmental Justice Advisory Council, <https://www.epa.gov/environmentaljustice/white-house-environmental-justice-advisory-council>.

³¹ Colorado Environmental Justice Act, HB21-1266 (2021).

³² 4 Pa. Code § 5.1033.

³³ 2019 Sess. Law News of N.Y. Ch. 735 (S. 2385).

³⁴ Local Law 64 of 2017.