RECENT ENVIRONMENTAL JUSTICE LAWS AND STATE ENVIRONMENTAL CONSTITUTIONAL AMENDMENTS

INTRODUCTION

Presenters:

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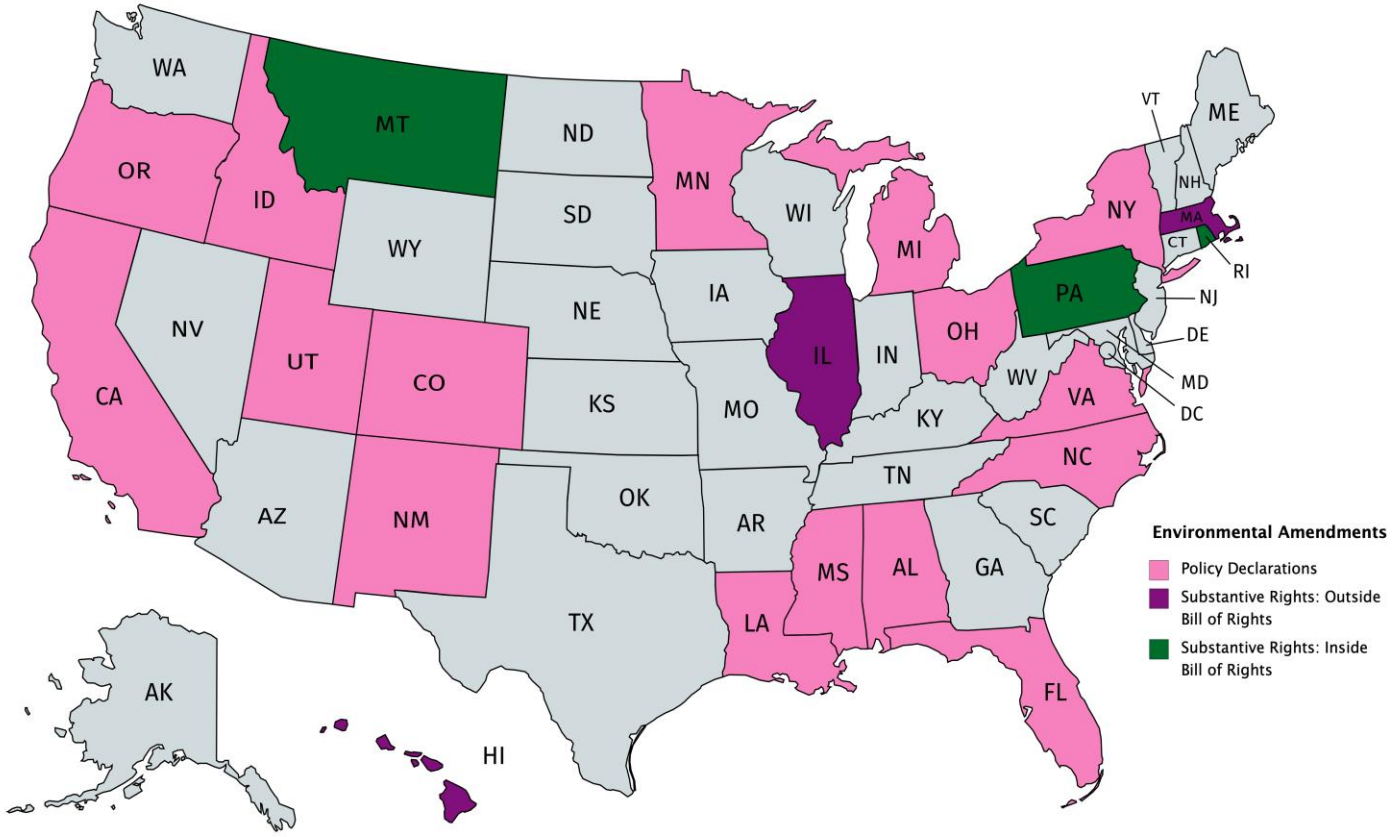
Agenda:

- First 45 minutes:
  - How judiciaries have interpreted certain states' environmental constitutional amendments and key takeaways
  - A look at the new environmental justice legislation
- 15 minutes for Q&A

STATE ENVIRONMENTAL CONSTITUTIONAL AMENDMENTS

WHAT IS AN ENVIRONMENTAL RIGHTS AMENDMENT?

- An ERA is an amendment to a state constitution giving the people a right to a "healthful" environment
- Differences in Amendments
  - Substantive Right vs. Policy Declaration
  - Declaration/Bill of Rights vs. Outside



DELVING INTO THREE STATES

Pennsylvania, Illinois, and Hawai'i guarantee a right to a clean or healthful environment

Pennsylvania's ERA is in its bill of rights

Illinois and Hawai'i's stipulate legal enforcement of their right against any party: public or private

Pennsylvania's has a trusteeship provision

Pennsylvania

Illinois

Hawai'i

ILLINOIS

ARTICLE XI § 1. PUBLIC POLICY - LEGISLATIVE RESPONSIBILITY

"The public policy of the State and the duty of each person is to provide and maintain a healthful environment for the benefit of this and future generations. The General Assembly shall provide by law for the implementation and enforcement of this public policy."

ARTICLE XI § 2. RIGHTS OF INDIVIDUALS

"Each person has the right to a **healthful** environment. Each person may enforce this right against any party, governmental or private, through appropriate legal proceedings subject to reasonable limitation and regulation as the General Assembly may provide by law."

ILLINOIS

Case Citation	Overview	Holding	Amendment's Use
Waukegan v. Pollution Control Board (Il. 1974)	IEPA brought a complaint to the Pollution Control Board against defendants for unlawfully operating without a permit, defendants were fined	The Court found that the imposition of fines a proper delegation of power	The Environmental Protection Act and Pollution Control Board were created pursuant to the ERA (*See also County of Will v. Pollution Control Board* (Il. 2019) However, the ERA allowed for a more permanent iteration that could not be amended as easily.
IL Pure Water Committee v. Director of Public Health (Il. 1984)	Plaintiffs wished to enjoin a water company and declare a statute that allowed Fluoride to be put in the water system to be unconstitutional	The allegation that a statute infringing the ERA need not be construed using strict scrutiny	The court refused to recognize that the ERA created a "fundamental right" to a healthful environment
Pioneer Processing Inc. v. EPA (Il. 1984)	IEPA approved a hazardous waste permit, then municipality rescinded their approval (concurrent regulation is allowed so long as local governments adhere to the minimum requirements set by the state (Chicago v. Pollution Control Board))	Reversed the lower court and allowed the Attorney General to represent the people AND held that the permit approved by the IEPA was invalid	Used the ERA tangentially to show that there is a public interest in a healthful environment, which gave the AG standing and invalidated the permit since the people elevated a healthful environment to a constitutional level
City of Elgin v. County of Cook, 660 N.E.2d 875 (Il. 1995)	Plaintiffs oppose a balefill (a landfill for disposed materials crushed into bales).	Plaintiffs complaints dismissed with prejudice	While a plaintiff need not allege a special injury to bring an environmental claim, there must nevertheless still exist a cognizable cause of action. Fear of environmental damage alone is not enough
Glisson v. Marion (Il. 1999)	Plaintiff wanted to enjoin the construction of a dam claiming it would destroy the habitat of two species on the endangered species list.	Plaintiffs did not have standing because their interest in preserving endangered species is not a legally cognizable interest for purposes of standing because it is not included in plaintiff's constitutional right to a "healthful environment"	It was the intent of the committee to broaden the law of standing by eliminating the traditional special injury prerequisite for standing to bring an environmental action. § 2 gives standing to an individual for a grievance common to members of the public and is limited to granting standing and does not create any new causes of action. Also reiterated the committee's notes that the ERA confers a fundamental right

PENNSYLVANIA

ARTICLE I § 27:

"The people have a **right** to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment.

Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the **Commonwealth** shall conserve and maintain them for the benefit of all the people."

PENNSYLVANIA

Case Citation	Overview	Holding	Amendment's Use
Commonwealth v. Harmar Coal Co. (Pa. 1973).	A coal mine owner requested a discharge permit from DER. The Department premised permit approval upon the mine owner treating the discharge of acid mine drainage from an adjacent mine	The Clean Streams Law requires an operator of an active mine to treat the entire discharge from the active mine and a discharge from an adjacent inactive mine necessary to protect the active workings of the mine	The Court used the ERA tangentially, to show the interest of the public for the protection of the environment. **1/3 of cases in PA's Supreme Court only use the amendment to illustrate public interest in the environment
Payne v. Kassab (Pa. 1976)	Street widening. Plaintiffs argued that § 27 confers on them a constitutional right and that the commonwealth violated their constitutional duties as trustees	Merely to assert that one has a common right to a protected value under the trusteeship of the State, and that the value is about to be invaded, creates no automatic right to relief.	No legislation was needed to implement that the Commonwealth is the trustee of public lands, the ERA does so *ipse dixit*. However, that alone cannot stop a highway expansion as the ERA did not create a private right to relief
Commonwealth v. Parker White Metal Co. (Pa. 1986)	An employee was criminally charged for dumping hazardous waste 9 times violating the Solid Waste Management Act. Defendant claims this is unconstitutional under equal protection and due process	Under equal protection scrutiny, the public health and welfare from the dangers of hazardous waste and the implementation of § 27 are a legitimate government interest and the flexible enforcement procedures in the act bear a substantial relation to the legitimate--indeed compelling--state interest	The explicit purpose of the Act to implement [the ERA], a remarkable document expressing our citizens' entitlement and "right to clean air, pure water, and -- to the preservation of the natural, scenic, historic and esthetic values of the environment." The courts of this Commonwealth, as part of a co-equal branch of government, serve as "trustees" of "Pennsylvania's public natural resources," no less than do the executive and legislative branches of government."

PENNSYLVANIA AND SELF-EXECUTING

Case Citation	Overview	Holding	Amendment's Use
Commonwealth v. National Gettysburg Battlefield Tower (Pa. 1973) (plurality opinion)	Company had federal permission to build a 307 ft observation tower in Gettysburg battlefield. The Attorney General (and thus the Commonwealth) relied on § 27 to bring suit.	Tower was built.	Before the ERA can be made effective, supplemental legislation will be required to define the values which the amendment seeks to protect and to establish procedures by which the use of private property can be fairly regulated to protect those values.
Robinson Township v. Commonwealth, (Pa. 2013) (plurality opinion)	Plaintiffs contested the amended Oil and Gas Act, which contained new fee and other provisions that preempted local governments from regulating anywhere in that area.	All parties have standing because they have a substantial, direct, and immediate interest. The court held that many of the provisions of the new amendment are an abuse of state police power and disregard the rights delegated in § 27.	Not only is the ERA self-executing, but also in footnote 52, the plurality explains that the plurality opinion in Gettysburg declaring it not-self-executing reverted to the Commonwealth Court's decision holding that the ERA is self-executing.
Pa. Envtl. Def. Found. v. Commonwealth, 161 A.3d 911 (Pa. 2017)	Environmental Groups brought a declaratory judgement suit against the Commonwealth for misappropriating funds from oil leases	The court held that because proceeds are from the sale of oil and gas from § 27's public trust, they must remain in the corpus of the trust	The Court re-affirmed their prior pronouncements that the public trust provisions of § 27 are self-executing.

HAWAI'I

ARTICLE XI § 9.

Each person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources.

Any person may enforce this right against any party, public or private, through appropriate legal proceedings, **subject to reasonable limitations and regulation as provided by law**.

HAWAI'I

Case Citation	Overview	Holding	Amendment's Use
Life of the Land v. Land Use Comm'n (Haw. 1981)	Land rezoning and appeal determining if members of a class action who do not own property or property next to rezoned property have standing	Even plaintiffs not holding property within the rezoned area had standing to protect their personal interests or "rights"	Standing may also be tempered, or even prescribed, by legislative and constitutional declarations of policy The footnote attached sites the ERA and subsequent cases site this case and declare that the ERA confers legally protected interests adequate to confer standing (*See In re Hawai'i Electric Co.* (2019)*; In re Maui Electric Co.* (2017))
Kahana Sunset Owner's Association v. Maui County Council (Haw. 1997)	Plaintiff who filed for rezoning won, then requested attorneys' fees.	While the situation in this case was not the appropriate case for awarding attorneys' fees, the court recognized that HRS § 607-25 allowed for the award of attorneys' fees to improve the implementation of laws to protect health, environmental quality, and natural resources in certain circumstances	The legislature found that the ERA had given the public standing to use the courts to enforce laws intended to protect the environment. However, the public has rarely used this right. To promote the usage of the ERA and private actions, an act was appropriate to allow the award of attorneys' fees in certain circumstances.
County of Hawai'i v. Ala Loop Homeowners (Haw. 2010)	Homeowners claim that the defense were required to obtain a special use permit to convert a farm into a school. The lower court had dismissed for lack of jurisdiction	The ERA created a private right of action to enforce the chapter 205 claim	The ERA created a private cause of action to enforce laws "relating to environmental quality" The amendment is self-executing, demonstrated by the plain language (supplies a sufficient rule by means of which the right may be enjoyed and protected, or the duty imposed may be enforced) and legislative intent
In re Hawai'i Electric Co. (2019); In re Maui Electric Co. (2017); In re Gas Co. (2020)	Environmental groups moved to intervene in an administrative proceeding regarding Power Purchase Agreements for coal plants or natural gas or oil lines	Groups could intervene and it is required that a person have an opportunity to be heard at a meaningful time and in a meaningful manner. Additionally, according to In re Gas Co., the commission must further consider greenhouse gases outside Hawai'i's border as well	Where a source of state law--such as the ERA--grants any party a substantive right to a benefit--such as a clean and healthful environment--that party gains a legitimate entitlement to that benefit as defined by state law, and a property interest protected by due process is created.

KEY TAKEAWAYS

1. State environmental amendments function best with and bolster supplemental legislation
2. ERAs help confer standing, they do not create an **independent** cause of action
3. No concern for influx of litigation

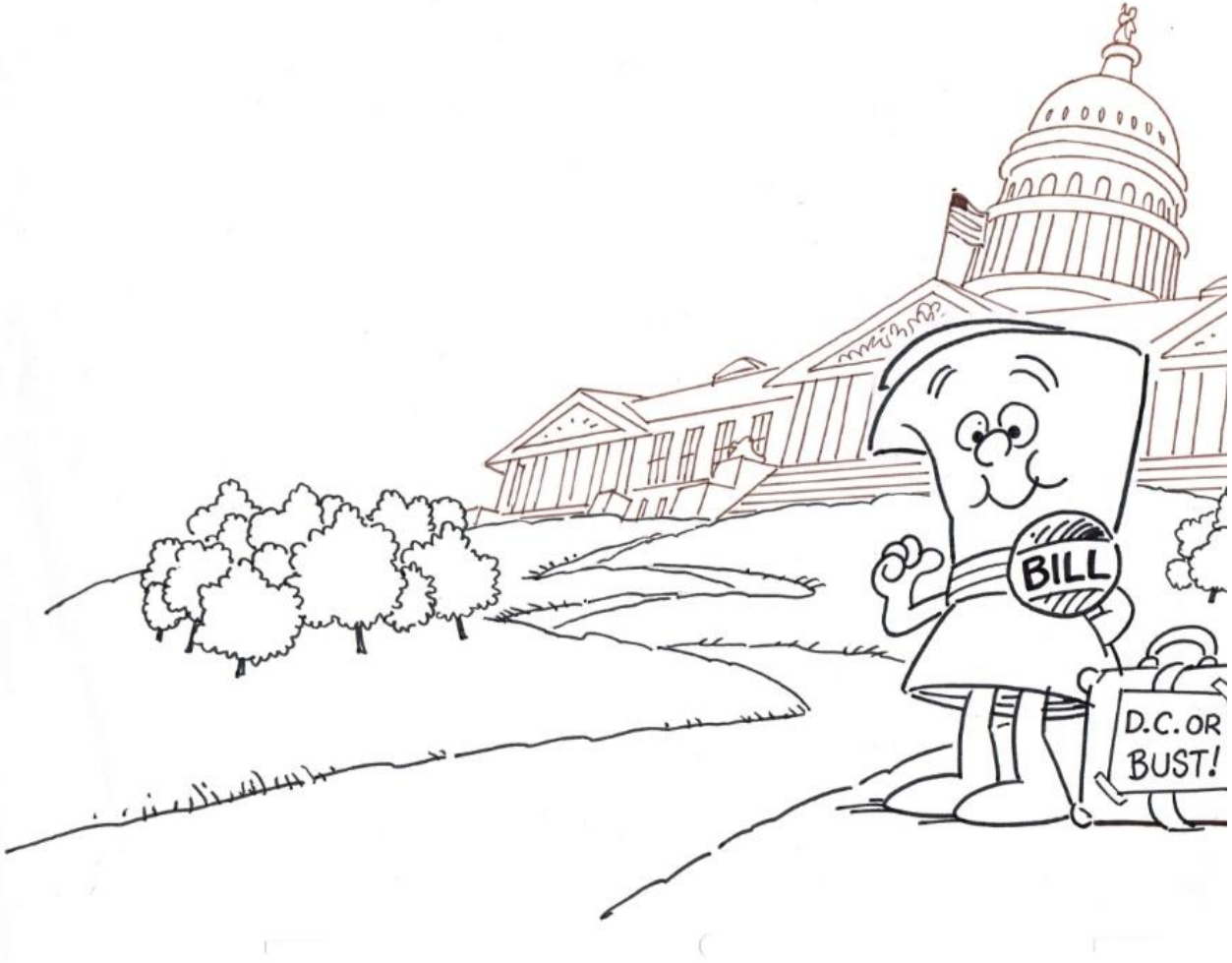
Pennsylvania

Illinois

Hawai'i

ADDRESSING ENVIRONMENTAL JUSTICE

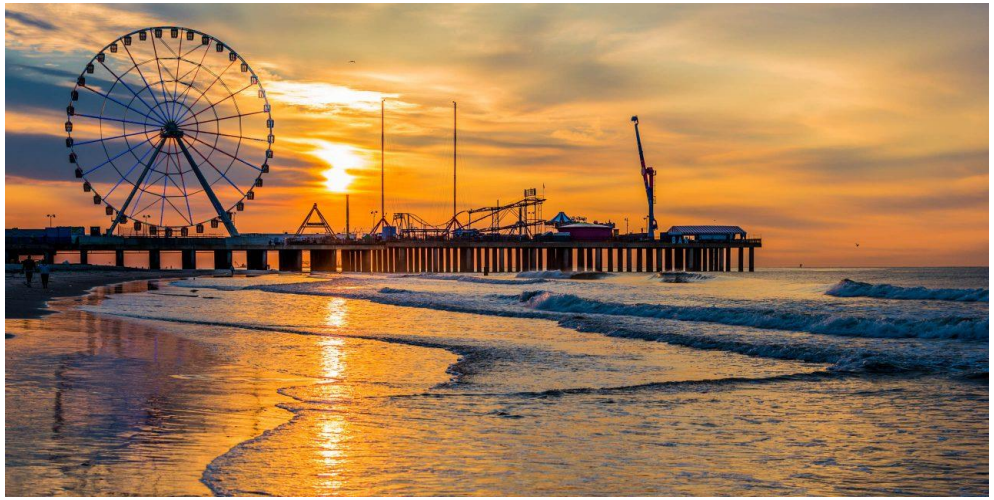
- Very few environmental justice cases utilizing an ERA
  - Environmental Justice is such a new focus of legislation
  - People have yet to try
- Coexisting Legislation!



STATE ENVIRONMENTAL JUSTICE LEGISLATION

PURPOSE

- New legislation in two new states:
  - New York
  - New Jersey
- What are their benefits?
- What could be their downfall?



NEW YORK'S ARTICLE 48: ENVIRONMENTAL JUSTICE LEGISLATION

Structure	Significant provisions	Benefits	Downfalls
Art. 48 is NY's Environmental Justice statute, it creates the "**Permanent Environmental Justice Advisory Group**"- ("Advisory Group") Permanent Environmental Justice Advisory Group	The "Advisory Group" shall adopt a model environmental justice policy applicable generally to state agencies that engage in activities or operations that may have a significant effect on the environment...The advisory group shall develop the model policy in consultation with representatives of minority and low-income communities, regulated parties, the environmental justice interagency coordinating council, other state agencies and the public. powers and duties of "Permanent Environmental Justice Advisory Group"	Article 48 ensures that the "model environmental justice policy" will be created with input from representatives of the communities that will benefit the most. Creates inroads with environmental justice communities, creates a dialogue specifically focused on lifting the environmental burdens facing disadvantaged communities.	The advisory group really just creates a model environmental justice policy but does not create anything that carries with it the force of law. In other words the environmental justice policy is almost nothing more than a recommendation to state agencies regarding issues of environmental justice that the advisory group feels are important enough to be included in the policy. There is nothing in Article 48 that says the Advisory Group's recommendations will be adopted or implemented.
Creates responsibilities for state agencies	Each state agency that engages in activities or operations that have a significant effect on the environment... shall be guided in its decision making on such activities or operations by an environmental justice policy. The agencies shall adopt rules and regulations setting forth its environmental justice policy. Each state agency shall appoint a staff member of the agency to serve as environmental justice coordinator and each agency shall develop an environmental justice training plan .	State agencies are required to adopt an environmental justice policy, as well as rules and regulations setting forth that policy. The EJ policies put forth by state agencies will ensure that environmental justice and the concerns of disadvantaged communities will at least be considered by agencies that have significant effects on the environment	State agencies do not have to adopt the model policy put forth by the Permanent Environmental Justice Advisory Group. The agencies can instead create their own policies, as Art. 48 does not mandate any substantive requirements for the individual state agency EJ policies. Furthermore, all the statute requires is that agencies have an EJ policy to "guide" decsision making but there is no provision that requires state agencies to adhere to the plan.
Establishes the "**Environmental Justice Interagency Coordinating Council**" ("Coordinating Council") **Environmental Justice Interagency Coordinating Council**	The Coordinating Council coordinates the activities of agencies required to adopt an environmental justice policy, and serves as a clearinghouse for state agencies and the public for information on environmental justice policies. The council shall consult with the permanent environmental justice advisory group; representatives of minority and low-income communities, including community-based organizations that advise or assist minority and low-income communities on	The Coordinating Council will provide support to multiple state agencies working on similar projects. Without a Coordinating Council, individual state agencies working on the same project might have environmental justice policies that are at odds with one another. The Coordinating Council ensures that the agencies are moving in the same direction in terms of engaging environmental	The Coordinating Council has no statutorily mandated requirements in terms of how to coordinate amongst various agencies. There is nothing in the statute that outlines the substance of what information or requirements the environmental justice policies must contain.

NEW JERSEY'S TITLE XI ENVIRONMENTAL JUSTICE LEGISLATION

Structure	Effects of Significant Provisions	Benefits	Downfalls
Title XI has a narrow scope, targeting polluters and the development of polluting facilities in environmental justice communities, rather than creating a broad EJ policy.	Cumulative impacts on environmental justice communities are the driving purpose of the statute. The statute focuses on the polluter, and puts permitting obligations on polluters rather than placing procedural requirements on the state	Targeting the polluter actually accomplishes the goal of reducing pollution on environmental justice communities. Title XI has teeth because it puts the onus on a permitted facility to consider environmental justice impacts, and actually prevents the approval of permit applications deemed to have an adverse environmental impact on "overburdened communities"	The statute does not place procedural requirements on state agencies to adopt an environmental justice policy. While state agencies would be required to create an EJ impact statement if they are seeking a permit to operate a covered facility, state agencies that are not seeking permits have no requirement to consider environmental justice concerns.
Identifies **"overburdened communities"** and considers the **cumulative impacts**	New Jersey Department of Environmental Protection (the "Department") to identify the state's "overburdened communities," defined as any census block group, as determined in accordance with the most recent United States Census, in which: (1) at least 35 percent of the households qualify as low-income households; (2) at least 40 percent of the residents identify as minority or as members of a State recognized tribal community; or (3) at least 40 percent of the households have limited English proficiency	Title XI uses objective criteria to establish who falls within an "overburdened community" and the criteria is broad so it should encompass a large populous.	The statute does not work with environmental justice communities in identifying overburdened communities for which the legislation is supposed to benefit
Creates **substantive permitting requirements**. substantive permitting requirements	Requires permit applicants to prepare an EJ impact statement, that considers the adverse environmental impacts on "overburdened communities". The department shall deny permits for covered facilities or place conditions on them after determining that together with other environmental or health stressors, the facility will cause or contribute to adverse cumulative environmental or public health stressors in the overburdened community that are higher than those borne by other communities within the State, county, or other geographic unit of analysis determined by the department.	Placing substantive requirements on permitted facilities to create and environmental justice impact statement means the state's largest polluters have to consider the effects of their pollution on EJ communities. In addition, title XI is not just a policy statement, it equips the NJDEP with statutory authority to deny permits or place significant conditions on permits that cause or contribute to adverse cumulative environmental impacts on EJ communities.	Although NJDEP has the authority to grant, deny, or place conditions on permits that will adversely affect EJ communities, the statute does not define what "cause or contribute" means. It is ultimately left up to the State's discretion to determine whator how a facility "causes or contributes" to adverse environmental impacts. In addition, Title XI Only applies to "covered facilities".

CONCLUSION: ENVIRONMENTAL JUSTICE IN MARYLAND

- Commission on Environmental Justice and Sustainable Communities
- Cumulative Impacts Bill in Maryland
  - MDE Cumulative Impacts Workgroup
  - H.B.1206
- Maryland Environmental Policy Act
  - H.B. 689 proposed in 2020 to reflect NEPA

Q & A