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June 18, 2020

The Honorable Karen E. Spilka
President of the Senate
24 Beacon Street, Room 332
Boston, MA 02133

The Honorable Robert A. DeLeo
Speaker, Massachusetts House of Representatives
24 Beacon Street, Room 356
Boston, MA 02133

The Honorable Michael J. Rodrigues
Chair, Senate Committee on Ways & Means
24 Beacon Street, Room 212
Boston, MA 02133

The Honorable Aaron Michlewitz
Chair, House Committee on Ways & Means
24 Beacon Street, Room 243
Boston, MA 02133

Re: Race as Criterion in Environmental Justice Bills is Crucial and Constitutional

Dear Senate President Spilka, Speaker DeLeo, Chair Rodrigues, and Chair Michlewitz,

On behalf of the Massachusetts Environmental Justice Legislative Table and undersigned bill sponsors and individuals, we write in support of environmental justice legislation for the Commonwealth of Massachusetts—specifically H.4264, S.464, and S.453. We applaud the actions of the Joint Environment, Natural Resources, and Agriculture Committee to report these bills favorably to the House and Senate Committees on Ways and Means. These environmental justice bills are a necessary response to decades of actions having a disparate environmental impact on low-income residents, residents lacking English language proficiency, and communities of color in Massachusetts.

Notwithstanding the favorable report on the bills, we understand that concern has been raised about the constitutionality of using race as one criterion in designating neighborhoods as environmental justice populations.[1] We also understand this concern to be based on the United States Supreme Court decision in *Fisher v. University of Texas at Austin*[2] and actions by the state of California to exclude race from its environmental mapping tool. The purpose of this letter is to explain why using race as one criterion in designating environmental justice populations is both crucial and meets constitutional standards as set forth by the Supreme Court of the United States. Indeed, contrary to the concerns that have been raised, using race as one of many factors to define environmental justice populations is well-established and in widespread use, including by the federal Environmental Protection Agency and many other states.

[1] The other criteria are income, income plus race, and lacking English language proficiency.
[2] *Fisher v. University of Texas at Austin*, 136 S.Ct. 2198 (2016).

Use of Race in the Massachusetts Environmental Justice Bills is Appropriate and Crucial

The use of race in the Massachusetts environmental justice bills is crucial to ensure protections and benefits for communities of color, including African American, Black, Cape Verdean, Asian and Pacific Islander, indigenous and tribal, and Latino/a/x residents throughout the Commonwealth. H.4264 defines environmental justice as

> "the equal protection and meaningful involvement of all people with respect to the development, implementation, and enforcement of energy and environmental laws, regulations, and policies, including climate change policies, and the equitable distribution of energy and environmental benefits, and energy and environmental burdens."

The corresponding definition of "environmental justice population" establishes criteria and thresholds that identify communities who bear an unfair share or burden of environmental pollution or limited access to natural resources—based on race,[3] income, race plus income, or lacking English language proficiency. The bills go on to provide enhanced public participation and agency review for actions that may affect environmental justice populations. These bills are intended to combat the as-yet intractable reality that people of color, low-income residents, and those lacking English language proficiency are disproportionately burdened by environmental contaminants and lack the environmental and energy benefits afforded to other, whiter and wealthier communities.

The Commonwealth of Massachusetts itself argued to the Supreme Court of the United States, only five years ago

> "persistent racial segregation is not simply the enduring result of our history[;] rather, segregation continues to be reinforced, and thus perpetuated, by contemporary forms of discrimination, including not only intentional discrimination but also unconscious bias in systemic, discretionary decision-making and purportedly 'neutral' policies and practices."[4]

Such discrimination

> "often corresponds with material neighborhood inequities, even after accounting for differences in socioeconomic status. These can include variations in housing standards; access to basic services; access to public amenities like parks, open spaces, and recreation centers; exposure to environmental hazards; and proximity to undesirable land uses."[5]

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[3] The bills rely on the term "minority" to signal race. "Minority" has been defined under Massachusetts law as including, but not limited to, "African Americans, Cape Verdeans, Western Hemisphere Hispanics, Asians, American Indians, Eskimos, and Aleuts." M.G.L. c. 7 § 58 (2018). *See also*, "a person with permanent residence in the United States who is American Indian, Black, Cape Verdean, Western Hemisphere Hispanic, Aleut, Eskimo, or Asian." M.G.L. c. 7C, § 6(b).

[4] Brief for Massachusetts et al. as Amici Curiae, *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc*., 135 S. Ct. 2507(2015).

[5] Id. at 16. citing Michelle Wilde Anderson & Victoria C. Plaut, Property Law: Implicit Bias and the Resilience of Spatial Colorlines, in Implicit Racial Bias Across the Law (Justin D. Levinson & Robert J. Smith, eds. 2012);

As Massachusetts Attorney General Maura Healey pointed out in a recent Environmental Justice Brief describing the insufficiency of current environmental justice laws in the Commonwealth, "environmental justice guidelines inform but do not drive decision-making," permitting "the concentration of polluting industries and facilities in our most vulnerable communities."[6]

Data show that race is the most consistent factor in determining the location of commercial hazardous waste sites, nationally.[7] Neighborhoods with higher populations of people of color often lack access to reliable municipal infrastructure and to healthy housing, food, green spaces, and other resources that mitigate environmental and energy burdens.[8] These same communities are now at increasing risk from the high heat and severe weather events associated with the climate crisis.[9] In Massachusetts, communities of color have long borne the brunt of exposures to chemical pollution[10] and transportation emissions[11] and are right now suffering the most devastating impacts of the coronavirus pandemic,[12] the risks of which increase with prolonged exposure to air pollution.[13]

Patrick Sharkey, Stuck In Place: Urban Neighborhoods and the End of Progress Toward Racial Equality, 25 (2013) (citing Douglas S. Massey & Nancy A. Denton, American Apartheid: Segregation and the Making of the Underclass, Harvard University Press (1993)); see also Hope Landrine & Irma Corral, Separate and Unequal: Residential Segregation and Black Health Disparities, 19 Ethnicity & Disease 179, 180-82 (2009).

[6] Office of the Massachusetts Attorney General Maura Healey, "COVID-19's Unequal Effects in Massachusetts; Remedying the Legacy of Environmental Injustice & Building Climate Resilience." May 12, 2020 https://www.mass.gov/doc/covid-19s-unequal-effects-in-massachusetts/download.

[7] Paul Mohai and Robin Saha, Which Came First, People or Pollution? Assessing the Disparate Siting and Post-Siting Demographic Change Hypothesis of Environmental Justice, 10 Environ. Res. Lett. 115008 (2015) (documenting racial composition of a neighborhood as the strongest predictor of where hazardous waste facilities are located).

[8] *See, e.g.,* Rachel D. Godsil, Viewing the Cathedral from Behind the Color Line: Property Rules, Liability Rules and Environmental Racism, 53 Emory L.J. 1807, 1841–49 (2004), https://ssrn.com/abstract=594066; see generally The Call for Environmental Justice Legislation: An Annotated Bibliography (PRRAC 2018), https://www.prrac.org/pdf/EJLegislationResearchGuide.pdf.

[9] *See* H. Orru et al., *The Interplay of Climate Change and Air Pollution on Health*, 4 Current Envtl. Health Report 504, 504 (2017) ("In general, climate change is expected to worsen air quality in several densely populated regions by changing atmospheric ventilation and dilution, precipitation and other removal processes and atmospheric chemistry.") *See also* U.S. Global Change Research Program, Impacts, Risks, and Adaptation in the United States: Fourth National Climate Assessment, Volume II (2018) https://nca2018.globalchange.gov/downloads/NCA4_2018_FullReport.pdf.

[10] Daniel R. Faber and Eric J. Krieg, Unequal Exposure to Ecological Hazards 2005: Environmental Injustices in the Commonwealth of Massachusetts, Northeastern Environmental Justice Research Collaborative 7, 32 (2005), pages 7, 32 (documenting that communities of color in Massachusetts average about six times more chemical releases in to the environment from facilities subject to reporting under the Toxics Use Reduction Act and ten times as many pounds of chemical releases per square mile) https://www.issuelab.org/resources/2980/2980.pdf.

[11] Union of Concerned Scientists: Inequitable Exposure to Air Pollution from Vehicles in Massachusetts: Fact Sheet, 1 (June 2019), https://www.ucsusa.org/sites/default/files/attach/2019/06/Inequitable-Exposure-to-Vehicle-Pollution-MA.pdf.

[12] Massachusetts Department of Public Health, COVID-19 Cases in MA, Count and Rate (per 100,000) of Confirmed COVID-19 Cases in MA by City/Town, January 1, 2020 – April 29, 2020, https://www.mass.gov/doc/confirmed-covid-19-cases-in-ma-by-citytown-january-1-2020-april-29-2020/download.

[13] Lisa Friedman, New Research Links Air Pollution to Higher Coronavirus Death Rates, New York Times (Apr. 7, 2020) https://www.nytimes.com/2020/04/07/climate/air-pollution-coronavirus-covid.html.

The enhanced public participation and review outlined in these bills address inequities faced by environmental justice communities and provide tools for those communities to shape and benefit from environmental, energy, climate, and public health laws and policies. The "environmental justice population" definition explicitly acknowledging race is rooted in environmental justice and civil and immigrant rights movements to eradicate discrimination, segregation, and unjust treatment of communities of color in Massachusetts and throughout the nation. An environmental justice law that does not directly address racial inequities is antithetical to the law's purpose, existing laws, and the on-the-ground injustice faced by the people whose experiences shape these laws.

Environmental Justice Laws and Policies that Consider Race are Constitutional.

The United States Constitution allows the Commonwealth to take race into consideration in defining environmental justice populations and providing enhanced public participation and agency review for actions that may impact such populations.[14] In considering whether a law that touches on racial issues is valid, courts first decide the applicable level of scrutiny under which to examine the law. Laws that distribute benefits and burdens on the basis of individual racial classifications (as, for example, affirmative action programs may) are examined with strict scrutiny.[15] In contrast, laws such as the bills in question here, which are demographic in nature and do not confer concrete benefits to any particular individuals, would typically be subjected to "rational basis" review – meaning that they would be constitutional if any rational basis exists for the passage of the law.[16] The environmental justice bills in question use the racial composition of a whole community as one factor in determining the location of an environmental justice population. The weight placed on race merely assists agency officials to define an area in need of consideration, rather than prompting a dispositive determination regarding the distribution of benefits or burdens.[17] Through enactment of these bills, people of all races living and working within environmental justice populations would be treated the same and all would benefit from any enhanced review or public participation afforded to communities with environmental justice populations.

Defining environmental justice populations in the manner envisioned by the bills in question is well-established. The United States Environmental Protection Agency (EPA) and many states have approved similar definitions in engaging in long-overdue remediation of environmental discrimination. The definitions of "environmental justice" and "environmental justice population" in these bills are consistent with environmental justice law and policy established and relied upon

[14] *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2525 (2015) ("[M]ere awareness of race in attempting to solve the problems facing inner cities does not doom that endeavor at the outset."); *Hayden v. Cty. of Nassau*, 180 F.3d 42, 51 (2d Cir. 1999) (citing Adarand at 237 and finding permissible a race conscious approach to eliminate the "persistence of both the practice and the lingering effects of racial discrimination.").

[15] *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 721 (2007).

[16] *Id.* at 789 (Kennedy, J., concurring in part and concurring in the judgment) (explaining that executive and legislative branches of government have used race-conscious measures "for generations" without constitutional violation).

[17] *Parents Involved* at 783 citing *Johnson v. California*, 543 U.S. 499, 505–506 (2005); *Hayden* at 48-50.

by the EPA and several states around the country.[18][19] In fact, pursuant to federal Executive Order 12898, all federal agencies *must* "make achieving environmental justice part of [their] mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of [their] programs, policies, and activities on minority populations and low income populations..."[20][21] which prohibits discrimination by Massachusetts agencies that receive federal funds. The Environmental Justice Policy of the Massachusetts Executive Office of Energy and Environmental Affairs uses race and has done so since the first environmental justice policy was adopted in 2002.[22] Not one of these laws or policies have been overturned as unconstitutional. The bills in question thus fall well within established legal frameworks that have undergirded civil rights and environmental justice for years.

Even if a court were to examine the bills in question here under the higher level of strict scrutiny reserved for race-conscious actions that provide concrete, individualized benefits – which is not the case here – Massachusetts would still be able to easily justify them. Laws subjected to a strict scrutiny review must pass a two-part test: if challenged, the Commonwealth of Massachusetts would first have to show that the state has a compelling government interest in passing the law; and then that the law is narrowly tailored to address that interest. Given the structure, language, and purpose of the laws proposed in Massachusetts, these bills should all survive such review even if subjected to this highest level of scrutiny.

In applying strict scrutiny analysis, the U.S. Supreme Court stated in *City of Richmond v. JA Croson*, "[t]here is no doubt that where gross statistical disparities can be shown, they alone in a proper case may constitute prima facie proof of a pattern or practice of discrimination."[23] To demonstrate its interest in correcting racial inequity, the Commonwealth can specifically identify the discrimination at issue and support that showing with a strong basis in evidence to conclude that corrective action is necessary. For example, an individual living in a community of color has a 70.6 percent chance of living in one of the most contaminated towns in Massachusetts, while an individual living in a predominantly white community has only a 1.8 percent chance of living in

[18] Existing environmental laws require consideration of race. For example, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), known also as Superfund. uses as a grant decision criterion the "extent to which a grant would address or facilitate the identification and reduction of threats to the health or welfare of children, pregnant women, minority or low-income communities, or other sensitive populations." 42 U.S.C. § 9604(k)(6)(C)(x).

[19] These state laws include, but are not limited to Section 75-0111(a) of New York's newly enacted Climate Leadership and Community Protection Act; Virginia's newly enacted EJ Act, Va Code § 2.2-234 et seq., as well as Sections 67-101(12) and 67-102(A)(11) of Virginia's Energy Policy statute; Section 65040.12(e)(1) of California's zoning and planning law; Section 1-701(a) of Maryland's Environment Code; Section 5 of the Illinois Environmental Justice Act 415 ILCS 155/5; Section 376.78(6) of Florida's Pollutant Discharge Prevention and Removal statue; and South Carolina Act 171 of 2007.

[20] *See e.g.,* Federal Interagency Working Group on Environmental Justice & NEPA Committee, Community Guide to Environmental Justice and NEPA Methods (March 2019) https://www.energy.gov/sites/prod/files/2019/05/f63/NEPA%20Community%20Guide%202019.pdf.

[21] 42 U.S.C. § 2000d et seq.

[22] Environmental Justice Policy of the Executive Office of Energy and Environmental Affairs (2002) https://www.mass.gov/files/documents/2017/11/29/ej%20policy%202002.pdf.

[23] *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 at 501 (1989); see also *Midwest Fence Corp. v. U.S. DOT*, 840 F.3d 932 at 953 (7th Cir. 2016), *H.B. Rowe Co., Inc. v. Tippett*, 615 F.3d 233 at 241 (4th Cir. 2010).

one of the most contaminated towns in the state.[24] This statistic demonstrates why the proposed race conscious EJ legislation is one such "proper case."[25] Further, the unequal distribution of benefits and burdens are, at least in part, the result of historical de jure state discrimination, as well as historical and current state agency decisions about enforcement, approval of permits for facility siting, and investment in transportation infrastructure, among others and in tandem with persistent housing segregation and concentrated poverty.[26]

The compelling government interest in remedying the persistent "practice and . . . lingering effects of racial discrimination"[27] is particularly furthered by these bills, which enhance access to public process for diverse communities.[28] In both the educational and law enforcement contexts, courts have upheld laws on the basis that a government was "motivated by a truly powerful and worthy concern and that the racial measure that they have adopted is a plainly apt response to that concern."[29] The communities whose lived experience provides them with the greatest understanding of environmental injustice often have least access to the policymaking process.[30] Engagement in public process is not only a core civic value, a lack thereof erodes a community's ability to advocate for critical resources and protect itself from harm. That these bills explicitly set out to dismantle barriers and create pathways to participation for diverse voices bolsters the compelling government interest of eradicating discrimination.

The consideration of race in the Massachusetts bills passes the Supreme Court's test for such laws and, like university admissions at issue in *Fisher*, would not violate the equal protection clause of the U.S. Constitution.[31] The Supreme Court in the *Fisher* case noted the need to reconcile the pursuit of diversity in higher education with the constitutional promise of equal treatment and found this use of race constitutional.[32] Race was merely one consideration among others to determine an individual's denial of admission to the University of Texas in *Fisher*. So, too, the

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[24] Unequal Exposure to Ecological Hazards 2005: Environmental Injustices in the Commonwealth of Massachusetts (2005).

[25] *See generally* Faber Krieg, Unequal Exposure to Ecological Hazards (2005).

[26] Massachusetts *Inclusive Communities* amicus brief at 17. See also Richard Rothstein, The Color of Law 25-26, 79, 170-71 (2017) (describing discriminatory housing policies in Boston, Cambridge, and Brookline) Alicia Sasser Modestino et al., The Greater Boston Housing Report Card 2019 67, 87 (June 2019) (stating that "few concrete actions have been taken to reverse the legacy of discriminatory federal, state, and municipal polices of the mid- to late-20th century" and that "persistent patters of segregation across Greater Boston" cannot be explained by differences in income); Michelle Shortsleeve, "Challenging Growth-Restrictive Zoning in Massachusetts on a Disparate Impact Theory." 27 BU Pub. Int. LJ 361 (2018); Ana Patricia Muñoz et al., "The color of wealth in Boston." Federal Reserve Bank of Boston (2015) https://www.bostonfed.org/publications/one-time-pubs/color-of-wealth.aspx.

[27] *Hayden* at 51.

[28] Existing Massachusetts law explicitly addresses race. For example, state law encourages school committees to eliminate the racial imbalance in public schools. M.G.L. c. 71, § 37C. A Lynn public school plan to implement M.G.L. c. 71, § 37C was determined to be constitutional. *Comfort ex rel. Neumyer v. Lynn School Committee*, 283 F.Supp.2d 328 (D.Mass. 2003).

[29] *Alexander v. City of Milwaukee*, 474 F.3d 437, 447 (7th Cir.2007); *Wittmer v. Peters*, 87 F.3d 916, 918 (7th Cir.1996).; *McLaughlin by McLaughlin v. Boston School Committee*, 938 F.Supp. 1001, 1013 (D.Mass 1996).

[30] Mass. Executive Office of Energy and Environmental Affairs, Environmental Justice Policy 4-5 (2017).

[31] As noted above, given the diffuse nature of the benefit to environmental justice populations in the bills in question, it is unlikely that a court would apply the level of scrutiny applied in *Fisher* – which involved individual admissions decisions.

[32] *Fisher* at 2214.

environmental justice bills incorporate race as one of several criteria to determine a designation to receive enhanced participation and review. As race-neutral alternatives were insufficient to achieve the goal of a diverse student body to promote a well-rounded education in *Fisher*, the environmental justice bills respond to decades of failed race-neutral environmental laws resulting in disparate impacts for people of color. Massachusetts has clear compelling interests in correcting current inequities in environmental and energy burdens and benefits based on race *and* in affording diverse voices the opportunity to influence environmental and energy decisions that impact the Commonwealth and its neighborhoods. As was required by the Supreme Court in the *Fisher* decision, the Commonwealth's environmental justice goals in these bills are concrete and precise.

The sponsors of these environmental justice bills have narrowly tailored them to directly address the Commonwealth's compelling interest in correcting inequity and ensuring access to robust public processes. Narrow tailoring involves analyzing: (1) the extent to which the government considered race-neutral alternatives and concluded they were insufficient; (2) the weight placed on race in the inquiry; (3) whether numerical quotas are used; and (4)-(6) the scope, duration, and flexibility of the program. All bills referenced above meet these six factors.

The above-referenced bills were drafted to respond to empirical studies of environmental justice populations, and the role that race, income, and English language proficiency each play in designating such communities.[33] In this context, where race is not a proxy for something else, race-neutral alternatives are inapposite. Since the Commonwealth implemented its first environmental laws three generations ago, it has lacked any state laws aimed at either preventing or eradicating discrimination in the distribution of environmental or energy benefits and reducing burdens. The outcome of such race-neutral laws and policies is decades of disproportionate siting of environmental burdens and harm to communities of color.[34] Race-neutral laws have not succeeded and there is a need for a tailored approach that considers community demographics, including race, to meet the compelling interest of redressing decades of concentrated pollution in communities of color. Furthermore, as stated above, the bills use no quotas, and have flexibility built in through periodic review of statutory definitions, which allows for and benefits from ongoing and periodic interplay between the legislature, the administration, and statutorily created advisory boards. These laws, therefore, meet the narrowly tailored requirement to address the compelling government interest discussed above.

Massachusetts, unlike California, does not prohibit agencies from considering race.

California's particular approach to identifying environmental justice populations—without reference to race—has apparently been cited by critics of the bills in question. However, California's approach lacks relevance to Massachusetts due to peculiar constraints in California law—the California Civil Rights Initiative created a section of the California Constitution that bans use of race in a way that the Massachusetts Constitution does not. In April 2013, the California Office of Environmental Health Hazard Assessment (OEHHA) released an online mapping tool called CalEnviroScreen 1.0, which identifies California communities by census tract that are disproportionately burdened by, and vulnerable to, multiple sources of pollution. The tool

[33] *See e.g.,* Marcos Luna, Evaluation of Massachusetts Environmental Justice Criteria (Aug. 8, 2019) http://w3.salemstate.edu/~mluna/EJ_Criteria_Analysis/index.html.
[34] *See, e.g.,* Godsil at 1841–49.

originally included race as a factor in identifying such communities, but OEHHA removed race as an indicator in CalEnviroScreen 1.1 in September 2013. OEHHA staff explained that, due to a wide and growing range of potential uses of CalEnviroScreen by state agencies, Cal/EPA and OEHHA decided to remove the race indicator based on concerns that *some* uses of the version of CalEnviroScreen that included the race indicator could result in lawsuits.

The OEHHA decision to exclude race in CalEnviroScreen is inapplicable to considerations at issue in Massachusetts for a few notable reasons. First, as noted above, the California Civil Rights Initiative, also known as Prop 209, bans use of race in a way that the Massachusetts Constitution does not. OEHHA specifically cited this section as a reason they removed the race indicator from CalEnviroScreen.[35] Second, OEHHA removed the race indicator not as a result of a specific challenge to the way in which the tool was being used, but rather as a precautionary measure to assure state agencies that they could use the tool in any possible application without risk of legal challenges and to encourage the widest possible adoption of the tool. The Commonwealth of Massachusetts does not face these same barriers in developing its solutions to overcome environmental injustice and discrimination.

Based on our review of the current jurisprudence and H.4264, S.464, and S.453, it is our firm belief that these laws fall well within constitutional boundaries, and are critically necessary to promote environmental justice in the Commonwealth.

If you have questions about the content of this letter, please contact Amy Laura Cahn, Senior Attorney and Interim Director, Healthy Communities and Environmental Justice Program, Conservation Law Foundation, at alcahn@clf.org.

Signed,

The Massachusetts Environmental Justice Legislative Table: 350Mass, Alternatives for Community & Environment, Better Future Project, Clean Water Action, Coalition for Social Justice, Conservation Law Foundation, Environmental League of Massachusetts, Green Energy Consumers Alliance, GreenRoots, Groundwork Lawrence, Lawyers for Civil Rights, Massachusetts Climate Action Network, Neighbor To Neighbor, and Toxics Action Center

Senator Sal N. DiDomenico
Senator James B. Eldridge

Representative Adrian C. Madaro
Representative Liz Miranda
Representative Michelle M. DuBois

[35] "California Deletes 'Race' From Pollution Screening Tool to Avoid Legal Risk," Risk Policy Report, October 7, 2013, https://web.archive.org/web/20140512221706/https://insideepa.com/Risk-Policy-Report/Risk-Policy-Report-10/08/2013/california-deletes-race-from-pollution-screening-tool-to-avoid-legal-risk/menu-id-1098.html (last accessed January 16, 2020).

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Representative Smitty Pignatelli, Chair
Joint Committee on Environment, Natural Resources and Agriculture

Senator Michael J. Barrett, Chair
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