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Symbolic Politics for Disempowered Communities: State Environmental Justice Policies

Tonya Lewis* & Jessica Owley**

I. INTRODUCTION

When Samara Swanston was growing up in the Corona and East Elmhurst neighborhoods of Queens, New York, she played in vacant lots and small wetlands containing turtles, frogs, salamanders, and tent caterpillar nests in the trees. Decades later, the vacant lots that once served as playgrounds for jovial children had come to serve as local dumps for companies illegally disposing metal parts and batteries. Pollution had turned the air toxic. Her husband began to experience increased asthma attacks. His doctor told him to move out of New York City. He later died of an asthma attack en route to the hospital. A second relative died at the age of 21 of an asthma attack in her Bronx apartment on an "ozone alert" day.¹

Swanston told her story before a 1991 public hearing committee in Albany, New York.² Hearings were being held across the state by

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1. MINORITIES AND THE ENVIRONMENT: AN EXPLORATION INTO THE EFFECTS OF ENVIRONMENTAL POLICIES, PRACTICES, AND CONDITIONS ON MINORITY AND LOW-INCOME COMMUNITIES (1992) (reprinting transcripts of hearing participants commenting on the theme of minority and low-income communities bearing an unfair and disproportionate burden of health problems caused by environmental factors and executive summary of report recommendations). At the time of the hearings, Swanston was an attorney with the U.S. Environmental Protection Agency and an Adjunct Law Professor at CUNY Law School. She has since written a number of articles on the topic of environmental justice. See, e.g., Samara Swanston, *Environmental Justice and Environmental Benefits: The Oldest, Most Pernicious Struggle and Hope for Burdened Communities*, 23 VT. L. REV. 545 (1998-1999).

2. *Id.* MINORITIES AND THE ENVIRONMENT: AN EXPLORATION INTO THE EFFECTS OF ENVIRONMENTAL POLICIES, PRACTICES, AND CONDITIONS ON MINORITY AND LOW-

the New York State Assembly to explore whether minorities and low-income communities bear an unfair, disproportional, and increasingly dangerous burden of health problems caused by environmental factors.³ According to the Committee:

One only need to take a walk through Brooklyn, Harlem, downtown Buffalo or Albany to note how many minority and low-income communities are being adversely affected by poor environmental conditions, policies, and practices . . . And a visit to any urban area emergency room will illustrate the physical toll these factors are taking on community residents.⁴

One year after publication of the Committee's findings, the New York State Assembly proposed its first piece of legislation related to environmental justice.⁵ The bill on "environmental equity" recognized the disproportionate siting of environmental facilities in minority and low-income communities, recognized that activities were taking place on a national level to address this issue, and set the goal of making the location of environmental facilities (such as incinerators, landfills, or sewage treatment plants) equitable among all communities.⁶ The bill passed in the Assembly but died in the Senate.⁷ One year later, the Assembly tried again with an environmental justice bill, requiring a survey of the location and type of environmental facilities across the state and consideration of whether the permitting of such facilities would disproportionately burden a minority or low-income community.⁸ This bill, too, died in the Senate.⁹ The Assembly continued to pass bills on environmental justice year after year for nearly a decade, only to have each fail in the Senate.¹⁰ Then, in 2003, the State Department of Environmental Conservation (DEC) re-

INCOME COMMUNITIES (1992)

3. *Id.*

4. *Id.*

5. A. 7140, 216th Sess. (N.Y. 1993). See RICHARD L. BRODSKY & SHELDON SILVER, N.Y.S. COMM. ON ENVTL. CONSERVATION, N.Y.S. ANN. REPORT (1993) 1, 5.

6. A. 7140, 216th Sess. (N.Y. 1993).

7. See BRODSKY & SILVER, *supra* note 5, at 1, 6.

8. A. 7140, 217th Sess. (N.Y. 1994). See RICHARD L. BRODSKY & SHELDON SILVER, N.Y.S. COMM. ON ENVTL. CONSERVATION, N.Y.S. ANN. REP. (1994) 1, 5.

9. A. 7140, 217th Sess. (N.Y. 1994).

10. See THOMAS P. DINAPOLI & SHELDON SILVER, N.Y.S. COMM. ON ENVTL. CONSERVATION, N.Y.S. ANNUAL REPORT (2002) 1, 7 available at <http://assembly.state.ny.us/comm/Encon/2002Annual/> (last visited October 24, 2014).

leased its environmental justice policy, *Environmental Justice and Permitting*, which the DEC claimed to be “groundbreaking.”¹¹ The policy provided guidelines for incorporating environmental justice concerns into the state’s environmental permit review process, primarily through enhanced public participation requirements in low-income and minority communities.¹²

Despite this new development, in 2004 the Assembly expanded its environmental justice legislation by requiring the DEC to publish a list of areas most adversely impacted by existing environmental hazards,¹³ establishing a state environmental justice policy and environmental justice advisory group,¹⁴ and requiring the state’s permitting process to consider whether environmental actions would disproportionately affect minority or low-income populations.¹⁵ Again, each piece of environmental justice related legislation failed in the Senate.¹⁶ In the decade to follow the release of the State’s policy on environmental justice, the Assembly has continued its annual passage of environmental justice bills, yet each failed in the State Senate.¹⁷

Why is it that the New York State Assembly has not faltered in its annual passage of environmental justice legislation even *after* the state’s environmental agency created and implemented what it called a “groundbreaking” environmental justice policy and despite the

11. N.Y.S. Dep’t of Env’tl. Conservation, *Comm. Policy 29, Environmental Justice and Permitting* (March 19, 2003), available at <http://www.dec.ny.gov/regulations/36951.html> (last visited October 24, 2014) [hereinafter *Policy 29*].

12. *Id.*

13. A. 7862, 227th Sess. (N.Y. 2004).

14. A. 8805, 227th Sess. (N.Y. 2004).

15. A. 5938, 227th Sess. (N.Y. 2004).

16. See THOMAS P. DINAPOLI & SHELDON SILVER, N.Y.S. COMM. ON ENVTL. CONSERVATION, N.Y.S. ANNUAL REPORT (2004) 1, 7–8.

17. More recent environmental justice related bills passed by the Assembly include one that would require the State DEC to publish a list of high local environmental impact zones (A.611), one that would create a permanent environmental justice advisory group (A.947), and one that would add a requirement to the State’s Environmental Quality Review Act, requiring a detailed statement on whether the action would cause a disproportionate or inequitable burden on a minority or economically distressed community (A.2546). See ROBERT K. SWEENEY & SHELDON SILVER, N.Y.S. COMM. ON ENVTL. CONSERVATION, N.Y.S. ANNUAL REPORT (2012) 1, 4, 9. In 2013, bills included one that would create a permanent environmental justice advisory group (A.3569) and one that would require the State DEC to publish a list of high local environmental impact zones (A.3729). See ROBERT K. SWEENEY, N.Y.S. COMM. ON ENVTL. CONSERVATION, N.Y.S. ANN. REP. (2013) 1, 25.

State Senate's clear resistance? The Assembly may feel the need to push for legislation despite the policy's presence because the DEC policy may be ineffective, toothless, or it may be that the Assembly thinks there is a power to having a policy legislatively enacted. An ineffective agency policy would not be a shocking thing. After all, we can all imagine situations where policies are declared simply to take a stance on an issue or recognize the plight of a particular demographic group without actually addressing the problem. In our research, we have found that policies on environmental justice, generally, are more effective at recognizing the plight of minority and low-income communities in regards to adverse environmental conditions than they are at actually addressing the problem. By creating a policy on environmental justice, a state's policymakers not only publicly recognize the plight of traditionally disempowered groups, but affirmatively take a stance on the side of protecting these communities. The provisions of environmental justice policies are most often incapable of actually addressing the problem at hand, essentially making these policies more symbolic than authentic.

Several factors can combine to create a situation where policies are more likely to be symbolic than authentic. Public pressure to regulate or high levels of uncertainty surrounding an issue can result in policymakers using symbolic policies to satisfy their constituencies and, in some cases, to move a topic off the table.¹⁸ Or, where solutions are costly (particularly when small groups with strong lobbies are likely to bear the cost), policymakers may turn to symbolic policies with hopes that they can avoid the high costs of real change.¹⁹ For example, the DEC's environmental justice policy doesn't actually redistribute pollution or even require that pollution be reduced in environmental justice communities.²⁰ In fact, the policy does not even require that the state environmental agency assess where toxic concentrations exist and which communities are impacted.²¹ The DEC thereby averts significant administrative costs, and industry escapes

18. See Ingolfur Blühdorn, *Sustaining the Unsustainable: Symbolic Politics and the Politics of Simulation*, 16 ENVTL. POL. 251, 256 (2007).

19. Jens Newig, *Symbolic Environmental Legislation and Societal Self-Deception*, 16 ENVTL. POL. 276, 282 (2007).

20. *Policy 29*, *supra* note 11.

21. *Id.*

the potential costs related to relocation or pollution control regulations.²² The State and the environmental agency get credit for embracing pollution control in disadvantaged communities, yet fail to effectuate any real change. All the while, the general public is duped into believing that something is actually being done to address the plight of these communities.

Traditional symbolic politics theory tells us that symbolic policies have a low impact on effectiveness, often setting forth goals to be reached but failing to implement the means necessary to achieve the stated goals.²³ Our research adds a prong to the typical symbolic politics analysis by assessing whether the general public can be so misguided by policymakers that it cannot grasp the idea that a policy is inherently meaningless when it arises from inconspicuous and vaguely stated goals that merely promote an idea.²⁴ At the time New York's policy originated, the governor and former DEC commissioner touted the policy to the public as creating "the most effective strategy for preventing or reducing disproportionately adverse environmental effects on low income and minority communities."²⁵ The response to the proposed policy from the environmental community was overwhelmingly positive.²⁶ When the policy was formalized, however, its goals were reduced to little more than promoting the concept of environmental justice; it contained no substantive measures to prevent

22. Most notably, governments attempt to avoid changes in the political framework that might result in relocation decisions by industry with the consequences of job losses. Dirk Matten, *Symbolic Politics in Environmental Regulation: Corporate Strategic Responses*, 12 BUS. STRATEGY & ENV'T 215, 220.

23. The notion of *merely symbolic politics* was first described by political scientist Murray Edelman over three decades ago. See MURRAY EDELMAN, *THE SYMBOLIC USES OF POLITICS* (1964). There is only a small number of conceptual analyses related to symbolic politics, most of which can be found in the German and Swiss literature, many of them drawing from earlier American scholars. Newig, *supra* note 19. See, e.g., Ingolfur Blühdorn, *supra* note 18 (offering a typology of various categories of symbolic politics); Sander Happaerts, *Sustainable Development and Subnational Governments: Going Beyond Symbolic Politics?* 4 ENVTL. DEV. 2 (2012) (evaluating sustainable development policies under the lens of symbolic politics).

24. This type of symbolic politics can be related to Edelman's description where the public is deliberately deceived by the politician. See EDELMAN, *supra* note 23. See also Blühdorn, *supra* note 18, at 257 (categorizing a type of symbolic politics as "the malicious deception of the unsuspecting and vulnerable public"); see also Newig, *supra* note 19, at 278 ("Symbolic legislation deliberately fails to meet its declared objectives.").

25. NYS DEC Press Release, Oct. 4, 1999.

26. See *infra* 42–43.

or reduce adverse environmental conditions in low-income and minority communities.²⁷ We find this practice to be symbolic politics to the nth degree. The general public was duped into believing that the State was actually going to address the adverse environmental conditions, when in reality, the State did nothing to achieve the goal it had widely promoted.

We have organized this Article in the following manner: Part II provides the history and evolution of environmental justice in the U.S. and summarizes current state approaches and policies. Part III describes the concept of symbolic politics, illustrates the reasons symbolic policies are likely to emerge, and discusses existing methods for assessing a policy's symbolic nature. Finally, in Part IV, we apply a symbolic politics analysis to New York's environmental justice policy, revealing its purely symbolic nature and identifying a potential new prong for assessing the symbolic nature of policies.

II. ENVIRONMENTAL JUSTICE

The definition of environmental justice is amorphous,²⁸ with various policies, community groups, and scholars assigning the phrase multiple meanings and interpretations.²⁹ The Environmental Protection Agency (EPA or "the Agency") defines environmental justice as "the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies."³⁰ The EPA further defines "fair treatment" to mean that "no group of people, should bear a disproportionate share of the negative environmental consequences resulting from industrial, governmental and commercial operations or policies."³¹ Like

27. See *Policy 29*, *supra* note 11.

28. Alex Geisinger, *The Benefits of Development and Environmental Justice*, 37 COLUM. J. ENVTL. L. 205, 206 n.2 (2012).

29. Aelita Neimanis, Heather Castleden & Daniel Rainham, *Examining the Place of Ecological Integrity in Environmental Justice: A Systematic Review*, 17 INT'L J. JUST. & SUSTAINABILITY 349, 358 (2012).

30. EPA, *Environmental Justice: Basic Information*, <http://www.epa.gov/environmental-justice/basics/index.html> (last visited October 28, 2014).

31. *Id.* A 2012 study of the literature found a variety of definitions for environmental justice, although the EPA's definition is most frequently cited. Neimanis, Castleden & Rain-

the federal government, most state governments define environmental justice (with some variation) with the statement that “no group of people” should bear a disproportionate share of society’s negative environmental consequences.³² These policies do not confer a right on all people to be free of disparate concentrations of environmental risk. Rather, they apply the concept of environmental justice in the sense of equal protection of the law to mean that no group of people, because of race or other characteristics, should bear an unfair share of environmental risk or pollution. As a result, environmental justice consideration in practice has appropriately been limited to low-income and minority groups. The practice of limiting environmental justice consideration to low-income and minority groups corresponds to a historical social movement³³ and a long line of research demonstrating a connection between the disparate concentrations of environmental toxins and these demographic groups.³⁴ Studies on environmental justice typically assess the proximal relationship between minority or low-income communities and environmental “bads” such as air pollution, solid waste landfills, or hazardous waste disposal sites.³⁵ However, some have evaluated the distribution of environ-

ham, *supra* note 29, at 358.

32. See Tonya Lewis & Sean Bennett, *Environmental Justice & the Demographic Threshold: Are Benefits Reaching Communities at Risk?* 6 ENVTL. JUST. 213 (2013) (reviewing current state definitions and criteria for designating the environmental justice community).

33. Several high-profile events brought national attention to the grassroots environmental justice movement. In 1982, a group of protestors used their bodies to block trucks attempting to dispose of 6,000 tons of PCB-laden soil in a poor, black community in Warren County, North Carolina. Over 500 people were arrested in the marches and demonstrations protesting the landfill. See Robert D. Bullard, *Environmental Justice for All*, 9 J. ENVTL. L. & LITIG. 285 (1994). Around the same time an activist group, People for Community Recovery, formed on the south side of Chicago over concern surrounding the environmental hazards in its community. The group’s founder, Hazel Johnson, has been referred to as the “Mother of Environmental Justice,” as she was responsible for spearheading a number of community-centered environmental improvement projects. See Symposium, *Environmental Justice: The Merging of Civil Rights & Environmental Activism*, 9 ST. JOHN’S J. LEGAL COMMENT 513 (1993–1994).

34. In 1987, a seminal study was released by the United Church of Christ Commission for Racial Justice correlating demographic characteristics (race) with the siting of hazardous and sanitary waste facilities, finding that people of color are 47% percent more likely to live near a hazardous waste site than white Americans. COMM’N FOR RACIAL JUST., UNITED CHURCH OF CHRIST, TOXIC WASTES AND RACE IN THE UNITED STATES (1987). For a more recent account of environmental justice articles, see Colleen Reed & Maureen George, *Where in the World is Environmental Justice?* 35 PROGRESS IN HUMAN GEOGRAPHY 835 (2011) (evaluating research articles on environmental justice from the past decade).

35. These studies are not without scrutiny. They are often criticized for the malleability

mental “goods” such as green spaces, parks, and clean air,³⁶ and have applied a discursive use of the term *environment* to include the urban areas where we live, work, and play.³⁷

This myriad of interpretations of what environmental justice includes is problematic as the confusion contributes to questions regarding the efficacy of the environmental justice movement. Are the goals too diffuse to be meaningful? Is environmental justice simply the right to be free from disparate concentrations of environmental toxins or is it more complex, calling for equal distributions of green spaces and playgrounds? The literature on the topic of environmental justice has failed to be critical of these issues and has not adequately questioned the efficacy of a broad definition of the environmental justice movement.³⁸ The movement’s decentralized, grassroots character also impedes its capacity to become an influential actor in the national decision-making context.³⁹ Becoming influential in the complex scientific decision-making processes surrounding environmental justice policy decisions takes technical and financial resources, some-

of the study outcome depending on the size of the area studied. Juliana Maantay, *Mapping Environmental Injustices: Pitfalls & Potential of Geographic Information Systems in Assessing Environmental Health & Equity*, 110 ENVTL. HEALTH PERSPECTIVES SUPP. n. 2 161, 165 (2002). See, e.g., William Bowen, Mark Salling, Kingsley Haynes, & Ellen Cryan, *Toward Environmental Justice: Spatial Equity in Ohio & Cleveland*, 85 ANNALS AM. ASS’N GEOGRAPHERS 641 (1995) (finding a strong association between minority groups and the distribution of hazardous sites when examining the relationship on a statewide level, but an inverse correlation when examining the relationship within smaller census tracts). In addition, identified correlations between demographic groups and the location of environmental harms are criticized for ignoring potential exogenous factors such as an expected increase in the number of hazardous sites within urban areas and the secondary effects of contagious industry, including the influence of hazardous facilities on nearby housing prices, which result in lower-income residents. See Vicki Been, *Locally Undesirable Land Uses in Minority Neighborhoods: Disproportionate Siting or Market Dynamics*, 103 YALE L.J. 1383 (1994) (evaluating the possibility that areas containing concentrations of least undesirable land uses (LULUS) attracted low-income and minority residents due to cheap housing).

36. See Paul Mohai, David Pellow, & J. Timmons Roberts, *Environmental Justice*, 34 ANN. REV. ENV’T & RESOURCES 405 (2009) (reviewing and discussing the application of critical race theory for understanding environmental injustices).

37. Robert Bullard, *Leveling the Playing Field through Environmental Justice*, 23 VT. L. REV. 453, 459 (1998).

38. See Robert J. Brulle & David N. Pellow, *Environmental Justice: Human Health & Environmental Inequalities*, 27 ANN. REV. PUB. HEALTH 103, 118 (2006) (discussing the theoretical literature on environmental justice, the impact of the environmental justice movement, and the role of federal and state governments in addressing environmental inequalities).

39. Alice Kaswan, *Environmental Justice & Environmental Law*, 24 FORDHAM ENVTL. L. REV. 149, 158 (2013).

thing environmental justice groups typically do not have, and this process is already heavily influenced by better-funded stakeholders.⁴⁰ Ideally, the political approach to environmental justice would consider “equity in the distribution of environmental risk, [recognize] the diversity . . . and experiences in affected communities” and enhance public “participation in the political processes which create and manage environmental policy.”⁴¹

A. The Federal Approach to Environmental Justice

The federal government began to respond to environmental justice concerns with widespread action in 1992 with the creation of the EPA’s Office of Environmental Justice⁴² and the National Environmental Justice Advisory Council in 1993.⁴³ President Clinton then issued Executive Order 12898 in 1994, directing all federal agencies to consider environmental justice in their agency activities affecting low-income and minority communities.⁴⁴ The accompanying Presidential Memorandum emphasized the importance of using the existing National Environmental Policy Act (NEPA) environmental review process for promoting environmental justice and offered six principles for assessing disproportionate impacts of federal actions on low-income, minority, and tribal populations.⁴⁵ The EPA has failed

40. Eileen Guana, *Environmental Law, Civil Rights & Sustainability: Three Frameworks for Environmental Justice*, 19 J. ENVTL. & SUSTAINABILITY L. 34, 50 (2012).

41. David Schlosberg, *Reconceiving Environmental Justice: Global Movements and Political Theories*, 13 ENVTL. POL. 517, 517 (2004).

42. EPA, *Environmental Justice: Basic Information, Background*, <http://www.epa.gov/compliance/environmentaljustice/basics/ejbackground.html> (last visited October 24, 2014). The Office was named the “Office of Environmental Equity” until the name was changed to “Office of Environmental Justice” in 1994.

43. EPA, *National Environmental Justice Advisory Council*, <http://www.epa.gov/compliance/environmentaljustice/nejac/index.html> (last visited October 24, 2014).

44. Exec Order No. 12898, 59 Fed. Reg. 7629 (1994). In 2011, 17 cabinet members and White House officials signed a Memorandum of Understanding on Executive Order 12898, formally recommitting their agencies to environmental justice and to the development of supporting procedures. See MEMORANDUM OF UNDERSTANDING ON ENVIRONMENTAL JUSTICE AND EXECUTIVE ORDER 12898, available at <http://epa.gov/environmentaljustice/resources/publications/interagency/ej-mou-2011-08.pdf> (last visited October 24, 2014). The Memorandum requires that each federal agency review and update (as applicable) its environmental justice strategy, post the strategy on the agency’s webpage, and provide annual progress reports on the agency’s implementation of Executive Order 12898.

45. Memorandum from President Clinton, March 1994, available at <http://www.epa.gov/>

to follow the Executive Order, has failed to protect minority and low-income populations,⁴⁶ has failed to provide overburdened areas direct relief from pollution,⁴⁷ and has not sufficiently monitored progress toward environmental justice.⁴⁸ Making matters worse, the Agency deviated from the Executive Order's focus in 2002 when it redirected its policy toward a "non-affirmative action" approach, stating that the Agency's environmental justice program was not "designed specifically to address the concerns of minority communities and/or low-income communities [and] to the contrary, environmental justice belongs to all Americans."⁴⁹

Most recently, however, the EPA has recommitted to addressing higher burdens of environmental exposure and risk in low-income and minority communities as part of Plan EJ 2014.⁵⁰ The new strategy has five cross-agency focus areas: (1) incorporating environmental justice into rulemaking; (2) considering environmental justice in permitting; (3) advancing environmental justice through compliance and enforcement; (4) supporting community-based action programs; and (5) fostering administration-wide action on environmental jus-

environmentaljustice/resources/policy/ej_guidance_nepa_epa0498.pdf (last visited October 24, 2014) (outlining the process for the recommended inclusion of how agencies will address any significant and adverse effects of proposed federal actions on low-income and minority populations as part of their mitigation strategies outlined in their environmental assessments or environmental impact statements). Under NEPA, federal agencies must prepare an Environmental Impact Statement for every "major Federal action. . . significantly affecting the quality of the human environment." 42 U.S.C. § 4331 (2008). In preparing an EIS, agencies must consider both impacts on the natural or physical environment and related social, cultural, and economic impacts. 40 C.F.R. §§ 1508.8, 1508.14.

46. See OFFICE OF INSPECTOR GENERAL REPORT, EPA NEEDS TO CONSISTENTLY IMPLEMENT THE INTENT OF THE EXECUTIVE ORDER ON ENVIRONMENTAL JUSTICE (2004) [hereinafter OIG REPORT] (describing problems and recommending corrective actions in regards to the EPA's failure to fully implement Executive Order 12898 and to address minority/low-income populations).

47. Geisinger, *supra* note 28, at 217.

48. Sarah Fredericks, *Monitoring Environmental Justice*, 4 J. ENVTL. JUST. 63 (2011).

49. OIG REPORT, *supra* note 46, at 10.

50. Plan EJ 2014 does not evaluate the distribution of environmental toxins or purport to reduce concentrations in low-income and minority communities. See generally OFFICE OF ENVTL. JUST., U.S. ENVTL. PROT. AGENCY, PLAN EJ 2014 (2011), available at <http://www.epa.gov/compliance/ej/resources/policy/plan-ej-2014/plan-ej-2011-09.pdf> (last visited October 24, 2014) (describing a four-year plan to strengthen efforts to promote and integrate environmental justice into the EPA's programs).

tice.⁵¹ The new strategy does not evaluate the spatial distribution of toxic facilities or limit pollution in overburdened areas.⁵²

B. State Approaches

The development of state policies on environmental justice coincided with the federal response to environmental justice concerns. Connecticut was the first state to declare such a policy in 1993.⁵³ Connecticut's legislatively enacted plan focuses primarily on increased opportunities for public involvement in the permitting of activities adversely affecting the environment. Specifically, applicants proposing certain facilities in designated environmental justice communities must file meaningful public participation plans with the Connecticut Department of Environmental Protection.⁵⁴ A number of other states developed policies on environmental justice similar to Connecticut's during the late 1990s and early 2000s.⁵⁵ As of 2014, forty-one states have environmental justice related statutes, regulations, or initiatives.⁵⁶ Methods for evaluating and addressing environmental justice vary by state, although most limit consideration to minority or low-income populations.⁵⁷

The criteria for determining what constitutes minority or low-income status varies by state. In Massachusetts, a community is considered a "minority community" where 25% of the residents are minority.⁵⁸ In New York, a minority community is composed of 51.1%

51. *Id.* at 8–20.

52. *Id.*

53. CONN. GEN. STAT. § 22a–20a (2009).

54. The policy applies to hazardous waste facilities, solid waste facilities, medical waste incinerators, and any major source of air pollution. *Id.* at § a(2).

55. For a comprehensive review of current state programs, see A.B.A. & HASTINGS COLL. OF THE LAW, ENVIRONMENTAL JUSTICE FOR ALL: A FIFTY STATE SURVEY OF LEGISLATION, POLICIES, AND CASES (Steven Bonorris ed., 4th ed. 2010), available at <http://gov.uchastings.edu/public-law/docs/ejreport-fourthedition.pdf> (last visited October 24, 2014).

56. Stephen Bonorris & Nicholas Targ, *Environmental Justice in the Laboratories of Democracy*, 25 NAT. RESOURCES & ENV'T 44 (2010).

57. See Lewis & Bennett, *supra* note 32.

58. Massachusetts Executive Office of Env't Affairs, *Environmental Justice Policy* (Oct. 9, 2002) available at <http://www.mass.gov/eea/docs/eea/ej/ej-policy-english.pdf> (last visited October 24, 2014) [hereinafter Mass. Pol.].

minority residents in an urban area or 33.8% in a rural area.⁵⁹ For low-income status, Connecticut identifies 59 communities where 30% of a census block group is 200% below the federal poverty level.⁶⁰ In Massachusetts, a low-income community occurs where the median household income is at or below 65% of the state-wide mean.⁶¹ In addition to environmental justice consideration for minority and low-income groups, additional groups considered include those who are “foreign born” or “lacking in English proficiency.”⁶² Demographic thresholds like these are problematic. They bifurcate areas into either an environmental justice community or a non-environmental justice community, without regard to the distribution of environmental hazards.⁶³ Demographic composition defines environmental justice communities in every state—not the environmental or public health condition of the area.

The spectrum of state activities dedicated to addressing environmental justice is broad. Stephen Bonorris and Nicholas Targ categorize three primary approaches: the internal management approach, the substantive approach, and the public participation approach.⁶⁴ Most states implement a combination of the three approaches.⁶⁵ The internal management approach is akin to the directives of Executive Order 12898 and occurs where state agencies are instructed to consider environmental justice in their activities affecting designated environmental justice communities. Under this approach, environmental justice concerns are integrated into the bu-

59. *Policy 29*, *supra* note 1. New York State applied the EPA Region 2 approach for determining demographic thresholds. NYS ENVTL. JUST. ADVISORY GROUP 2002 REPORT, RECOMMENDATIONS FOR THE NYS DEP'T OF ENVTL. CONSERVATION 9, 10 (2002), http://www.dec.ny.gov/docs/permits_ej_operations_pdf/ejfinalrpt.pdf (last visited October 24, 2014) [hereinafter *Advisory Group Recommendations*]. The method applied statistical analyses to population data to determine where the natural breaks occurred between minority/non-minority and low-income/non low-income groups. Separate criteria were developed for urban areas where a greater number of minority and low-income residents was present. U.S. EPA REGION 2 GUIDELINES FOR CONDUCTING ENVIRONMENTAL JUSTICE ANALYSES § 2.2.2, <http://www.epa.gov/region2/ej/guidelines.htm#step2> (last visited October 24, 2014).

60. CONN. GEN. STAT. § 22a-20a (2009).

61. Mass. Pol., *supra* note 58.

62. *Id.*

63. Lewis & Bennett, *supra* note 322, at 217.

64. Bonorris & Targ, *supra* note 56, at 44-46.

65. For a thorough evaluation of state approaches, see Lewis & Bennett, *supra* note 32.

reaucratic system and might include the formation of interagency workgroups, the publishing of policy guidelines, and educating decision makers on the process.⁶⁶ Also along these lines, some states have developed boards or committees to evaluate the adequacy of existing state law to address environmental justice issues. South Carolina developed an advisory group to study environmental justice practices in the state's agencies,⁶⁷ and New Jersey developed an advisory council to advise the state environmental agency on issues of environmental justice.⁶⁸

The substantive approach includes activities designed to avoid disparate impacts of environmental toxins in particular communities.⁶⁹ Although no state policy directly limits the release of environmental pollutants (and therefore, arguably, no state is currently taking the substantive tack), some states incorporate environmental justice into their permitting schemes, including New York, Massachusetts, and New Mexico. New York requires the permit applicant to complete an enhanced review of the area surrounding the proposed project when applying for a permit.⁷⁰ In Massachusetts, projects within one mile of an environmental justice area necessitate enhanced analysis of impacts and mitigation measures.⁷¹ New Mexico's environmental justice policy directs all state agencies to use available environmental and public health data for environmental justice communities when "determining siting, permitting, compliance, enforcement, and remediation of existing and proposed industrial and commercial facilities."⁷²

The public participation approach is meant to create better-informed administrative decisions and to grant the environmental

66. *Id.*

67. S.C. ENVTL. JUSTICE COMM., FINAL REPORT, available at <http://www.scstatehouse.gov/archives/dhec/EJAdvisoryFinalReportCombined.pdf> (last visited Oct. 24, 2014).

68. New Jersey Department of Environmental Protection, Office of Environmental Justice, *Environmental Justice Advisory Council*, <http://www.state.nj.us/dep/ej/ejcouncil.html> (last visited Oct. 24, 2014).

69. Bonorris & Targ, *supra* note 56, at 45.

70. See *Policy 29*, *supra* note 11 at V(D); Mass. Pol., *supra* note 58.

71. Mass. Pol., *supra* note 58, at 8.

72. N.M. Exec. Order No. 2005-056 (Nov. 4, 2005), http://www.nmenv.state.nm.us/Justice/EO_2005_056.pdf.

justice community the opportunity to participate in the environmental decision-making process.⁷³ States often create public participation strategies alongside substantive and internal management processes.⁷⁴ Typically, public participation measures apply either to general communication regarding environmental conditions in these communities or to the process surrounding specific permitting actions.⁷⁵ Some states require project applicants to develop formal public participation plans.⁷⁶ In New York, project applicants must outline how they will inform the community of the proposed action and how they will address specific community concerns.⁷⁷ Sometimes, the permit applicant or developer is required to hold informal public meetings to provide residents with information about the proposed project.⁷⁸ In Pennsylvania, permit applicants are required to meet with town officials to evaluate the need for a community benefit agreement, where the developer and the impacted community agree to certain terms and conditions in exchange for the community's support of the developer's proposed project.⁷⁹

73. Bonorris & Targ, *supra* note 56, at 44–46; see Ryan Holifield, *Environmental Justice as Recognition and Participation in Risk Assessment: Negotiating and Translating Health Risk at a Superfund Site in Indian Country*, 102 ANNALS ASSOC. AM. GEOGRAPHERS 591 (2012).

74. See, e.g., *Policy 29*, *supra* note 11.

75. General communication activities include the development of a direct contact person or environmental justice office or development of a hotline for residents to call with environmental concerns. See, e.g., TX COMM. ENVTL. QUALITY, Environmental Equity Program (Feb. 2013), available at <http://www.tceq.texas.gov/agency/hearings/envequ.html>. Direct communication measures are taken during specific projects and may include activities such as the public posting of project-specific information or meeting with community leaders. See, e.g., *Policy 29*, *supra* note 11, at (III)(b)(1).

76. See, e.g., *Policy 29*, *supra* note 11, at (III)(b)(1); CONN. GEN. STAT. § 22a-20a (2009).

77. *Policy 29*, *supra* note 11.

78. See, e.g., PA Dept. of Env'tl. Prot. Policy Office, Env'tl. Justice Pub. Participation Policy (2004) 012-0501-002, available at <http://www.elibrary.dep.state.pa.us/dsweb/Get/Version-48671/012-0501-002.pdf> (last visited Oct. 24, 2014); *Policy 29*, *supra* note 11, at (V)(D)(3).

79. PA Dept. of Env'tl. Prot. Policy Office, Env'tl. Justice Pub. Participation Policy (2004) 012-0501-002, available at <http://www.elibrary.dep.state.pa.us/dsweb/Get/Version-48671/012-0501-002.pdf> (last visited Oct. 24, 2014). For an analysis of community benefit agreements and environmental justice, see Vicki Been, *Community Benefits Agreements: A New Local Government Tool or Another Variation on the Exactions Theme?* 6 U. CHI. L. REV. 5 (2010). According to Been, the benefits offered under a community benefit agreement vary and may include commitments for hiring local laborers, assuring a certain percentage of housing construction will be low-income, or a promise to protect/improve the environment. In return, the community promises to abstain from any legal or procedural challenges to the action. *Id.* at 5–6.

Although enhanced public participation measures can arguably limit future pollution-emitting activities through active community involvement in the permitting process, the *most* effective means for limiting pollution in these overburdened communities would be for states to limit the amount of toxic releases. However, no state currently does so under its environmental justice policy. In fact, states do not even calculate where toxic concentrations are occurring or consider disparate health effects under their environmental justice policies.⁸⁰

C. New York State's Policy

There is no New York State statute on environmental justice, no state regulation, and no executive order.⁸¹ There is, however, an environmental justice policy developed and executed by the state's environmental agency. In 1998, parties concerned about alleged environmental disparities affecting minority and low-income communities met with executive staff from the DEC,⁸² claiming: (1) there was a lack of public access to information regarding environmental conditions in these communities; (2) the permitting process failed to address disproportionate adverse environmental impacts; (3) there was an inequitable distribution of green benefits such as open spaces and grant funds; and (4) there was a pressing need for more effective and consistent enforcement of conservation law violators.⁸³ In response⁸⁴ on October 4, 1999, New York Governor George Pataki and DEC Commissioner John Cahill announced the creation of a New York State Program to address environmental justice concerns and community participation in the state's environmental permitting

Although rising in popularity, these agreements are relatively new and the net benefits to the parties involved are not completely known. *Id.* at 6.

80. See Lewis and Bennett, *supra* note 32.

81. The State Assembly has repeatedly attempted to pass legislation on the issue of environmental justice. See *supra* section I; See, e.g., SWEENEY & SILVER, *supra* note 17, at 4, 12.

82. Erin M. Crotty, *New York's Model for Environmental Justice*, 30 HUM. RTS. 11, 11 (2003).

83. Policy 29, *supra* note 11, at II.

84. *Id.*

process.⁸⁵ A 1999 EPA environmental justice grant supplemented program development funding.⁸⁶

The first steps in the development of the state program included the naming of an Environmental Justice Coordinator, the creation of an Office of Environmental Justice, and the establishment of an Environmental Justice Advisory Group to develop recommendations for the DEC's forthcoming environmental justice policy.⁸⁷ The Advisory Group held meetings in cities across the state, including Syracuse, Buffalo, New York City, Albany, and the Onondaga Nation, to listen to the concerns of minority and low-income communities, as well as others affected by environmental issues.⁸⁸ The Advisory Group submitted its findings to the DEC in early 2002. In a nutshell, the Advisory Group recommended that the DEC (1) define environmental justice communities geographically by evaluating the distribution of toxic releases and demographic data, (2) enhance public notice and participation procedures in relation to environmental permitting decisions in these communities, and (3) enhance the state's permitting procedures for these communities under the State Environmental Quality Review Act.⁸⁹

In August 2002, the DEC released a draft of its environmental justice policy, which it based on the Advisory Group's Report and the public comments that followed it.⁹⁰ The DEC then held a public comment period on the draft policy.⁹¹ On March 19, 2003, DEC issued its final policy, *Policy 29* "Environmental Justice and Permit-

85. NYS DEC Press Release, *supra* note 25.

86. The EPA State & Tribal Environmental Justice Grant addressed these elements: (1) formation of an environmental justice Advisory Group; (2) development of an environmental justice permit policy with guidelines for addressing environmental justice permitting issues; (3) enhancement of the DEC website; (4) conducting a series of public meetings throughout the state to identify environmental justice concerns; and (5) recommendations for a strategic environmental justice plan. See ENVT'L JUSTICE ADVISORY GRP., RECOMMENDATIONS FOR THE N.Y.S. DEC ENVT'L JUSTICE PROGRAM (2002) at 2, http://www.dec.ny.gov/docs/permits_ej_operations_pdf/ejfinalrpt.pdf (last visited Oct. 24, 2014).

87. *Id.*

88. The Advisory Group was chaired by the DEC's Environmental Justice Coordinator and consisted of eighteen appointed members, including federal, state, and local health officials, environmental justice advocates, environmentalists, a Native American representative, and an academician. See *id.*

89. *Id.*

90. *Policy 29*, *supra* note 11.

91. *Id.* § II.

ting.”⁹² The policy defines environmental justice as “the fair treatment and meaningful involvement of all people regardless of race, color, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.”⁹³ It further defines “fair treatment” as “no group of people, including a racial, ethnic, or socioeconomic group, should bear a disproportionate share of the negative environmental consequences resulting from industrial, municipal, and commercial operations or the execution of federal, state, local, and tribal programs and policies.”⁹⁴ Under the policy, environmental justice communities are those where minority residents comprise 51.1% of the population in an urban area and 33.8% of the population in a rural area,⁹⁵ or where low-income residents make up 23.59% of the total population.⁹⁶ Communities meeting these demographic thresholds are defined geographically (mapped) using Geographic Information Systems (GIS) and serve as the foundation for the state’s environmental justice policy.⁹⁷ There is no consideration for the distribution of toxins or public health in this designation, and all of the state’s environmental justice activities specifically target (and are only applicable to) these predetermined communities.⁹⁸

92. *Id.*

93. *Id.* § III(A)(2).

94. *Id.*

95. *Id.* § III(A)(6). Note, the U.S. Census ‘block group’ is used as the area for determination, which typically contains between 250 and 500 housing units.

96. *Id.* § III(A)(3).

97. *Id.* § V(B)(2).

98. The obvious result of the demographic threshold approach is no consideration for disproportionate burdens on environmental justice communities, thereby failing to actually address the substantive nature of environmental justice efforts. A less obvious implication is that communities falling outside of the specified criteria cannot be considered for environmental justice efforts, regardless of existing environmental conditions or toxic concentrations. New York State Senator George Maziarz commented on the issue, stating, “Unless the NYS DEC’s environmental justice policy corrects its basic assumptions that environmental injustice happens only to minority or poor communities or if it does recognize this, continues to pursue policy that denies equal protection to these other burdened communities, any report, policy, or regulation will lack legitimacy.” Maziarz argued on behalf of Niagara County, one of the most environmentally burdened communities in the nation, as it is the location of the infamous Love Canal and other environmental tragedies that eventually led to the development of the federal Superfund program. He refers to communities burdened with heavy levels of radioactive and chemical contamination, as well as with the only commercial hazardous waste disposal facility in the northeast, noting that these communities are not necessarily low-income or minority, but

Environmental justice “activities” generally fall into one of two categories: either incorporating environmental justice concerns into the environmental review process or enhancing public participation in low-income and minority populations.⁹⁹ *Policy 29* also outlines a number of activities to be developed *post-policy* enactment. We discuss each category of activities below.

D. Incorporating Environmental Justice into the Permitting Process

In New York, the State Environmental Quality Review Act (SEQRA) requires state agencies and units of local government to consider environmental factors in planning, permit review, and decision-making processes.¹⁰⁰ The SEQRA process requires that all agencies, including the state environmental agency (DEC), complete an environmental assessment to identify and mitigate significant environmental impacts resulting from the projects or activities (“actions”)¹⁰¹ that they undertake, fund, or approve (including issuance of environmental permits).¹⁰² These environmental assessments are

neither are they wealthy. See Letter from George Maziarz, New York State Senator, to NYS DEC Office of Environmental Justice (March 15, 2005), *available at* http://www.dec.ny.gov/docs/permits_ej_operations_pdf/sengeorgemaziarz.pdf (last visited Oct. 24, 2014). Despite the argument that environmental justice policies should be expanded to include demographic groups outside of the traditionally designated minority and low-income groups, there is an inherent value in the focus on these groups as a result of the long, sad history of housing toxic facilities in these politically disempowered communities.

99. See generally *Policy 29*, *supra* note 11.

100. N.Y. ENVTL. CONSERV. LAW § 8-0103; 6 N.Y.C.R.R. § 617. The State Environmental Quality Review Act is SEQRA, whereas the process for review under the Act is known as SEQR (State Environmental Quality Review).

101. N.Y. ENVTL. CONSERV. LAW § 8-0105 (4); N.Y.C.R.R. § 617.2(b). Certain minor actions and actions whose environmental impacts are addressed by other statutes are exempt from the SEQR process, including enforcement proceedings or the maintenance or repair of existing structures. N.Y. ENVTL. CONSERV. LAW § 8-0105(5).

102. N.Y. ENVTL. CONSERV. LAW § 8-0103; 6 N.Y.C.R.R. § 617. The Legislature has made SEQR self-enforcing. That is, each agency is responsible for ensuring it is in compliance with the requirements of the act. There is no “SEQR police.” While the DEC is charged with issuing regulations regarding the SEQR process, the DEC has no authority to review the implementation of the process by other state agencies. Compliance is “enforced” only through citizen suits (or threats thereof) alleging that an agency did not comply with SEQRA. Although the DEC provides informal guidance on how the SEQR process should be followed, state and local agencies are expected to consult with their own legal counsel to ensure compliance. See N.Y.S. Dep’t of Envtl. Conservation, *SEQR, Environment Impact Assessment in New York State*, *available at* <http://www.dec.ny.gov/permits/357.html> (last visited Oct. 24, 2014).

standardized through the use of an Environmental Assessment Form that provides necessary information for determining whether the proposed action will have a significant impact on the environment.¹⁰³ The basic Environmental Assessment Form comes in either a short form or a longer, "full" form. The full form is used by project applicants where the activity under review is more likely than not to have a significant impact on the environment (called Type I actions).¹⁰⁴ Where an action or activity has been predetermined by the State DEC *not* to result in a significant environmental impact (called Type II actions), no environmental assessment (and thus no Environmental Assessment Form) is required.¹⁰⁵ The short form is used only when an activity is neither a Type I nor Type II action and is therefore an "unlisted action."¹⁰⁶ If after reviewing either the short or full form the action agency determines that the action will have a significant adverse environmental impact, the agency or project applicant must complete an environmental impact statement addressing all potential impacts, potential alternatives, and proposed methods for mitigation.¹⁰⁷

The DEC issues several types of environmental permits, including those for mining and land reclamation, wastewater discharge to surface and groundwater, facility permits for air emissions, solid and

103. 6 N.Y.C.R.R. § 617.1(c). For access to the SEQRA Forms and guidance documents for applicants, see N.Y.S. Dep't of Env'tl. Conservation, *supra* note 102.

104. SEQRA contains a list of actions predetermined to fall under the category of Type I actions, including, for example, the adoption of a municipality's land-use plan, the sale or transfer of one hundred or more contiguous acres of land by a state or local agency, and large-scale projects such as the construction of a facility with more than 100,000 square feet. 6 N.Y.C.R.R. § 617.4 (b)(1-11). Agencies can also adopt their own list of predetermined Type I action in addition to those outlined in SEQRA. § 617.4(2).

105. 6 N.Y.C.R.R. § 617.6(1)(i). SEQRA contains a list of actions predetermined to fall under the category of Type II actions, including: the maintenance or repair of an existing facility involving no substantial changes, agricultural management practices, and repaving of existing highways. See 6 N.Y.C.R.R. § 617.5(c). Each agency may also adopt its own list of Type II actions as long as the action will not have a significant impact on the environment. 6 N.Y.C.R.R. § 617.5(b).

106. An agency may instead require or use a full environmental assessment form for unlisted actions if the short form would not provide sufficient information to determine the significance of potential environmental impacts. 6 N.Y.C.R.R. § 617.6(a)(3).

107. For EIS content, see 6 N.Y.C.R.R. § 617.9(b). When the agency has completed a draft EIS or when a draft EIS prepared by a project applicant is adequate for public review, the DEC will determine whether to hold a public hearing on the action. In making the determination, the DEC considers several factors. 6 N.Y.C.R.R. § 617.9(a)(4).

hazardous-waste permits, and water-withdrawal permits. While SEQRA applies to these permit issuances, the state's environmental justice policy only requires the DEC to incorporate environmental justice into its decision-making processes for certain actions.¹⁰⁸ These include major projects and major modifications under the State Pollutant Discharge System (applies to the discharge of industrial waste and sewage into bodies of water),¹⁰⁹ air pollution control under the state's Air Pollution Control Act (applies to major sources of air pollutants),¹¹⁰ solid waste management and resource recovery facilities,¹¹¹ industrial hazardous waste management,¹¹² and the siting of industrial hazardous waste facilities.¹¹³

Upon receipt of an application for a permit covering these actions, the DEC conducts a preliminary screening to identify whether the proposed project is in or near an environmental justice community.¹¹⁴ If no environmental justice community is identified, the proposed action is determined to not likely affect an environmental jus-

108. *Policy 29, supra* note 11, at (V)(A). The Advisory Group had recommended that the policy apply to major projects under sixteen of the state's environmental regulatory programs, see ADVISORY GROUP RECOMMENDATIONS, *supra* note 59, at 4–5, yet the DEC only applied the policy to five programs.

109. The State Discharge Elimination System (SPDES) is an EPA-approved program for the control of wastewater and storm water discharges in accordance with the Clean Water Act. Actions requiring permits and subject to the state's environmental justice policy include the discharge of sewage, industrial waste, or other wastes into the waters of the state. *Policy 29, supra* note 11, at (V)(A)(i). "Other" wastes include garbage and refuse. N.Y. ENVTL CONSERV. LAW § 17-0701(1)(a).

110. N.Y. ENVTL CONSERV. LAW § 19-0101. The DEC is the state agency that carries out both the state and federal air pollution and monitoring programs. Federal law requires the DEC to submit a state implementation plan that demonstrates how state air pollution control programs will be carried out to reduce pollution and to ensure that air contaminant levels are in compliance with the National Ambient Air Quality Standards (42 U.S.C. §§ 7410). The DEC's Division of Air Resources administers permits to applicants. 6 N.Y.C.R.R. Part 201. Only Title V facility permit actions (facilities judged to be major) are subject to the state's environmental justice policy. *Policy 29, supra* note 11, at (V)(A)(ii). This includes stationary sources that directly emit 100 tons per year or more of any air pollutant or air contaminant regulated under the Act or 10 tons per year of a hazardous air pollutant. See 6 N.Y.C.R.R. § 201-2.1(b)(21).

111. In addition to major projects or modifications, this includes a limited number of minor modifications. See *Policy 29, supra* note 11, at (V)(A)(iii).

112. *Id.* at (V)(A)(iv).

113. *Id.* at (V)(A)(v).

114. *Id.* at (V)(B)(1). The determination of whether the community is an environmental justice community is used using GIS mapping and census block data to identify whether the community meets the policy thresholds.

tice area and the permit-review process continues independent of the environmental-justice policy requirements.¹¹⁵ However, if an environmental-justice community is identified,¹¹⁶ the policy requirements must be incorporated into the process and project applicants must be provided with relevant information on environmental justice.¹¹⁷

Policy 29 requires project applicants to complete a Full Environmental Assessment Form for all unlisted actions, that is, those that do not fall into the predetermined categories of Type I (more likely to result in a significant environmental impact) or Type II (determined not to result in a significant impact).¹¹⁸ This is distinguishable from the standard SEQRA procedures, which only require agencies or project applicants to complete the Short Environmental Assessment Form for unlisted projects. The short form is four pages and applicants respond to twenty questions regarding the proposed project and its anticipated effects.¹¹⁹ For example, applicants must respond as to whether the project is consistent with current zoning standards, whether it requires a permit or agency approval, and other questions surrounding the basic infrastructure (water lines, etc.) required for the project.¹²⁰ The full form, required for all unlisted actions under *Policy 29*, is twenty-three pages and consists of two parts. Like the short form, the full form requires applicants to complete a series of questions surrounding the project's anticipated infrastructure needs and zoning requirements.¹²¹ However, the content is more substantive in that applicants must also respond to a number of community-specific questions related to the project setting, such as which school district the project site is located in, which police serve the site, and

115. *Id.* at (V)(B)(2).

116. *Id.* at (V)(B)(2) and (V)(C). For a determination that a proposed action will affect an environmental justice community, a substantial amount of the census block identified as an environmental justice community must fall within the affected area.

117. *Policy 29*, *supra* note 11, § (V)(B–M).

118. *Id.* § (E).

119. *Short Environmental Assessment Form*, http://www.dec.ny.gov/docs/permits_ej_operations_pdf/seaf.pdf (last visited Oct. 24, 2014).

120. *Id.*

121. See Full Environmental Assessment Form, Part I, Project and Setting, Appendix A to 6 N.Y.C.R.R. 617.20, http://www.dec.ny.gov/docs/permits_ej_operations_pdf/feafpart1.pdf (last visited Oct. 28, 2014).

whether there are nearby parks.¹²² The applicant must also respond to specific questions regarding the anticipated effects of the project on traffic, lighting, noise, odors, and impacts on transportation routes such as pedestrian or bike lanes.¹²³

When identifying potential project impacts, although applicants are instructed to “consider the possibility for long-term and cumulative impacts as well as direct impacts,”¹²⁴ the applicant (or the DEC in its review of the form) is *not* required to consider existing sources of pollution, localized public health issues, or to even identify the community as an environmental-justice community.¹²⁵ Using the information provided, the DEC will then determine whether the project is likely to have a significant environmental impact.¹²⁶ Examples of where the agency might find a potential significant impact include a substantially adverse change in existing air quality, ground or surface water quality or quantity, the removal or destruction of large quantities of vegetation or fauna, the creation of a hazard to human health, or the impairment of the character or quality of a community or neighborhood.¹²⁷

If it is determined that a significant environmental impact is likely to occur as a result of the project, the project applicant¹²⁸ must complete an Environmental Impact Statement (“EIS”).¹²⁹ The format of the EIS is flexible, but the SEQRA process requires a number of ele-

122. *Id.*

123. See Full Environmental Assessment Form, Part II, Identification of Potential Project Impacts, Appendix A to 6 NYCRR 617.20, http://www.dec.ny.gov/docs/permits_ej_operations_pdf/feafpart2.pdf.

124. *Id.*

125. *Id.*

126. See 6 N.Y.C.R.R. § 617.7(c)(1)(i–xii).

127. *Id.*

128. The project applicant (sponsor) has the option to request that the DEC prepare the draft EIS. In the event that this is the case, the applicant may be charged a fee. 6 N.Y.C.R.R. § 617.9(a)(1).

129. *Policy 29, supra* note 11, § (V)(H). This is standard SEQRA procedure following a DEC determination of a potential significant environmental impact for any Type I or unlisted action. See 6 N.Y.C.R.R. § 617.7. An EIS can be labeled as draft, final, supplemental, or generic. A draft EIS is the version of the EIS that the lead agency (the DEC) makes available for public review and comment. In a final EIS, the DEC responds to the substantive comments or issues identified during the public review period. A lead agency may require a supplemental EIS to address issues that were not addressed or were inadequately addressed in either the draft or the final EIS. 6 N.Y.C.R.R. § 617.2(n).

ments, including the purpose of the proposed action; the public needs and benefits for the action, including social and economic considerations; a concise description of the environmental setting of the area to be affected; an evaluation of the potential significant adverse environmental impacts including cumulative impacts and other associated environmental impacts; a description of mitigation measures; and a description and evaluation of the range of reasonable alternatives, including alternative sites for the project, size or magnitude, technology, and timing.¹³⁰ For environmental justice areas, *Policy 29* requires the EIS to identify the environmental justice area to be affected, describe the existing environmental burden on the area, and evaluate the additional burden of significant environmental impact on the community.¹³¹ The DEC will identify the scope or breadth of analysis on an individual project basis.¹³² When the DEC has determined that the draft EIS is adequate for public review, SEQRA grants the agency discretion as to whether to hold public hearings on the proposed action.¹³³ However, in the case of an environmental justice community, *Policy 29* requires that the DEC conduct a public hearing where a draft EIS includes an evaluation of additional burdens on an environmental justice community.¹³⁴ After the issuance of a hearing notice, *Policy 29* grants the project applicant and the public access to the DEC Office of Hearings and Mediation Services for alternative dispute resolution.¹³⁵ When the resolution consists of enforceable permit conditions, the DEC incorporates the conditions into the permit. When the resolution consists of conditions beyond the enforceable

130. See 6 N.Y.C.R.R. § 617.9(b)(5), for a complete list of information required.

131. *Policy 29*, *supra* note 11, § (V)(J).

132. *Id.*

133. 6 N.Y.C.R.R. § 617.9(a)(4). In determining whether to hold a hearing, the lead agency is to consider the degree of interest in the action shown by the public or involved agencies, whether significant adverse environmental impacts have been identified, the adequacy of mitigation measures and alternatives proposed, and the extent to which a public hearing can aid the agency's decision-making process.

134. *Policy 29*, *supra* note 11, § (V)(K). SEQRA outlines the process for the public hearing. Notice must be published at least 14 days in advance of the hearing in a newspaper of general circulation in the area of the potential impacts of the action, and the hearing must commence no less than 15 calendar days or no more than 60 calendar days after the filing of the notice of completion of the draft EIS. 6 N.Y.C.R.R. § 617.9(a)(4)(i-ii).

135. *Policy 29*, *supra* note 11, § (V)(L).

authority of the DEC, the non-DEC parties are encouraged to engage in a private agreement enforceable by those parties.¹³⁶

To summarize the modifications to the DEC's permitting process under *Policy 29*, the DEC must: (1) require that the project applicant complete a Full Environmental Assessment in lieu of the shorter form for all unlisted actions (those not predetermined likely or not likely to pose a significant environmental impact); (2) require the incorporation of environmental justice into the EIS where one is required; (3) require a public hearing where the EIS evaluates the potential burden on an environmental-justice community; and (4) offer mediation between parties in certain circumstances.

E. Public Participation

Policy 29 requires applicants proposing certain activities¹³⁷ or projects located in identified environmental-justice communities to develop and implement enhanced public-participation plans. The permit applicant is required (1) to submit to the DEC a written plan that identifies stakeholders in the proposed action, including residents adjacent to the proposed site as well as local elected officials and community-based organizations; (2) to distribute and post written "plain language" information on the proposed action, permit a review process, and translate these materials for non-English speaking stakeholders where appropriate; (3) to hold public informational meetings to keep the public informed throughout the permit review process; and (4) to establish accessible document repositories within the community or on the internet to make pertinent project information available.¹³⁸ The permit applicant is also required to submit reports to the DEC throughout the process summarizing community concerns, progress made towards plan implementation, and final certification of plan compliance.¹³⁹ In addition to the requirements for permit applicants, *Policy 29* establishes more general public participation

136. *Id.*

137. Included activities or projects are those that affect the permitting process, including the discharge of water pollutants, air pollutants, solid waste management, hazardous waste management, and the siting of hazardous waste facilities. *See id.* § V(D)(1)(1-4).

138. *Id.*

139. *Id.* § V(D).

measures, including the translation of informational documents related to the environmental review process¹⁴⁰ and the development of a toll-free environmental justice hotline to enable public access to the Office of Environmental Justice.¹⁴¹

F. Policy 29's Future Objectives

Policy 29 also outlines a number of activities to be conducted post-2003.¹⁴² Within three months of the policy's effective date, DEC staff was to be educated on environmental justice and the DEC Office of Environmental Justice was to develop a curriculum and begin implementing a formal training to affected staff.¹⁴³ Six months after the policy's effective date, the DEC was to identify and begin conducting workshops to educate the public on environmental justice, the permitting process, and the agency's environmental justice policy.¹⁴⁴ More substantive directives include conducting supplemental compliance and enforcement inspections of regulated facilities in environmental justice areas (where there "is reason to believe that such facilities are not operating in compliance with the Environmental Conservation Law")¹⁴⁵ and the creation of two work groups "to assist DEC to develop and incorporate critical information into the DEC environmental review process."¹⁴⁶ The first group, later named the Disproportionate Adverse Environmental Impact Group, was to develop recommendations for conducting a disproportionate adverse

140. *Id.* § (III)(B)(11). Documents translated include "What is SEQRA"; "A Citizen's Guide to SEQR"; "The SEQR Cookbook"; "How to Apply for a DEC Permit"; "The Guide to Permit Hearings"; and "The Guide to Mediation Services."

141. *Id.* § (III)(B)(1). The DEC's website states the "purpose of this hotline is to serve minority and low-income communities. It is not intended as a hotline for general environmental information unrelated to issues of Environmental Justice." See *Environmental Justice Hotline*, Department of Environmental Justice, <http://www.dec.ny.gov/public/917.html> (last visited October 24, 2014).

142. For a complete list of activities, see *Policy 29*, *supra* note 11, § (III)(B).

143. Including staff in, among others, the Divisions of Air Resources, Solid and Hazardous Materials, Water, Environmental Permits, Public Affairs, and Education. *Id.* § (B)(9).

144. *Id.* § (III)(B)(7).

145. *Id.* § (III)(B)(11).

146. *Id.* § (III)(B)(8).

environmental impact analysis as a component of the EIS for projects in environmental justice communities.¹⁴⁷

In its final report, the Disproportionate Adverse Environmental Impact Group recommended that the DEC adopt methods to assess disproportionate adverse impacts, but was unable to reach a consensus on a specific method.¹⁴⁸ The Disproportionate Adverse Environmental Impact Group also recommended that environmental and human health be part of EIS analysis.¹⁴⁹ In identifying specific criteria to be included, it again deferred to the DEC.¹⁵⁰ The second work group, later named the Health Outcome Data Work Group established in conjunction with the New York State Department of Health, was to identify sources of human-health data and the means for incorporating the data into the environmental review process.¹⁵¹

The DEC (1) did not adopt either group's recommendations and continues to use demographic data as the sole criteria for designating an environmental justice community, (2) does not consider disproportionate environmental impacts in its evaluation of whether to grant a permit to pollute in these communities, and (3) does not consider existing health disparities in the analysis.¹⁵² We assess the validity of the policy's requirements in Section IV when we evaluate New York's *Policy 29* under the lens of symbolic politics; however, it is first necessary to consider why policymakers sometimes implement toothless policies by conceptualizing the theory of symbolic politics.

147. *Id.* § (III)(B)(8)(ii).

148. See Final Report of New York State Department of Environmental Conservation Disproportionate Adverse Environmental Impact Analysis Work Group, *available at* http://www.dec.ny.gov/docs/permits_ej_operations_pdf/daeireport.pdf (last visited October 24, 2014). The DEC has yet to adopt these recommendations.

149. *Id.* at 3.

150. *Id.*

151. *Policy 29*, *supra* note 11, § (B)(8)(ii). The Health Outcome Data Work Group's Report was published three years after *Policy 29*'s effective date. See NYSDEC and NYSDOH, Report of the Health Outcome Data Work Group, *available at* http://www.dec.ny.gov/docs/permits_ej_operations_pdf/hodreport.pdf (last visited October 24, 2014) (recommending a number of health outcomes to be considered in environmental justice analysis, including respiratory diseases, cardiovascular diseases, cancer, perinatal health, and lead (blood levels)). The Health Outcome Data Work Group also proposed that spatial statistics be incorporated into environmental review to evaluate for clusters of illnesses in conjunction with the environmental justice analysis. The DEC has not adopted any of the recommendations.

152. See generally *Policy 29*, *supra* note 11.

III. CONCEPTUALIZING SYMBOLIC POLITICS

Strategies of environmental protection have been unable to halt the trajectory of environmental destruction. Some argue that this is the inevitable outcome of half-hearted measures accomplishing too little, too late.¹⁵³ Programs designed to address environmental problems are often more symbolic than functional.¹⁵⁴ This may occur because the politico wished to take a stance on an environmental issue. By creating pro-environment policies, the policymaker gets credit for voting for "health and the environment" and against "trading lives for dollars."¹⁵⁵ Often in this case, the policymaker or legislature passes the hard issues surrounding how to actually implement the policy on to the regulatory agency or to the courts.¹⁵⁶ The lawmakers or policymakers may or may not have intended for the policy goals to be realized.

Policies sometimes appear more symbolic than functional simply because the policy fails.¹⁵⁷ To label symbolic politics simply as ineffectual politics, however, is misleading. Laws and policies fail to meet their goals for a host of reasons. Ineffective laws or policies differ from symbolic politics because the policymakers actually intend for the goals to be reached. These policymakers plan and hope for the substantive outcome, yet often the means implemented are simply insufficient for achieving the policy's stated goals. In contrast, authentic politics genuinely seek to respond to citizens' concerns and attempt to effectively address the "real issues."¹⁵⁸ Thus, *symbolic politics* is the term reserved for cases where the legislature or policymakers know at the outset that the measures being implemented would be insufficient for achieving the policy's goals and that the policy will ultimately fail.¹⁵⁹ In this section, we consider some of the reasons symbolic poli-

153. Blühdorn, *supra* note 18, at 252.

154. See John P. Dwyer, *The Pathology of Symbolic Legislation*, 17 *ECOLOGY L.Q.* 233 (1990).

155. *Id.* (arguing that Section 112 of the Clean Air Act is symbolic legislation).

156. *Id.*

157. Newig, *supra* note 19, at 277-78.

158. Blühdorn, *supra* note 18, at 258.

159. Symbolic politics are characterized by the fact that the gap between codification (or release of a policy) and implementation is already known and tolerated, if not deliberately intended. Matten, *supra* note 22, at 216.

tics emerge and potential methods for distinguishing symbolic policies from legitimate ones. This background sets the stage for an evaluation of New York's environmental justice policy under the lens of symbolic politics.

A. Why Symbolic Politics Emerge

When first articulated by Murray Edelman, symbolic politics theory suggested that privileged elites used deceptive practices to trick common citizens.¹⁶⁰ That is, citizens were fooled into believing that productive policies had been enacted to increase the general welfare when, in fact, the laws were empty of substance. Symbolic laws thus can be labeled as lip service, toothless, empty rhetoric, or window dressing.¹⁶¹ While Edelman's work in 1968 may have been groundbreaking, the reasoning behind symbolic politics theory is common sense. We can easily envision circumstances where politicians and the public support toothless policies. Public choice theory lays the groundwork for the theories of symbolic rhetoric.¹⁶² Individual politicians make decisions that are most likely to benefit them.

The nature of elections means that politicians promote policies that will garner votes. Some issues have widespread support and it is hard to appear to be opposing them, and yet the politicians may not have the desire or political will to affect actual change. Environmental laws often fall into this category. No one wants to be seen as anti-environment, but many are reluctant to make the real changes to behavior and the economy that yield sought-after environmental benefits.¹⁶³ More recent scholarship notes that in some cases, the rhetoric stems not just from politicians but also from an electorate that does not actually want to undertake the measures needed to meet the stated goal.¹⁶⁴ Thus, symbolic politics may stem from deception of the public by politicians *or* self-deception of individuals who are conflict-

160. EDELMAN, *supra* note 23, at 2.

161. Happaerts, *supra* note 23, at 4.

162. See Newig, *supra* note 19, (applying public choice theory and self-deception to a case where the public supported strict traffic restrictions in Germany to reduce smog in summer months, yet did not obey the temporary speed limits).

163. See generally Matten, *supra* note 22.

164. See generally Blühdorn, *supra* note 18.

ed about wanting to support the goals of the policy yet worry about the costs such policies might entail.¹⁶⁵

The latter category has been referred to as *simulative politics* where a policy “articulates demands which are *not supposed* to be taken seriously and implemented,” but rather, are part of a larger “tacit strategic community” between the public and the politicians.¹⁶⁶ As a form of self-deception, the public acquiesces or supports a policy claiming to address a societal problem (such as pollution) without actually implementing the means to address the problem.¹⁶⁷ This mutual tactic between politicians and consumers can be exemplified in the regulation of greenhouse gases. The general public may appear to want regulation, yet may not be prepared or have the desire to change behaviors or alter lifestyles to reduce greenhouse gas concentrations. The more the government appears to be doing something to address the reduction of gases, the less important it becomes to the general public.¹⁶⁸ Regardless of whether the public acquiesces to a policy’s creation, symbolic politics require that policymakers know from the outset that policy will be ineffective at reaching its stated goals.

All politics contain a degree of symbolism, yet the scale is a graduated one.¹⁶⁹ Some laws (including the Clean Water Act and the Endangered Species Act) contain aspirational provisions that no policymaker, drafting or voting for the law, envisioned coming to pass.¹⁷⁰ For example, the Clean Air Act declared a goal of achieving national ambient air quality standards in every state by 1975.¹⁷¹ This never happened, yet the Act’s implementation is estimated to have prevent-

165. Newig, *supra* note 19, at 279.

166. Blühdorn, *supra* note 18, at 267–68.

167. Newig, *supra* note 19, at 291–92.

168. Edelman finds that whether or not the legislation is actually implemented may be less important than the fact that the legislation has been introduced or enacted. *See* EDELMAN, *supra* note 23.

169. Newig, *supra* note 19, at 278.

170. *See, e.g.,* Christopher T. Giovino, *Defending Overstatement: The Symbolic Clean Air Act and Carbon Dioxide*, 30 HARV. ENVTL. L. REV. 99 (2006) (arguing that “Congress chose consciously to include symbolic mandates in the Clean Air Act, a precommitment strategy designed to ensure that the Act would be respected by regulators and regulated entities alike”).

171. 42 U.S.C. § 7401 (2012). The Clean Water Act also contained ambitious goals, calling for the elimination of the discharge of all pollutants into navigable waterways by 1985. 33 U.S.C. § 1251(a)(1).

ed more than 200,000 deaths in just two decades.¹⁷² By stating the larger goal of achieving air quality goals in every state, Congress signaled that it was making pollution control a national responsibility.¹⁷³ Meanwhile, other portions of the Act substantively addressed the underlying issue of air quality through the implementation of pollution-reduction measures.¹⁷⁴ In contrast, the Pollution Prevention Act of 1990, which created a national policy to “prevent or reduce pollution at the source whenever feasible,”¹⁷⁵ contained broad aspirational provisions without compliance and action-forcing mechanisms to ensure pollution was reduced.¹⁷⁶ Furthermore, the legislation did not come with a large budget, regulatory structure, implementation deadlines, a designated compliance authority, or stringent emission standards.¹⁷⁷ Instead, the Act authorized the EPA to take on a number of advisory responsibilities, including: (1) developing and implementing a strategy that promotes EPA activities that prevent the generation, emission, or discharge of pollution at their source; (2) establishing an independent office to coordinate approaches to source reduction; (3) coordinating with other federal agencies to facilitate source reduction; (4) developing a standard means to measure source reduction; and (5) establishing a state grant matching program and a clearing-

172. Ambient concentrations of a number of air pollutants have been significantly reduced under the Act, including lead by 92%, thereby greatly reducing the number of children with low IQs resulting from dirty air. Despite significant improvements in air quality, urban problems of ozone, carbon monoxide, and particulate matter persist; one hundred million Americans currently live in cities that are out of attainment with ozone standards. *The Clean Air Act: Highlights of the 1990 Amendments*, EPA, available at http://www.epa.gov/air/caa/pdfs/CAA_1990_amendments.pdf (last visited October 24, 2014).

173. Paul Rogers, *EPA History: The Clean Air Act of 1970*, EPA J. (1990) available at <http://www2.epa.gov/aboutepa/epa-history-clean-air-act-1970> (last visited October 24, 2014). The 1967 Clean Air Act had been perceived as a failure, and there was mounting public pressure for Congress to set national air quality standards as a means to rectify the nation's air pollution crisis. *See id.*

174. *See, e.g.*, 42 U.S.C. § 7412 (2012). Dwyer argues § 112 is symbolic legislation for the regulation of primary air pollutants due to the complexities surrounding the EPA's mandate under the Clean Air Act to implement “health-based standards.” Dwyer, *supra* note 154, at 235.

175. 42 U.S.C. § 13101(b) (2012) (defining pollution prevention as “any practice which (i) . . . reduces the amount of any hazardous substance, pollutant, or contaminant entering any waste stream or otherwise released into the environment (including fugitive emissions) prior to recycling, treatment, or disposal).

176. Miles L. Burnett, *The Pollution Prevention Act of 1990: A Policy Whose Time Has Come or Symbolic Legislation?* 22 ENVTL. MGMT. 213, 214 (1998).

177. *See generally*, 42 U.S.C. § 13101 (2012).

house on source reduction practices.¹⁷⁸ None of these functions directly limit or reduce the amount of pollution disposed of or released into the environment. So, while the Clean Air Act has provisions for reducing pollution, the Pollution Prevention Act contains nothing that effectively reduces the amount of pollutants in the environment. The Pollution Prevention Act is a stronger example for symbolic politics than the Clean Air Act.

How did the circumstances differ surrounding the passage of the Clean Air Act and the Pollution Prevention Act? Why, in one instance, would Congress enact a law with teeth and substance and in another completely sidestep any substantive measures? There are a number of theories for why this occurs. Symbolic politics, or those laws and policies with a paucity of substantive measures despite legislative representations to the contrary, are said to occur in conditions of high political pressure or in instances where there is a good degree of public attention on the issue.¹⁷⁹ Social problems without an appropriate solution at the time or for which the short-term costs exceed the benefits are also likely to result in symbolic politics.¹⁸⁰ In such cases, sometimes the politico creates policy simply to declare a stance on an issue where it is not yet prepared to offer the solution.¹⁸¹ In the case of the Pollution Prevention Act, the politico declared the nation's position on the issue of pollution prevention—that it was preferable, albeit voluntary. Without including an “enforcement stick” or action-forcing mechanisms, the Senate Environment and Public Works Committee stated that the act was only intended as a first step in developing a larger pollution-regulatory framework.¹⁸²

Symbolic politics are also more likely to occur when the issue at hand is complex, when significant diverging interests are present, and

178. 42 U.S.C. §§ 13102–13105 (2012).

179. Newig, *supra* note 19, at 282.

180. *Id.*

181. Sometimes these “replacement policies” arise as a matter of choice in attempts to avoid or postpone uncomfortable implications of a policy measure; or a policy may be a “cunning and sinister strategic instrument used by power elites to deceive the public into believing that its concerns are being heard and addressed, whilst the elites are secretly pursuing their own interests which probably conflict with those of the public.” Blühdorn, *supra* note 18, at 256.

182. US S. 1990. Comm. on Env't. and Public-Works, POLLUTION PREVENTION ACT of 1990, 101st Cong. 2d Sess., S. Rept. No. 526.

when there is a misalignment of costs and benefits¹⁸³ as is the case when it comes to pollution prevention, industry, and public health.¹⁸⁴ The larger the societal conflict of interest among competing groups and the more complex and opaque the issue, the more symbolic politics are likely to emerge.¹⁸⁵ This is where public deception is more likely to occur. When the issue is complex, an asymmetric distribution of information regarding a proposed solution can result.¹⁸⁶ Typically, the problem is so complex that less-informed social groups cannot fully grasp the implications of the proposed solution and remain ignorant of the symbolic nature of the proposed solution itself.¹⁸⁷ The public often responds as if the problem is being addressed, and pay less attention.¹⁸⁸ In this sense, the substance of the act becomes less important than the public's perception or reaction to it.¹⁸⁹ The appearance of taking action occurs without the costs of the action. Dwyer says that this process is especially problematic regarding environmental laws because environmental groups take the legislator's promise of a risk-free environment at face value and are expecting the granting of certain "rights" inherent in such promises, while industry rigorously opposes the policy at every stage out of fear that it will be strictly enforced.¹⁹⁰ The end result is one where promises are made, yet not kept, and little room exists for a political compromise because the issue is presumed to have already been addressed.¹⁹¹

183. Happaerts, *supra* note 23, at 4.

184. A few articles have focused on the connection between symbolic politics and environmental regulations, especially where industry is concerned. *See, e.g.*, John Dwyer, *supra* note 154 (discussing the symbolic nature of the Clean Air Act); Dirk Matten, *supra* note 22 (applying a symbolic politics analysis to a German waste management act); Miles Burnett, *supra* note 176 (evaluating the Pollution Prevention Act for its symbolic nature).

185. Newig, *supra* note 19, at 284.

186. *Id.* at 298-04.

187. *Id.* (arguing that the German Summer Smog Act of 1995 was so riddled with exceptions to the rule that the overall objective of reducing ozone concentrations could never be achieved. It was perceived that the government was handling the situation and public attention on the issue dropped abruptly after the law's passing).

188. *Id.* at 291.

189. JOSEPH GUSFIELD, *SYMBOLIC CRUSADE: STATUS POLITICS AND THE AMERICAN TEMPERANCE MOVEMENT* 21 (2d. ed. 1986).

190. Dwyer, *supra* note 154, at 234.

191. *Id.*

Sander Happaerts argues that symbolic politics is more frequent when potential solutions would disrupt existing power structures or income disparities—basically, where a policy would significantly affect the social-economic status quo.¹⁹² Symbolic policies are more likely when more interests or sectors are involved.¹⁹³ The greater the number of types of stakeholders, the harder it is to satisfy all parties substantively. The more agencies or sectors involved, the harder it becomes to coordinate productive solutions.

Another hallmark of symbolic politics is that while the policy is not effective in addressing a substantive issue, it is effective *politically*. In other words, the establishment of a policy furthers the political goals of a specific political actor or actors.¹⁹⁴ The politician gets credit for addressing an issue that the public is concerned about, yet the issue may not be addressed substantively.¹⁹⁵ Newig identifies symbolic policies as those with low issue-related substantive effectiveness but high political-strategic effectiveness.¹⁹⁶ Traditional economic theory states that politicians are self-interested agents and that their behavior is heavily influenced by the constraints they face in the pursuit of self-interest.¹⁹⁷ Policymakers are faced with the task of issuing policies and regulations that appease the general electorate, that do not threaten the ability for businesses to conduct their activities, and (perhaps most notably) that do not result in job loss.¹⁹⁸ The general electorate will fall for the symbolic (decoy) policy so long as there is an asymmetric distribution of information between business and the general public.¹⁹⁹ In environmental politics, for example, the general

192. Happaerts, *supra* note 23, at 4. In his evaluation of a burden-shifting provision in the U.S. tax code, Steve Johnson found that Congress resorted to symbolic legislation because true burden-shifting (that is, actual attainment of the law's stated goal) would have been "calamitous" and not pragmatic. Steve R. Johnson, *The Dangers of Symbolic Legislation: Perceptions and Realities of the New Burden-of-Proof Rules*, 84 IOWA L. REV. 413, 457 (1999).

193. Happaerts, *supra* note 23, at 4.

194. Blühdorn, *supra* note 18, at 257.

195. *Id.*

196. Newig, *supra* note 19, at 279–80.

197. ROBERT MCCORMICK & ROBERT TOLLISON, *POLITICIANS, LEGISLATION, & THE ECONOMY: AN INQUIRY INTO THE INTEREST-GROUP THEORY OF GOVERNMENT* 1 (1946).

198. Matten, *supra* note 22 at 220.

199. *Id.* at 221.

public is typically unable to “monitor the effective implementation of environmental laws.”²⁰⁰

Environmental policies are often symbolic, serving at times as little more than lip service. They are often toothless, and sometimes become outright failures. Yet evaluating the symbolic nature of a policy is not easy. Policies of all types, especially environmental policies, can be analytically complex. “Political action has several interlocking layers,”²⁰¹ and there are varying degrees and types of symbolic politics to consider. Despite this complexity, we have identified common themes in the approach to analyzing the symbolic nature of policies. We now consider these themes and their applications and then move into the analysis of New York’s policy.

B. Methods for Assessing the Symbolic Nature of Policies

Symbolic politics occur in two forms, either (1) where policymakers deliberately intend for a law or policy to fail or (2) where the policy is designed merely to initiate a political process towards reaching broader goals that the government is currently unable or unwilling to fulfill.²⁰² This implies that the concept of symbolic politics is one of *ex ante* perspective, requiring us to consider what the intent was of the policymakers at the time the policy was created, including what they actually knew as well as what they *could have known*.²⁰³ This can

200. *Id.*

201. Blühdorn, *supra* note 18, at 257.

202. Matten, *supra* note 22, at 216. Blühdorn argues that symbolic politics as traditionally described fails to fully encompass the current state of affairs. He asserts that we have moved beyond symbolic politics to a stage of “performance of seriousness.” Finding that general assertions that symbolic politics are simply a result of the strategic action of political elites are simplistic and unhelpful, he breaks symbolic politics into typologies while declaring the typologies all to be inadequate statements of our current state of affairs where the electorate silently endorses the ineffectualness of policies. In analytically distinguishing various types of symbolic politics, Blühdorn begins by categorizing all symbolic politics as “replacement actions” for policies that would be genuinely effective in achieving their declared purpose. These replacement actions, which are incapable of achieving the policy’s apparent goals, are then subdivided into either category of (1) best possible action or (2) deliberate strategy. If the policy falls into the category of “best possible action,” then it arose from a political dilemma where there were no other viable alternatives. If the policy was developed as a “deliberate strategy,” then it may have been a strategic choice where alternative forms of action were consciously avoided. Blühdorn, *supra* note 18.

203. Newig, *supra* note 19, at 279.

be difficult for obvious reasons, as there is no real way to determine what goes on in the minds of politicians.²⁰⁴ Avoiding this obstacle, researchers have developed ways (or signals) to identify whether a policy is more symbolic than functional.

We can think of symbolic politics as having two components of efficacy: substantive and political-strategic.²⁰⁵ Substantive efficacy is whether the policy is likely to reach its stated goals (does the policy have the provisions, including funding and enforcement mechanisms, to achieve what it sets out to do).²⁰⁶ Political-strategic efficacy is whether the policy is likely to help politicians reach other goals (does the policy increase the likelihood of a favorable rating or re-election for the policymaker?).²⁰⁷ Newig offers elements for measuring each type of efficacy.

To assess substantive efficacy, we look to the policy's substantive suitability, enforceability, and recognition of the framework parameters. Substantive suitability examines the extent to which the substantive elements of the policy are suited to attain the policy's goals.²⁰⁸ This requires an inquiry into whether the law or policy (if actually carried out as specified) would yield the stated goals.²⁰⁹ Where the policy elements don't even meet the policy objectives on paper, the substantive or issue-related effectiveness will necessarily be low.²¹⁰ Assessing enforceability involves considering the legal provisions of the law or policy and whether they provide the implementing authority with the ability to control compliance or sanction non-

204. Conducting interviews of those involved at the time the policy or law is created may be of some use, provided that the responses given are accurate. One researcher interviewed the congressional staff that worked for the Democratic and Republican members active in the development of certain legislation, primarily to determine whom the audience or interest group was of the Trafficking Victims Protection Act of 2000. Barbara Ann Stolz, *Interpreting the U.S. Human Trafficking Debate Through the Lens of Symbolic Politics*, 29 L. & POL. 311, 316–17 (2007), (evaluating the symbolic function of the Trafficking Victims Protection Act).

205. Newig, *supra* note 19, at 281.

206. *Id.* at 279.

207. *Id.* at 280–81.

208. *Id.* at 280.

209. *Id.*

210. Happaerts also characterizes symbolic politics where policies have a low-impact effectiveness and as deliberately failing to meet policy objectives, essentially not solving any of the problems in the 'real' world. See Happaerts *supra* note 23, at 4–5.

compliance.²¹¹ Where policies fail to provide agencies with tools to enforce the law, again substantive effectiveness will be low.²¹² Even where there is high suitability, an inability to enforce makes a law toothless.²¹³ Finally, recognition of framework parameters involves looking at a broader array of factors to examine the context of the policy's implementation.²¹⁴ Do we have the adequate resources and structures to implement the policy? Do appropriate agencies exist? Is there missing infrastructure? A lack of material elements for implementation inevitably equals low substantive effectiveness.

The criteria for assessing prospective political-strategic effectiveness are a little harder to categorize, but Newig suggests three objective criteria likely to demonstrate high political-strategic effectiveness, including the severity of legal consequences in cases of non-compliance, position in the hierarchy of law, and timing. First, high severity of legal consequences in the case of non-compliance signals a strong resolve on an issue.²¹⁵ When a policy has severe consequences for infractions, it conveys the message that the policymakers view the issue as a serious one.²¹⁶ Where these severe penalties (large fines, long sentences) are accompanied by an inability to enforce the law, we might expect high political-strategic efficiency even though substantive efficiency is low.²¹⁷ Second, the position that the law or poli-

211. Newig, *supra* note 19, at 281.

212. Often the means or tools implemented are unrelated to the specific goals of the policy or are primarily economic in nature. Happaerts, *supra* note 23, at 8–9. In order not to interfere with existing administrative and political action, the instruments designed for the policy often do not have teeth. *Id.* at 4.

213. Newig, *supra* note 19, at 284–86 (Even though a German smog act targeting ozone had implemented a related ban on non-low-emission vehicles, Newig found it to be symbolic when the politicians interviewed admitted to their awareness that traffic restrictions were massively violated and not enforced).

214. *Id.* at 281.

215. *Id.* at 286–88 (finding a German Ordinance on Large Combustion Plants to be a highly effective and substantive environmental law on the basis of stringent threshold values for air pollutants for power stations, monitoring by authorities, and serious fines for violators).

216. *Id.* at 289. In the case of the German Smog Act, members of parliament and governmental officials admitted they did not actually want the ordinance to be enforced, which would have required massive traffic bans lasting for several weeks each summer. In contrast, the combustion plant ordinance was easier to enforce, at the source of the pollution (the power plant).

217. *Id.* at 286. Newig found the substantive suitability of the smog act to ultimately be low on the basis of numerous exceptions to the ban on non-low-emission vehicles, yet the act maintained high political-strategic efficiency as measured by the subsequent decline of atten-

cy occupies in the hierarchy of law may play a role. When a policy is embodied in a constitutional amendment or legislation, it may seem more powerful or important than something coming in the form of an administrative regulation or local ordinance.²¹⁸ Policy announcements in statutes or executive orders likely receive a higher profile in the media and appear more important than policies articulated in agency-guidance documents.²¹⁹ Third, looking at the timing of a policy announcement or bill passage provides some guidance on political-strategic effectiveness.²²⁰ Passing laws shortly before an election for example may result in higher political-strategic effectiveness as policymakers seek to visibly take credit for new policies.²²¹

Beyond examining the objective criteria, understanding subjective criteria embodied by legislative intent is important.²²² Such information may be hard to obtain however, without extensive confidential interviews with key policymakers.²²³ Potentially, political effectiveness could be measured by election returns and polling data. Yet, it can be hard to tease out the effect of one policy or law on a candidate's popularity. Moreover, there may be political-strategic gains that are less visible.²²⁴ According to Happaerts, symbolic policies often begin with an initial burst of political will for the institutionalization of the concept, followed by a universal lack of political will to sincerely commit to the policy goals.²²⁵ These measures of political-strategic effectiveness serve as examples but are not an exhaustive list of factors. Indeed, there is a squishiness to trying to assess political-strategic effectiveness. Even though it is challenging, reviewing a pol-

tion by the general public on the issue after legislation was enacted. *See also* Happaerts, *supra* note 23, at 4 (finding sustainability policies to have high political effectiveness on the basis of succeeding in displaying to the public a broad commitment by public officials on the issue of sustainability, despite a low impact effectiveness).

218. Newig, *supra* note 19, at 281.

219. *Id.*

220. *Id.*

221. *See* Happaerts, *supra* note 23, at 4.

222. Newig, *supra* note 19, at 281.

223. *Id.*

224. Blühdorn considers a situation where issues of political effectiveness include generating and stabilizing power. He theorizes that, in some instances, the political elites are actually "victims of unfavorable conditions which are beyond their control" thereby creating replacement policies for more authentic ones. Blühdorn, *supra* note 18, at 256–57.

225. Happaerts *supra* note 23, at 11.

icy for substantive effectiveness is more straightforward than trying to assess the strategic-political benefits a policy might yield.

Happaerts adds to the analysis by looking at the policy goals and the specific policy instruments put into place to achieve these goals.²²⁶ Distinguishing between strategic and operational goals, he says that strategic goals are those that are "abstract and express a government's vision of the future."²²⁷ These policies essentially build upon a model that is meant to stimulate a core issue and hope that the government and non-government actors will "have the goodwill to follow the noncommittal guidelines"²²⁸ (like the Pollution Prevention Act, perhaps). Often in this case, the efforts are not concerned with the substance of the policy at all (as in Newig's substantive suitability analysis) and often include activities such as public participation, translating documents, and administrative support units, such as interdepartmental committees or working groups.²²⁹ There may be a "master document" in the form of a "strategy, plan, or something else," developed to represent the government's efforts to institutionalize the policy goals.²³⁰ Besides these instrumental efforts, Happaerts finds there is often a reliance on economic instruments, the most common in the form of project funding or subsidies.²³¹ A final type of policy instrument includes "information instruments" used to "incite other actors to join the government in their pursuit."²³² This may come down in the form of public information documents or guides to those individuals encouraged to follow the policy.²³³ Happaerts says the "toothless character" of these is further underscored by numerous problems regarding their enforcement with no stringent evaluation instruments implemented.²³⁴

Assessing the degree to which a policy meets its stated goals can be accomplished using Newig's analysis of substantive efficacy by

226. *Id.* at 8.

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.* at 8-9.

232. *Id.* at 9.

233. *Id.*

234. *Id.*

looking to its substantive suitability, enforceability, and framework parameters as described above. Whether the policy fits into the category of best possible action or deliberate strategy can be assessed in part by Newig's analysis of political-strategic efficacy. If the action is deliberately undertaken to deceive the public and pursue a secret agenda, it is more likely that the policy will result in high-political efficacy. If the political effectiveness is low, one can look to other evidence to ascertain whether other options existed at the time the policy was created. In the next section, we apply Newig's approach for evaluating the symbolic nature of New York's policy on environmental justice.

IV. NEW YORK'S ENVIRONMENTAL JUSTICE POLICY: SYMBOLIC OR AUTHENTIC?

With the backdrop of symbolic politics and a general understanding of environmental justice policies, this section examines whether New York's environmental justice policy is something authentic with meaning and substance or just another example of symbolic politics.²³⁵ Evaluation of the substantive and political efficacy of the decade-old policy provides insight as to the functional versus symbolic nature of the policy. We begin by providing the general construct and timing of New York's policy and then move to its evaluation. We conclude by considering whether the policy in its primarily symbolic form has any functional value in a symbolic state.

A. The Timing of Policy

Following the 1987 seminal United Church of Christ study on toxic waste and race, the early 1990s were abuzz with talk of environmental justice, including numerous scholarly symposia,²³⁶ the

235. See Steve R. Johnson, *The Dangers of Symbolic Legislation: Perceptions and Realities of the New Burden-of-Proof Rules*, 84 IOWA L. REV. 413, 457 (1999) (assessing a section of the tax code to determine whether it has any substantive meaning and concluding that it does not).

236. See e.g., Symposium, *Environmental Justice: The Merging of Civil Rights & Environmental Activism*, 9 ST. JOHN'S J. LEGAL COMMENT 1 (1993-1994); Symposium, *Third Annual Stein Center Symposium on Contemporary Urban Challenges*, 21 FORDHAM URB. L.J. 425 (1994); Symposium, *Environmental Justice*, 5 MD. J. CONTEMP. LEGAL ISSUES 1 (1994); Symposium, *Earth Rights and Responsibilities: Human Rights and Environmental Protection*, 18 YALE J. INT'L L. 213 (1993); Symposium, *Race, Class, and Environmental Regulation*, 63 U. COLO. L. REV. 839 (1992).



Figure 1: Community residents rally in 1997 to demand that the Manhattanville Bus Depot invest in alternative fuels to protect Harlem schoolchildren from elevated exposure to diesel fumes.²³⁷

EPA's 1992 creation of its Office of Environmental Justice, President Clinton's 1994 Executive Order, and the emergence of environmental advocacy groups.²³⁸ States were beginning to respond by enacting their own environmental justice legislation and related policies.²³⁹ In 1998, community representatives met with New York State officials to discuss their concerns surrounding environmental justice²⁴⁰ and WE ACT, a non-profit environmental justice organization "negotiated with Governor Pataki and the DEC to create an Environmental Justice Advisory Committee."²⁴¹ In 1999, Governor Pataki and DEC Commissioner John Cahill announced the creation of a New York State program to address environmental justice concerns, which included the formation of an Environmental Justice Advisory Group to provide recommendations on how to incorporate community participation and environmental justice concerns into the state's permitting process. In the DEC press release announcing the new program, Commissioner Cahill stated:

237. WE ACT FOR ENVIRONMENTAL JUSTICE, 17th ANNIVERSARY REPORT 9 (photo) (2005).

238. See *supra* note 33.

239. See *supra* § II.B.

240. Policy 29, *supra* note 11, § II.

241. WE ACT, 17th ANNIVERSARY REPORT, *supra* note 236, at 18.

Governor Pataki recognizes the importance of environmental justice and the need for community involvement in permitting decisions that can potentially impact the environment and public health This program will ensure that local communities are given an opportunity to express their concerns and that those concerns are considered when making permitting decisions.²⁴²

Cahill also “said that addressing environmental justice and facility compliance issues early on in the permitting process is the most effective strategy for preventing or reducing disproportionately adverse environmental effects on low-income and minority communities.”²⁴³ The response to the announcement by environmental groups was strongly positive. The board president of the New York capital region’s Arbor Hill Environmental Justice Corporation, stated, “The Governor’s commitment to environmental justice is second to none. George Pataki has a real appreciation that all New Yorkers must be treated fairly and meaningfully involved in development decisions and the implementation of environmental laws.”²⁴⁴ The chairman of the New York League of Conservation Voters (an influential political group who had recently endorsed the Governor) said:

I think it is very smart for Governor Pataki to move aggressively on the environmental justice issue. I know both the Governor and Commissioner Cahill consider the issue very important, as does the entire environmental community. Setting up a program that will fully evaluate the environmental justice impact of projects, early in the permitting process, is a good first step in the effort to integrate these considerations into all government decision making.²⁴⁵ The program would eventually “formalize existing practices within the state’s permitting process and develop new policies and strategic initiatives . . . in ensuring fair treatment of all individuals . . .”²⁴⁶ This formalization came down in 2003 in the DEC’s policy on environmental justice, Commissioner *Policy 29*, Environmental Justice and

242. NYS DEC Press Release, *supra* note 25.

243. *Id.*

244. Aaron Mair, Board Member of the NY League of Conservation Voters and Board President of the Arbor Hill Environmental Justice Corporation (in a 2002 press release announcing the League’s early endorsement for George Pataki for Governor), *available at* <http://nylcw.com/Politics/2002/pataki.html>.

245. NYS DEC Press Release, *supra* note 25.

246. *Id.*

Permitting (*Policy 29*). To assess whether *Policy 29* is authentic politics and a genuine effort by the DEC and the governor's office to improve environmental justice outcomes or just another example of symbolic politics, we look at the substantive efficacy of the policy.²⁴⁷

B. *Policy 29's Substantive Efficacy*

The first step in assessing whether a policy is symbolic involves examining whether the substance of the policy could actually produce its desired outcome.²⁴⁸ Symbolic politics is the most obvious where a policy's goals are not achievable even on paper.²⁴⁹ Additionally, a hallmark of symbolic politics is that those involved in crafting and supporting the strategy understood at its implementation or passage that it would not be effective.²⁵⁰ Using Newig's elements as the basis of our analysis, we evaluate the substantive efficacy of the policy by looking to its substantive suitability (the extent to which the substantive requirements of the policy are actually related to the policy's goals), its enforceability, and the policy's framework (does the policy create an advisory structure or something more concrete like an enforcement agency?). In other words, we are asking whether the policy contains the proper tools for achieving its goals.

Looking to the substantive suitability of the policy, it is helpful to first identify the goals of the policy and the mechanisms or tools involved in its implementation. We can then evaluate whether the tools implemented are (or have been) capable of meeting the policy goals. *Policy 29* states: "This policy is specifically intended to ensure that the DEC's environmental permit process promotes environmental justice . . . This policy also encourages DEC efforts to implement other programs, policies, regulations, legislative proposals and activities related to environmental justice."²⁵¹ Based on these policy statements, the policy, in effect, should do two things: (1) ensure that the state's permitting process promotes environmental justice and (2) result in supplemental environmental justice activities within the state. The

247. See *infra* § (IV)(B).

248. *Id.*

249. *Id.*

250. See *infra* § (IV)(B).

251. *Policy 29*, *supra* note 11, § (III).

policy outlines fifteen directives for achieving these goals.²⁵² These directives can be categorized into four types of activities: those that target permit applicants regarding the required procedures surrounding the state's policy on environmental justice, those that target the environmental justice community to enhance communication and public participation, those that enhance the state's permitting review process to incorporate environmental justice, and those that require future policy developments.²⁵³

Are these directives capable of reaching the policy's first-stated goal of ensuring that the state's permitting process *promotes* environmental justice? As outlined in Section II, the modifications to the state's permitting process under the policy include the requirement that permit applicants submit a public-participation plan for certain activities proposed in environmental justice communities as well as modifications to the DEC's application of the SEQRA process.²⁵⁴ The public-participation plans require the applicant to identify all stakeholders to the proposed action, to post project-related information in plain language (and translated when necessary) within the community, and to hold public informational meetings to keep the public informed throughout the process.²⁵⁵ As the SEQRA process allows agencies to require the use of a longer Environmental Assessment Form in lieu of a shorter form for actions the agency deems appropriate, *Policy 29* formalizes this option by requiring project applicants to complete the longer form for all unlisted actions proposed in identified environmental justice communities.²⁵⁶ *Policy 29* also requires that permit applicants outline how the environmental justice community will be affected and hold public hearings on the proposed activity where it is determined a significant adverse environmental impact will occur and an EIS is required.²⁵⁷

In assessing whether these directives are capable of achieving the policy's goal of promoting environmental justice, it is helpful to reconsider the policy's definition of environmental justice: "the fair

252. *Id.* § (III)(B)(1-15).

253. *Id.*

254. *See supra* § (II)(C)(1).

255. *Id.*

256. *Id.*

257. *Id.*

treatment and meaningful involvement of all people regardless of race, color, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.”²⁵⁸ Fair treatment is further defined to mean “no group of people, including a racial, ethnic, or socioeconomic group, should bear a disproportionate share of the negative environmental consequences resulting from industrial, municipal, and commercial operations or the execution of federal, state, local, and tribal programs and policies.”²⁵⁹ It would be difficult to argue that the policy’s directives on paper do not *promote* these concepts. After all, one can construe “promote” to mean to simply encourage, support, or advertise. The policy never actually states that its goal is to address or rectify instances of environmental injustices. With that, it is fair to conclude that the policy’s directives are capable of producing the policy’s goals, thereby demonstrating high substantive suitability.

However, if we look beyond the goals actually stated in the policy to what the policymakers were promoting around the time the policy was being developed, the public’s perception of what the policy would actually achieve may have been different from what was stated in the policy. In 1999, when DEC Commissioner Cahill announced the new state program, he noted that “addressing environmental justice and facility compliance issues early on in the permitting process is the most effective strategy for preventing or reducing disproportionately adverse environmental effects on low income and minority communities.”²⁶⁰ Based on this statement, the general public likely expected that addressing environmental justice issues and facility compliance would be a priority under the state’s then-forthcoming environmental justice policy. Yet, in regards to facility compliance, the policy states only that supplemental enforcement and compliance inspections will occur where there is reason to believe a facility is in non-compliance.²⁶¹ There are no mandatory compliance inspections of facilities in environmental justice communities nor are there requirements for permit applicants to mention facilities out of compli-

258. *Policy 29*, *supra* note 11, § (III)(A)(2).

259. *Id.*

260. NYS DEC Press Release, *supra* note 25.

261. *Policy 29*, *supra* note 11, § (III)(B)(10).

ance in the vicinity of their proposed project. And, environmental justice is only *promoted* under the policy.

The second policy goal was to *encourage* the DEC's efforts to implement other programs, policies, regulations, legislative proposals, and activities related to environmental justice. The directives outlined in the policy included developing a formal training on environmental justice to affected staff in a number of the DEC's divisions, drafting legislation to establish funding and criteria for a technical assistance grant program for assisting the public in the permit review process, and promulgating regulations to address disproportionate adverse environmental impacts on environmental justice communities.²⁶² Here again, it would be difficult to argue that on paper the policy directives are not capable of achieving the desired or stated goals. If the policy's goal is merely to *encourage* the development of other programs, regulations, and legislative proposals, it certainly achieves this goal through the stated directives to begin agency training programs and the drafting of legislation and regulations. The problem is that many members of the general public, are apt to believe that an order to develop draft regulations to address disproportionate adverse environmental impacts will actually result in the regulation being produced, thereby actually addressing the problem at hand.

Newig's second element in determining the substantive suitability of a policy tells us to look to the policy's enforceability.²⁶³ *Policy 29* sets forth 15 directives.²⁶⁴ The policy contains two measures directly related to ensuring that the state's permitting program promotes environmental justice, including the requirements for enhanced public participation plans and completion of lengthier environmental assessment forms.²⁶⁵ The enhanced public participation plans are to be completed by the project applicant and submitted to the DEC as part of the permitting process.²⁶⁶ However, there is no enforcement

262. *Id.* § (III)(B)(9), (12), (13).

263. *See supra* § (III).

264. *See supra* note 252.

265. *See supra* § (II)(C)(1).

266. *Id.*

mechanism to ensure the project applicant executes the participation plan.²⁶⁷

The DEC is also responsible for processing and either approving or denying the permit applications and thus oversees preparation of the environmental assessment forms. With regard to those directives encouraging DEC efforts to implement other environmental justice programs, policies, and the like, there does not appear to be any “enforcement stick” if the DEC does not follow through. In fact, the policy uses a lot of soft language such as:

This policy shall be reviewed at least 18 months from the effective date and be revised, *as necessary*, to *consider* the policy’s applicability to various DEC Programs, incorporate *evolving* information on environmental justice[,] . . . reflect the *best available* environmental information and resources[,] . . . [and] DEC shall *periodically* evaluate the need for further revision . . . as implementation *experience is gained*.²⁶⁸

More than a decade has passed since the policy’s effective date, yet the policy has never been revised, has never been applied to other DEC programs, and has not been amended to incorporate new information or resources. However, the policy does not explicitly state that these things must be achieved. The policy is only to be revised *as necessary*; the DEC should only *consider* whether the policy is applicable to other agency programs; and new information and resources are only to be added when *experience is gained*.

Where explicit, concrete directives exist, such as the one to “establish two work groups to assist DEC to develop and incorporate critical environmental justice information into the DEC environmental review process,”²⁶⁹ the DEC has followed through.²⁷⁰ The problem is that the policy directives continue with vague requirements stating, “results will be considered by the DEC Commissioner when revising this policy.”²⁷¹ The DEC may have *considered* the work groups’ recommendations, but they were sparsely integrated into the

267. *Id.*

268. *Policy 29, supra* note 11, § (III) (emphasis added).

269. *Id.* § (III)(B)(8)(1).

270. *See supra* § (II)(C)(1).

271. *Policy 29, supra* note 11, § (III)(B)(8).

final policy²⁷² and the policy has never been amended. Even if the DEC failed to enforce the policy's directives, the policy explicitly states that it "does not create any right or benefit, substantial or procedural, enforceable by law or equity by a party against the DEC or any right to judicial review."²⁷³ Thus, on the enforceability question, *Policy 29* fares poorly—indicating low substantive efficacy and high likelihood of symbolic politics.

The third and final element of Newig's assessment of substantive efficacy directs us to look at the framework of the policy.²⁷⁴ To do so, we examine an array of factors relating to the context of the policy's implementation. Are there adequate resources and structures to implement the policy? Do appropriate agencies exist? Is there missing infrastructure? Although on paper the DEC appears to have put into place the mechanisms necessary for achieving the policy's loosely stated goals, Happaerts adds to the analysis by examining the nature of the policy's goals (either strategic or operational).²⁷⁵ In doing so, we can assess whether the policy is merely strategic in presenting a government's vision of the future or is enforcing operational procedures toward a concrete goal.²⁷⁶ If the policy's goals appear to be strategy-oriented rather than operational, the likelihood of symbolic politics is increased.²⁷⁷

In the case of *Policy 29*, the goals of *promoting* environmental justice and *encouraging* the development of related activities most certainly fall into the category of strategic over operational. There are no operational goals such as reducing the number of hazardous facilities by "x" amount in an environmental justice community with "y" number of facilities. As is often in these types of strategic policies, the DEC is promoting the concept of environmental justice (like sustainability or pollution prevention) hoping the governmental and non-governmental actors "will have the goodwill to follow these non-committal guidelines."²⁷⁸ Similarly, as Happaerts suggests is the norm

272. See *supra* § (II)(C)(1).

273. *Policy 29*, *supra* note 11.

274. See *supra* Section III.

275. *Id.*

276. Happaerts, *supra* note 23, at 8.

277. *Id.*

278. *Id.*

with strategically symbolic policies, the efforts are not concerned with the substance of the policy at all²⁷⁹ (such as reducing disparate concentrations of environmentally hazardous facilities). Instead, they include activities such as public participation, translating documents, and developing administrative support units such as interdepartmental committees or working groups. Besides these instrumental efforts, symbolic policies often include a reliance on economic instruments, the most common being in the form of project funding or subsidies,²⁸⁰ as is the case in the DEC's environmental justice program today.²⁸¹ The DEC's Environmental Justice Community Impact Grant Program (apart from the policy) provides grants from \$2,500 to \$50,000 to community-based organizations for research and education projects that address environmental justice.²⁸² These community grants, although undoubtedly important to improving conditions in environmental justice communities, do little to address the disparate concentrations of pollution allocated under the state's permitting program.

In determining how *Policy 29* ranks in overall substantive efficacy, the analyses of substantive suitability, enforceability, and overall policy framework bring about mixed results. *Policy 29* appears to rank high for substantive suitability because the policy's directives are suited to the goals of policy, but only because the goals are to *promote* environmental justice in the state's permitting process and to *encourage* additional activities (draft regulation and legislation, programs, etc.) related to environmental justice. The policy goals do not explicitly address environmental justice issues or disproportionate distributions of environmental hazards amongst minority and low-income communities, despite what the DEC Commissioner promoted during the policy's development. Similarly, the policy would rank high for its enforceability, but only because the only things to enforce are the *promotion* of environmental justice in the agency's permitting program and the *encouragement* of developing related programs and ac-

279. *See id.*

280. *Id.* at 8–9.

281. In 2014, Governor Andrew Cuomo committed an additional \$1 million for the grant program. *See NY DEC Environmental Justice Community Impact Grant Program*, <http://www.dec.ny.gov/public/31226.html> (last visited October 24, 2014).

282. *Id.*

tivities.

In terms of assessing the policy's overall framework under Newig's analysis, there is no lacking infrastructure or instruments to achieve the policy's stated goals as the DEC implemented an Environmental Justice Coordinator and an Office of Environmental Justice to aid in the implementation of the policy's directives. Under Happaert's analysis, however, we find that the overall policy framework is strategic over operational and is primarily comprised of administrative elements. It would appear that the strategic nature of the policy would necessarily outweigh whether the policy directives were related to the policy's goals and if these directives were accompanied by an enforcement stick. It does not matter if the directives are suitable and enforceable if the goals are not what the public perceives them to be. *Policy 29's* stated goals are vague—to *promote* and to *encourage*—whereby the public's perception of the policy's goals is most likely not so squishy. If the government develops a policy on environmental justice, the general public should expect a policy that actually addresses issues of environmental justice, and rightly so, especially when the policymaker is touting one that will.

C. Policy 29's Political-Strategic Efficacy

Symbolic policies often begin with an initial burst of political will for the institutionalization of the concept at issue, followed by a lack of political will to sincerely commit to the policy goals.²⁸³ Without backing or widespread political support, there is no political capital invested to build a powerful policy.²⁸⁴ The result is a lack of capacity (no personnel, budget, or time) to see the policy through. It is when this low capacity occurs that the "intentional aspect of symbolic politics becomes visible."²⁸⁵ This assessment describes the political story of *Policy 29*. New York's stance on environmental justice was being promoted before the policy was ever released. The initial burst of political will for institutionalizing environmental justice came in 1999 in response to increased pressure from state environmental justice

283. Happaerts, *supra* note 23, at 11.

284. *Id.* at 12.

285. *Id.*

groups. It was then that Governor George Pataki and DEC Commissioner John Cahill began touting the state's new environmental justice program, four years before the policy was ever released. With the program just getting off the ground Cahill said, "In naming an environmental justice coordinator, DEC is moving ahead with our goal of developing and implementing a state program to ensure that the public's rights are not overlooked in the permitting process" and stated that "addressing environmental justice and facility compliance issues . . . is the most effective strategy for preventing or reducing adverse environmental effects on low income and minority communities."²⁸⁶ The state's environmental groups rallied around the new program, including representatives from the highly visible New York City group, WEACT for Environmental Justice, and the New York League of Conservation Voters.²⁸⁷ Yet, when it came time to sincerely commit to these goals, political will seemed to flounder and the policy that was released was watered down, promising only the *promotion* and *encouragement* of environmental justice principles in the state's environmental process.

The final policy ignored some of the pressing recommendations of the Environmental Justice Advisory Group developed by Governor Pataki and Commissioner Cahill, including the recommendation to define environmental justice communities geographically by evaluating the distribution of toxic releases and demographic data.²⁸⁸ The State Assembly's response to the release of *Policy 29* serves as another indicator that expectations for the policy had been greater. For ten years prior to the release of the state's policy, the State Assembly passed similar legislation on environmental justice (only to have it die in the Senate).²⁸⁹ The year *after* the DEC policy was released, the Assembly *expanded* its environmental justice legislation to include a bill requiring the DEC to publish a list of areas most adversely impacted by existing environmental hazards,²⁹⁰ to legislatively establish a state environmental justice policy and environmental justice advisory

286. NYS DEC Press Release, *supra* note 25.

287. *Id.*

288. See ENV'T'L JUSTICE ADVISORY GROUP, RECOMMENDATIONS, *supra* note 86, at 9-11.

289. See *supra* § (I).

290. A. 7862, 227th Sess. (N.Y. 2004).

group,²⁹¹ and to require the state's permitting process to consider whether environmental actions would disproportionately affect minority or low-income populations.²⁹² Each of these bills, too, died in the Senate.²⁹³ More recently, the Assembly has used the DEC's *inaction* in relation to its 2003 environmental justice policy as the basis for its annual passage of environmental justice legislation.²⁹⁴

So while the DEC (and the governor) may have intended to take the issue of environmental justice off the table by creating an agency policy, that at least one political group in power (the Assembly) was not convinced that it was a meaningful policy. After all, the Assembly continued to push to pass legislation on the topic. Despite this push, the Assembly majority passed the executive budget *without* any funding to advance the environmental justice policy,²⁹⁵ raising questions as to the legitimacy of its attempts to push forward the state's policy. After all, it has been made quite clear that the Senate will continue to abstain from passing any of the Assembly's proposed legislation on the topic. By proposing environmental justice legislation, the Assembly comes across as in favor of effectuating real change, yet when the governor's executive budget proposed funding for the policy's projects, the Assembly fails to pass it in the final budget.

Although the then DEC Commissioner criticized the Assembly for its lack of financial support,²⁹⁶ the governor's proposed 2003–2004 budget did not provide for funding specifically for grants to enhance the participation of environmental justice communities in the permitting process.²⁹⁷ Instead, the governor proposed a meager \$500,000 for “urban environmental initiatives” identified in *Policy 29*,²⁹⁸ which was adopted in the final enacted budget.²⁹⁹ Ultimately,

291. A. 8805, 227th Sess. (N.Y. 2004).

292. A. 5938, 227th Sess. (N.Y. 2004).

293. See *supra* § (I).

294. A. 2003, 227th Sess. (N.Y. 2004).

295. Erin M. Crotty, *Environmental Justice Initiative Needs Funding*, ALBANY TIMES UNION, June 2, 2003, at A6.

296. *Id.*

297. Governor George E. Pataki, *2003–2004 New York State Executive Budget*, 91 NEW YORK STATE DIVISION OF THE BUDGET, <http://www.budget.ny.gov/pubs/archive/fy0304archive/fy0304littlebook/Overview0304.pdf>. (Last visited October 24, 2014) [hereinafter “Executive Budget”].

298. *State of New York, Act, January 29, 2003*, 53–54. <http://www.budget.ny.gov/>

the \$500,000 paled in comparison to what was allocated to other environmental programs, including \$15 million for the development of the Hudson River Park; \$10 million for State Parks Infrastructure projects; \$5 million for the Hudson River Estuary Management Plan; \$5 million for municipal parks and historic preservation projects; \$5 million for waterfront revitalization projects; and \$750,000 to restore and preserve historic barns.³⁰⁰ The specific “initiatives” for which the \$500,000 was to be spent on is not exactly clear, although the DEC offers a number of community grants related to environmental justice.³⁰¹

In evaluating the symbolic nature of *Policy 29*, it may be beneficial to imagine what an operational policy might actually look like, one where the policymaker actually intended for a substantive outcome. A sound environmental justice policy and associated methodological practices might have looked something like the following: the DEC identifies environmental justice communities through the evaluation of socioeconomic and demographic factors *in addition to* an evaluation of the distribution of toxic releases and disparate concentrations.³⁰²

pubs/archive/fy0304archive/fy0304appropbills/ted.pdf (last visited October 24, 2014). Note, there are no “urban environmental initiatives” explicitly outlined in *Policy 29*.

299. Executive Budget, *supra* note 297.

300. *Id.* at 90–91. Based on this non-exhaustive list, Pataki ranked (or at least priced) preserving barns higher than supporting the participation of minority and low-income communities in the state’s environmental permitting process. Yet, the governor was not touting the preservation of these barns from his political podium as he was the state’s forthcoming policy on environmental justice.

301. For a list of previous grants funded, see Department of Environmental Conservation, *Winners of Past Environmental Justice Community Impact Grants*, <http://www.dec.ny.gov/public/31403.html> (last visited October 24, 2014).

302. A subsequent gubernatorial administration did initiate what appeared to be substantive action along these lines. In 2008, interim Governor David Patterson convened an Environmental Justice Interagency Task Force. The Task Force met with one hundred stakeholders (community groups, businesses, and environmental groups) to collect recommendations on issues of air, water, land, food, and toxics. Within these recommendations were calls to the DEC for the creation of a state environmental justice map and database, as well as for the prioritization of enforcement actions and pollution reduction programs in environmental justice communities. In response, the Task Force called for the establishment of an interagency environmental justice Mapping Work Group, to be chaired by the DEC. The Map Group was directed to develop *new* criteria for defining environmental justice areas and to create maps representing Environmental Justice areas using these criteria. All relevant data and tables, including information related to polluting facilities, was to be amassed in an Environmental Justice GIS Database to facilitate access to other State agencies and the public. The data and methods would be used to identify “communities of concern” or “communities of disproportionate impact.” See

The DEC also establishes an Office of Environmental Justice to oversee facility compliance in these communities, the permitting process for proposed activities within these communities, and to respond to community concerns specific to these areas.

Instead of this hypothetically sound policy, the governor advocated for and the DEC adopted a very different policy. They established an environmental advisory group and two working groups to devise proposed means for identifying the environmental justice community and addressing environmental justice within the state, yet never adopted an overwhelming majority of their recommendations, including the most pressing one of identifying communities of concern based on disparate impacts and health effects. Instead of producing an office to oversee substantive issues such as facility compliance, permitting activities, and community outreach in environmental justice communities, the DEC developed the Office of Environmental Justice that answers an environmental-justice hotline, trains agency staff on environmental-justice issues, translates documents into Spanish, and oversees grant funding. Although these activities may be of value, they will not directly address disproportionately adverse effects on low-income and minority communities.

In terms of the subjective issues surrounding the political efficacy of *Policy 29*, we cannot say for certain that the policy's promotion and development positively influenced the governor's career. It may be helpful to gain some sense of the legitimacy of the governor's pro-health and environment trademark by considering the circumstances surrounding his tenure and the environmental policies he supported. Doing so brings about mixed reviews. Pataki's "legacy" is centered on his environmental advocacy and the development of policies to protect the environment.³⁰³ He is perhaps most notably credited with the

generally NYS Environmental Justice Interagency Task Force Draft Recommendations June 10, 2009, http://www.dec.ny.gov/docs/permits_ej_operations_pdf/drftplnejintertskfrce.pdf (last visited October 24, 2014). These initiatives appear to have been stifled with a change in gubernatorial leadership and an accompanying lack of support for environmental justice initiatives.

303. See, e.g., Jacob Gershman, *Green Pataki Taking a Cue from Giuliani*, NEW YORK SUN, August 15, 2007, available at <http://www.nysun.com/new-york/green-pataki-taking-a-cue-from-giuliani/60515/> (on the issue of Governor Pataki and former DEC Commissioner Cahill starting their own environmental consulting business); The Audubon Society of New York, *Audubon Honors George Pataki & Peter Berle*, November 5, 2008, available at <http://www.audubon.org/newsroom/press-releases/2008/audubon-honors-george-pataki-peter-berle>

preservation of 900,000 acres of open space, primarily in the Adirondack region.³⁰⁴ During his tenure, Pataki also invested more than \$13.4 billion in environmental protection, including funding the state's brownfield program, the state's Clean Water/Clean Air Bond Act, expanding the state's park system, and adopting policies to encourage pollution reduction measures and green infrastructure by industry.³⁰⁵

Pataki may, however, not be as green as he is sometimes portrayed to be. The governor's confident rhetoric about protecting the environment did not always match the results. He has been criticized for weakening the enforcement capabilities of the DEC through a reduction in staff and enriching businesses through his brownfield legislation.³⁰⁶ He is said to have "failed to deliver on [environmental] promises" in his efforts to "create a friendly environment for business."³⁰⁷ In 2004, Pataki was criticized for caving to "immense pressure from the chemical industry, specifically the American Plastics Council,"³⁰⁸ when he vetoed a bill that would have restricted the use of PVC pipe in the state, which is believed to have dangerous effects on human health and the environment.³⁰⁹ And in 2003, Pataki was criticized for reopening an East Harlem bus station in a low-income and minority community already home to similar facilities, while

berle (honoring Pataki for his many "cutting edge policies in conservation" during his tenure as governor); Michael Cooper, *The Shadow of His Predecessor Dominates the Pataki Legacy*, NEW YORK TIMES, July 20, 2005, http://www.nytimes.com/2005/07/29/nyregion/29pataki.html?_r=0 (stating, "If there is one area where Mr. Pataki will leave a lasting imprint, . . . it is as a conservationist.").

304. Cooper, *supra* note 303.

305. See Governor George E. Pataki, *2005-06 New York State Executive Budget*, <https://www.budget.ny.gov/pubs/archive/fy0506archive/fy0506littlebook/lb0506.pdf> (Last visited October 24, 2014).

306. Gershman, *supra* note 303.

307. Anthony DePalma, *Pataki's Various Shades of Green*, N.Y. TIMES, June 19, 2005, <http://www.nytimes.com/2005/06/19/nyregion/19pataki.html?pagewanted=all>.

308. Center for Health, Environment and Justice, Citizens' Environmental Coalition, Healthy Building Network, New York Committee for Occupational Safety & Health, Uniformed Fire Officers Association, *Governor Pataki Fails to Protect Health of Workers, Firefighters, and Residents Across NY by Vetoing PVC Pipe Restriction Law*, Press Release, December 16, 2004, available at http://www.chej.org/ppc/docs/pvc_polyvinyl_chloride_or_vinyl/PVC_NYPNR.pdf.

309. The Plastic Pipe Restriction Law, A 11660/7577, would have restricted the use of a number of plastics.

closing a facility in a non-residential Hudson area.³¹⁰ Pataki's record of fulfilling his environmental promises is also lackluster. Pataki vowed he would establish strict standards for mercury emissions from power plants, enforce environmental regulations, and punish polluters; yet, Pataki failed to do so.³¹¹

In sum, public opinion on Pataki's environmental record is mixed, making it difficult to weigh the legitimacy of his environmental commitment with the symbolic nature of the policies he supports. Whether his environmental advocacy benefited his political career is also unclear. Pataki publicly flirted with the idea of running for president near the end of his gubernatorial term.³¹² Public support for Pataki, however, dropped in 2005 to "its lowest level since his first year as governor. . . ."³¹³ When offered the choice of Governor Pataki or former New York City Mayor Rudolph W. Giuliani as a presidential candidate, 55% of those polled chose Giuliani, whereas only 16% chose Pataki.³¹⁴ One cannot conclude one way or another whether Pataki's promotion of his environmental justice policy, or its perceived failure, played a role in either the advancement or demise of his political career.

D. Policy 29: *Symbolic or Not?*

Applying Newig's analysis, we cannot conclude that *Policy 29* is merely symbolic politics because the policy directives are aligned with and are capable of achieving the policy's stated goals. However, Newig's analysis is inadequate for assessing symbolic politics because

310. Leon Tulton, *Bus Depot Reopens*, EAST HARLEM NEWS, September 25, 2003, http://www.east-harlem.com/mt/archives/2003_09.html.

311. DePalma, *supra* note 307. Erin Crotty, former DEC Commissioner during Pataki's administration is also criticized for failing to ward off interference from industry opposed to tough environmental regulations and for "lacking sufficient independence from the governor's office[.]" Anthony DePalma, *Head of Environmental Agency Plans to Step Down*, N.Y. TIMES, January 15, 2005.

312. Gershman, *supra* note 303.

313. A New York Times public poll found that the public was dissatisfied with Pataki for a number of reasons, including his stance on the death penalty, late budgets, and the inability of lawmakers to agree on major issues such as school financing. Michael Slackman & Marjorie Connelly, *Pataki's Rating Declines Sharply in Poll of State*, N.Y. TIMES, February 15, 2005, <http://www.nytimes.com/2005/02/15/nyregion/15york.html>.

314. *Id.* Twenty-three percent of those polled said they would not want either to run for president.

it does not consider the whole picture of the legislation or policy at issue. His typology fails to ask the fundamental question of whether the policy does what it publicly purports to do. That is, he misses a large category of symbolic politics where the legislators represent a law as being more substantive than it actually is. *Policy 29* does in fact correspond to the more general definition of symbolic politics offered initially by Edelman,³¹⁵ and later by Blühdorn³¹⁶ where the general public is deceived by the politico, either deliberately as a matter of strategic choice or due to inescapable pressures.

It is admittedly difficult to assess whether political actors are being strategic in pursuance of grander career goals, taking a political stance on the issue of protecting minority and low-income communities from adverse environmental conditions, or attempting to take the issue off the table until a better solution could be found (or some combination thereof). What is clear with *Policy 29*, however, is that the executive branch held it up as something that it was not while simultaneously building a reputation as being environmentally protective. The general public could not have grasped the meaningless nature of the policy's inconspicuous and vaguely phrased goals (to "promote the concept of environmental justice"), especially considering how the governor and DEC Commissioner had touted the policy as "the most effective strategy for preventing or reducing disproportionately adverse environmental effects on low-income and minority communities."³¹⁷ Such a scenario, where the politico touts a specific objective to be achieved through a policy, only to release a much different and watered down policy with goals so vaguely stated that the public could not possibly grasp their meaningless character, serves as a useful future prong for analyzing the symbolic nature of a policy.

V. CONCLUSION

The DEC's policy may package what appears to be a number of suitable means appropriate for addressing environmental justice. These include measures to enhance public participation as well as

315. See *supra* note 23.

316. See *supra* note 18.

317. DEC Press Release, *supra* note 25.

methods to enhance the permitting requirements in these communities. In a perfect world, increasing the residents' knowledge of environmental toxins in their communities would arm them with the proper weapons and ammunition to defend themselves against an impending attack. In the case of *Policy 29*, however, these residents are given little more than access to a hotline to call between nine and five and to have a few administrative documents translated for them. The primary source of information regarding potentially toxic projects in their community will come from the permit applicant proposing the project. The heightened permit requirements, arguably the most substantive means for addressing environmental justice, in effect do little, if anything, to address issues of environmental injustice. But, does the state's policy do anything positive in terms of addressing environmental justice? The answer must be "yes." By creating the policy, the state is acknowledging that minority and low-income communities are exposed to a disparate amount of adverse environmental effects. The state is now offering grants to these communities to improve their environment. A dialogue is occurring around the plight of these communities. And there is an Office of Environmental Justice, even if it does little more than translate documents and answer phone calls from residents.

Despite the potential benefits arising from the policy, the deceptive and symbolic nature of *Policy 29* should not be overlooked. First and foremost, the general public may (at least for a period of time) believe that the state is actually going to address the disproportionate exposure to environmental hazards. Little do voters know, the state is not even assessing where these disproportionate exposures are occurring under the policy.³¹⁸ The real danger of the symbolic nature of

318. At some point, states should revisit the very definition of environmental justice. It is conceivably too narrow to define an environmental justice community demographically, without regard for the distribution of hazardous pollutants and associated health risks within these communities. It is at the same time perhaps too restrictive to define an environmental justice on the percentage of minority or low-income residents, excluding neighborhoods and communities outside of these parameters. It is also perhaps too narrow to discuss only environmental justice in terms of the distribution of environmental hazards or pollutants as *Policy 29* does, without regard for other issues often faced by low-income and minority environmental justice communities, such as lack of green spaces, parks, access to health care, and even a scarcity of trees in many inner-city urban environments. Honing in on what environmental justice actually means, in the literature and in state policies, could help guide the way to more authentic policies capable of identifying problems and the solutions that would address them.

the policy is that it has the potential to thwart development of authentic policies related to environmental justice and deter continued action of investment on behalf of state representatives and community groups. This can occur out of the public's disillusionment with the state and its current lackluster performance on addressing environmental justice, or out of a misconception that the state is already handling the issue with its current policy—if the state already has an environmental justice policy, then the general public may be less apt to push for legislation or a new policy. Further, the resources being used to administer the current policy (office staff, translating permit application process documents, etc.) are currently unavailable to implement environmental justice programs that may have more of a direct impact on community enhancement (e.g., pollution monitoring, planting trees to absorb pollution, health care related to effects of air pollution—i.e., respiratory illness).

Other implications of the current symbolic policy include the souring public perceptions of the agency's ability to carry out the task, resulting in potential long-term negative effects on the engaged involvement of the electorate. This can be politically damaging because it undermines public trust in political institutions and impairs the ability of citizens to make effective use of their democratic rights. Lastly, the practice is simply morally rotten because it aims to distort political realities, deceive righteous citizens and conceal hidden agendas. Whether the symbolic nature of New York's environmental justice policy was intentional or not, its structure allowed for politicians to vote for civil rights and environmental protection without substantively addressing either.