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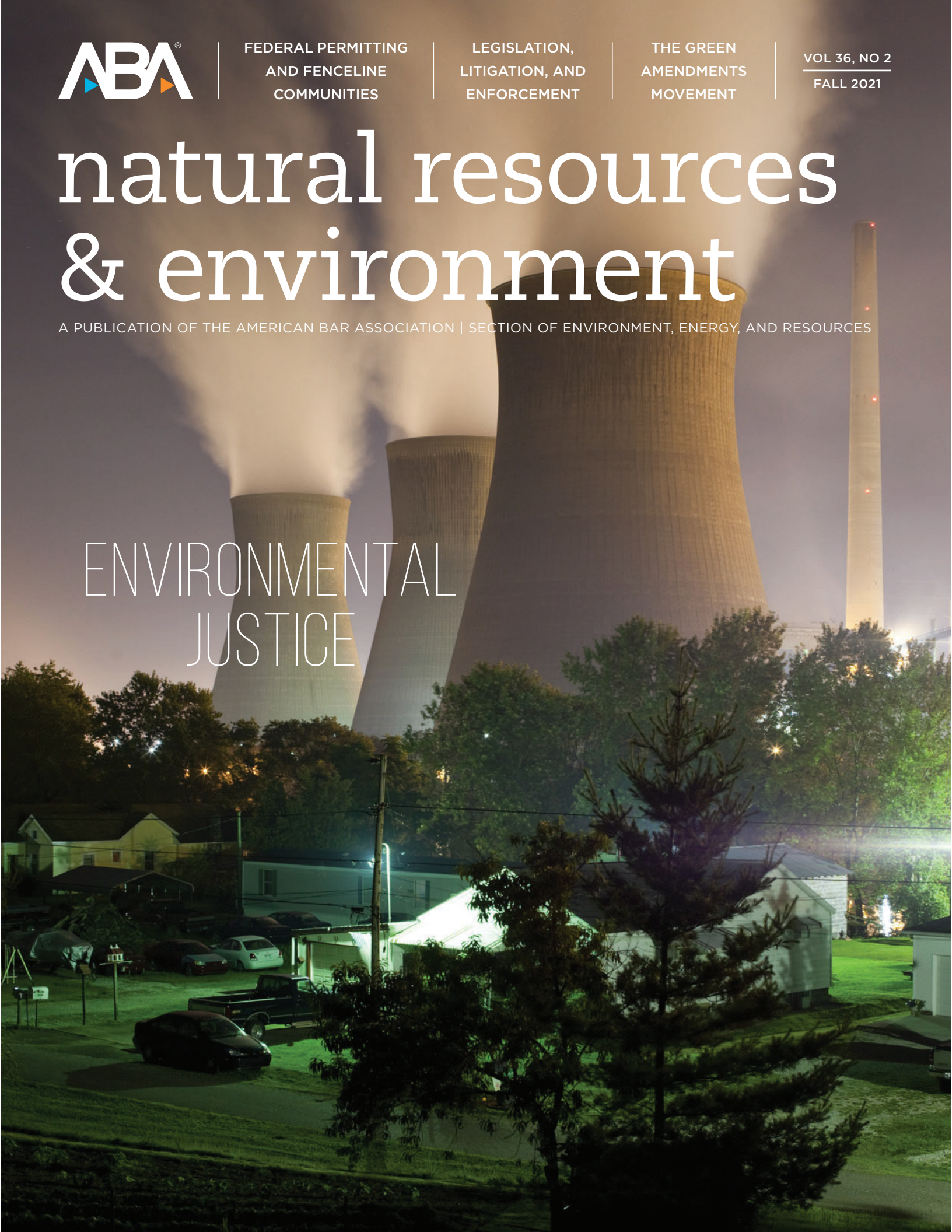

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features

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Environmental Justice Litigation

Few Wins, Still Effective

Douglas A. Henderson, Cynthia A. M. Stroman, and Joseph A. Eisert

Over the past 40 years, individuals and environmental groups alike have filed environmental justice (EJ) lawsuits, alleging either intentional racism, disparate impacts, or both, associated with landfill siting, infrastructure projects, and industrial emissions. But so far EJ litigation has resulted in few big wins for plaintiffs, at least using standard measures of orders or judgments finding discrimination or disparate impacts. The question is why. Is the lack of blockbuster EJ wins caused by bad facts, bad laws, bad agencies, or bad judges—or even systemic racism itself? Or is it more likely that the legal system—as currently structured and interpreted—is simply an ineffective tool to curb environmental injustice? Putting these questions aside, is it fair to even judge the success of EJ litigation by litigation wins alone?

In this article, we outline the history of EJ litigation, review the main causes of action, highlight key recent EJ cases, and offer observations on EJ litigation going forward. Most environmental lawyers today probably cannot name one absolute EJ "win," underscoring one of the biggest myths of EJ litigation—that nothing has really worked, which is not really accurate. Even if EJ lawsuits have not resulted in big judgments, EJ litigation has been successful in highlighting environmental injustice and forcing federal and state agencies to grapple with EJ in the assessment and approval of projects. And while litigation tea leaves can always be read differently, with expected tweaks and shifts on the horizon, EJ litigation may soon become the most important topic in environmental law, perhaps second only to climate change.

Environmental Justice Inception: The Constitution and Civil Rights

Early EJ plaintiffs, inspired by the civil rights movement, framed environmental racism cases as equal protection or due process violations of the U.S. Constitution. In what most consider to be the first and most inspirational EJ lawsuit, *Bean v. Southwest Waste Management Corp.* challenged the siting of a new solid waste landfill in Northwood Manor, a predominantly African American neighborhood in Houston, Texas. 482 F. Supp. 673 (S.D. Tex. 1979). Plaintiffs lost because they could not surpass the high hurdles needed to prove intentional discrimination. Many other cases arguing equal protection violations or violations of section 1983 under the Civil Rights Act of 1866 similarly fell short because of the requirement to prove intentional discrimination. *See R.I.S.E. Inc. v. Kay*, 768 F. Supp. 1144 (E.D. Va. 1991); *East-Bibb Twiggs Neighborhood Ass'n v. Macon-Bibb Cnty. Planning & Zoning Comm'n*, 706 F. Supp. 880 (M.D. Ga.), *aff'd,* 896 F.2d 1264 (11th Cir. 1989) (siting of solid waste landfill did not evidence intent to prevail on Equal Protection). None of the constitutional or section 1983 challenges for EJ have succeeded in the traditional legal sense.

Largely because of these hurdles, EJ plaintiffs turned to the Civil Rights Act of 1964, typically under sections 601 and 602 of Title VI. 42 U.S.C. § 2000d *et seq*. Under section 601, no agency receiving federal funds may have a racially discriminatory purpose or effect. It is under section 601 of Title VI where plaintiffs can bring intentional discrimination claims against agencies. But EJ plaintiffs recognized quickly the same evidentiary hurdles exist under section 601 as for Equal Protection or section 1983 claims.

Under section 602 of Title VI, private parties could bring lawsuits to enforce "disparate impact" claims. In the context of EJ, this meant—initially at least—that third parties could enforce disparate impact claims, alleging, for example, that the site of a solid waste landfill would violate section 602 where it created disparate environmental impacts. In *Alexander v. Sandoval*, 532 U.S. 275 (2001), a case not involving EJ claims, the U.S. Supreme Court corralled EJ litigation when it found no private right of action to enforce Title VI regulations. Under *Sandoval*, private parties could not bring disparate impact

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claims under Title VI to enforce an agency's regulatory obligation to evaluate whether permitting decisions considered environmental disparate effects. *See Erie CPR v. Pa. DOT*, 343 F. Supp. 3d 531, 548 (W.D. Pa. 2018) (reviewing Title VI EJ claims). After *Sandoval*, federal agencies continued as the main shepherds for EJ enforcement, a troubling result for EJ plaintiffs because, they claimed, agencies were one of the main reasons for lax EJ assessments.

Even before *Sandoval*, federal agencies were already the main shepherds for EJ. In 1993, President Clinton issued Executive Order 12,898 (E.O. 12,898). Under E.O. 12,898, federal agencies were required to consider EJ effects under the National Environmental Policy Act (NEPA), which requires an environmental assessment for significant federal actions affecting the natural environment. Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, 59 Fed. Reg. 7629 (Feb. 16, 1994). The goal was straightforward enough—require federal agencies to fully consider the EJ aspects of funding and permitting decisions. After E.O. 12898, a wide range of agencies developed internal EJ guidelines and promulgated regulations to require EJ analysis in their decisions.

But how has EJ fared with agencies driving the charge? While more successful than private party lawsuits under the Constitution, agency focus on EJ has largely remained in the backseat of the administrative decision-making process. Factually, federal agencies rarely have taken actions to stop or modify projects based on inadequate EJ assessments, and few have ever even identified disparate impacts. In a widely cited review conducted for the Environmental Protection Agency (EPA), Deloitte Consulting LLP found EPA's Office of Civil Rights EJ record dismal across several measures. Deloitte Consulting LLP, Environmental Protection Agency, Order #EP10H002058 (Mar. 21, 2011). At the time of that report, only 6 percent of Title VI complaints were accepted or rejected within the agency's own 21-day deadline.

Across the board, agency review of EJ impacts has been underwhelming. Two leading scholars found EPA's approach for handling EJ generally "ineffectual." David A. Dana & Deborah Tuerkheimer, *After Flint: Environmental Justice as Equal Protection*, 111 Nw. U. Law Rev. 93, 97 (2017). Others concluded that, under either section 601 or 602 of Title VI of the Civil Rights Act, EJ plaintiffs only have had "limited success" before agencies. Albert Huang, *Environmental Justice and Title VI of the Civil Rights Act: A Critical Crossroads*, ABA Trends (Mar. 2012). A more recent review found EJ enforcement under Title VI falling short of its goals across different political administrations. *See* Mollie Soloway, *Measuring Environmental Justice: Analysis of Progress Under Presidents Bush, Obama, and Trump*, 51 Env't L. Rep't 10038, 10043 (2021) (noting most EJ claims have "largely been unsuccessful, leaving communities without a promising basis for bringing an EJ claim in federal court"). That a 17-year delay by EPA in responding to a discriminatory siting complaint was not an abuse of its discretion underscores the exasperating nature of agency EJ enforcement for many. *See Padres Hacia Una Vida Mejor v. McCarthy*, 614 F. App'x 895, 896–97 (9th Cir. 2015).

Environmental Justice Litigation under NEPA

By far, NEPA has been the most active battleground for EJ disputes. Results in NEPA EJ cases go both ways, with some courts finding agencies fairly and fully considering the EJ impacts of federal projects, and other courts finding agencies ignored the EJ effects of their actions. While the NEPA case law makes clear E.O. 12,898 provides no private right of action to enforce EJ in federal agencies, most courts permit challenges to EJ under NEPA for the "failure to take a hard look" and under the Administrative Procedure Act (APA) for "arbitrary and capricious" decision-making. *See City of Crossgate v. U.S. Dep't of Veterans Affairs*, 2021 WL 1069041, at *2 (W.D. Ky. 2021) (no private right of action under E.O. 12898 but EJ challenge available under APA).

Recent courts find agencies reasonably considered EJ in the NEPA project review process, even when the EJ assessments themselves were unsound. *See Atchafalaya Basinkeeper v. U.S. Army Corps of Eng'rs*, 2020 U.S. Dist. LEXIS 51688, at *35 (M.D. La., Mar. 25, 2020) (finding "risk of a large spill resulting in adverse environmental impacts to any particular resource or community was determined to be minimal"). Still other courts find agencies failed to consider EJ properly under NEPA. For example, in *Hausrath v. U.S. Department of the Air Force*, 2020 U.S. Dist. LEXIS 183733, at *41 (D. Idaho, Oct. 1, 2020), the EJ issue at stake was the noise effects of Air Force training missions in urban centers. Plaintiffs alleged the Air Force environmental assessment (EA) failed generally to consider the environmental effects of increased noise on minority and low-income residents in the urban areas and failed specifically to consider that minority and low-income residents may be more susceptible to adverse noise impacts than the general population. Agreeing with the plaintiffs, the court found the Air Force's consideration of EJ impacts was "too cursory" and "flawed": "the USAF chose particular metrics to play down the known effects of military aircraft noise upon urban communities." *Id.* at *47 (citations omitted). After finding the Air Force acted arbitrarily and capriciously under the APA by omitting key elements of an appropriate EJ analysis, the court required the USAF to complete a more detailed environmental impact statement (EIS) on these EJ impacts, among other issues.

Most of the time, at issue in NEPA EJ litigation are the nuts-and-bolts issues associated with EJ assessments in the permitting process. For instance, in *Standing Rock Sioux Tribe v. Army Corps of Engineers*, 255 F. Supp. 3d 101, 137 (D.D.C. 2017) (citations omitted), plaintiffs alleged the Corps failed to conduct an appropriate EJ analysis of a new natural gas pipeline across Lake Oahe. The Corps defined the unit of geographic analysis for the EJ assessment as a 0.5-mile radius around the pipeline crossing, an area that did not include the reservation, and the EJ assessment compared the average demographic data for the "impacted" area to "counties in the general vicinity" of the Oahe crossing. Using this analysis, the Corps concluded there was "no concern" to minority populations." *Id.*

Finding the identification of an EJ "impacted community" was a task assigned to the "special competency of the appropriate agencies," the court found the 0.5-mile radius appropriate.

Id. at 138. But the court also found that, while the Corps' EJ analysis covered the "construction" impacts, it failed to address the potential "spill" impacts" on impacted EJ communities. *Id.* at 139. With that error, the court noted, the analysis was "not enough to reasonably support the conclusion that the Tribe will not be disproportionately affected by an oil spill in terms of human health or environmental effects." *Id.* at 140 (citing CEQ Guidance). Ultimately, however, the court declined vacatur of the Corps's decision during remand. According to the court, even if the Corps addressed EJ in an EIS instead of an EA, "there is reason to think that, in doing so, it has a substantial possibility of validating its prior conclusion." Later, the court required finalization and implementation of oil-spill response plans, completion of a third-party compliance audit, and additional public reporting of information regarding pipeline operations. *See Standing Rock v. U.S. Army Corps of Eng'rs*, 282 F. Supp. 3d 91 (D.D.C. 2017). But the court included no EJ-specific mitigation efforts despite the court's initial finding of certain EJ deficiencies. So, is this an EJ win, or a loss?

These "methodological" disputes in NEPA EJ litigation often only mask philosophical disputes, as shown in a recent NEPA EJ case involving the Federal Energy Regulatory Commission (FERC or the Commission). In *In re Annova LNG Common Infrastructure, LLC*, 2020 WL 865088 (FERC Feb. 21, 2020), environmental groups sought a rehearing on FERC's authorization of an LNG terminal in the Brownsville Ship Channel. They argued FERC violated NEPA by failing to take a "hard look at whether the project's direct, indirect and cumulative impacts to air quality, even if the relevant emissions would not exceed the NAAQS, would disproportionately affect EJ communities." *Id.* Critical of FERC's EJ assessment, Sierra Club argued FERC improperly chose Cameron County as the comparison population to the minority and low-income populations most directly affected by the project. For Sierra Club, however, that choice masked the EJ implications of the project because Cameron County itself qualified as a minority and low-income population. *Id.* at **9.

The Commission, pointing to the lack of alternatives to the project, found Sierra Club "misunderstands the use of another population for comparison in an EJ analysis." *Id.* at **10. "Because here all project-affected populations are minority or low-income populations, or both," the Commission noted, it is not possible that impacts will be disproportionately concentrated on minority or low-income populations versus on some other project-affected comparison." *Id.* As the Commission explained, Cameron County itself was used because that was "where the LNG facility will be located, and no other alternatives would meet the projects' purpose and need." *Id.* (citations omitted). Accepting its EJ assessment interpretation, the Commission found the facility would directly and indirectly support employment and income in the local community. *Id.* at **11.

As for disproportionate air quality impacts, the Commission noted, the project's air emissions would not exceed the NAAQS. *Id.* at **12. After noting the project area EJ index showed 80% of the population in the state had a lower EJ index for ozone, the Commission, after reviewing specific asthma rates and hospitalization rates for Hispanic or Latino populations, found those generally consistent with the statewide rates. *Id.* at **13. For the Commission, actual data did "not support a conclusion that the anticipated exposure to ozone in minority or low-income communities would result in a disproportionately high and adverse impact" in the communities near the project. *Id.*

Now-Commission Chair Glick, in a sharply worded dissent, summarized FERC's argument as follows: "a project located in an overwhelmingly poor or minority community raises EJ concerns only if the individuals in that community have some sort of predisposition or susceptibility to the project's adverse impacts." *Id.* at **25. That logic was "nonsense," he concluded. *Id.* at **26. According to Commissioner Glick, "[t]he population-wide incidence of respiratory diseases does nothing to help us assess whether and how this Project will disproportionately affect the EJ communities in the surrounding area or what that means for the public interest." *Id.* The Commission's conclusion was troubling for Commissioner Glick: "the upshot of the Commission's approach is to signal to developers that they can sidestep EJ concerns as long as they ensure that all, or substantially all, of a project's adverse impacts fall on low-income or minority communities." *Id.* at **25. As this case illustrates well, just what is and is not an appropriate EJ assessment remains an open issue.

Environmental Justice Litigation under State Environmental Justice Statutes

If EJ litigation under NEPA is the grumpy uncle of environmental litigation, EJ litigation under state EJ statutes is the new kid in town. Two recent cases underscore the growing importance of EJ litigation involving purely state EJ requirements. In the first, a group of plaintiffs alleged that the State of Massachusetts EJ requirements were not met in constructing a natural gas compressor, an argument the First Circuit Court of Appeals rejected after finding the state EJ requirements were in fact met by the Massachusetts Department of Environmental Protection. *Town of Weymouth v. Mass. Dep't of Env't Prot.*, 961 F.3d 34 (1st Cir. 2020) (location of natural gas compressor did not violate Massachusetts EJ statutory requirements).

The second key state EJ case also involved the construction of a natural gas pipeline, but with a far different—and more publicized—result. In *Friends of Buckingham v. State Air Pollution Control Board*, 947 F.3d 68, 87–92 (4th Cir., 2020), the U.S. Court of Appeals for the Fourth Circuit found the requirements of the Commonwealth of Virginia's ambitious, but not well-defined EJ statute were not met. For the court, the analysis of EJ completed by the Virginia Air Pollution Control Board was insufficient and rendered the permit approval arbitrary and capricious. First, the analysis failed to determine the "character of the local population" and failed to determine if the local community was a "minority" population, the first steps in the EJ analysis. *Id.* at 87–88. The court found the board "acted arbitrarily in failing to provide any explanation regarding the EJ issue, which makes its extensions of public comments and additional meetings ring hollow." *Id.* at 89.

Second, the court found the board's reliance on the plant's compliance with state air quality standards was insufficient to

evaluate the EJ implications of the plant. For the board, compliance with air quality standards led it to dismiss the EJ concerns peremptorily. For the Fourth Circuit, the mistake was fundamental: "[e]ven if all pollutants within the county remain below state and national air quality standards, the Board failed to grapple with the likelihood that those living closest to the Compressor Station—overwhelmingly minority population according to the Friends of Buckingham survey—will be affected more than those living in other parts of the same county." *Id.* at 91–92. For the court, the mistake was rejecting disproportionate impact on the basis that air quality standards were not met. *Id.* at 92. In a widely covered opinion, the court observed, "environmental justice is not merely a box to be checked, and the Board's failure to consider the disproportionate impact on those closest to the Compressor Station resulted in a flawed analysis." *Id.* Other recent courts have addressed EJ rights under state EJ statutes. *Golden Door Properties, LLC v. Cnty. of San Diego*, 50 Cal. App. 5th 467, 556 (2020) (uncertainty in extent of EJ required under CEQA); *Winchester v. Energy Facilities Siting Bd.*, 2020 Mass. App. Unpub. LEXIS 620 (July 9, 2020) (affirming EJ assessment associated with underground electric transmission line).

The rise in state EJ litigation is not an aberration. In the last year, New Jersey filed 12 lawsuits targeting polluters across New Jersey whose actions threaten the health and safety of residents in minority and lower-income communities in Newark and other cities. Brought under New Jersey's Spill Compensation and Control Act and other state environmental statutes, the New Jersey attorney general noted the lawsuits were filed against "those who, by design or circumstance, disproportionately harm the environment and communities of our low-income and minority neighbors." *See* News Release, Off. of Att'y Gen., State of New Jersey, DEP File 12, New "Environmental Justice" Lawsuits Targeting Polluters in New Jersey's Lower-Income and Minority Communities (Aug. 27, 2020). In filing these EJ lawsuits, Attorney General Gurbir Grewal noted, "we're committed to our pathbreaking approach to environmental enforcement, which ensures that our efforts to clean up our environment will also serve our comprehensive justice agenda for low-income communities and communities of color." New Jersey's filing of these EJ lawsuits signals more to come. *See* News Release, Off. of the Att'y Gen., State of New Jersey, Attorney General Grewal, DEP Acting Commissioner LaTourette Announce Nine New Environmental Enforcement Actions, Seven in Environmental Justice Communities (May 10, 2021).

Environmental Justice Litigation Realities

So, what are the lessons for EJ litigators today? First, from an evidentiary perspective, it's a long shot for any EJ plaintiff to prove intentional environmental discrimination under environmental laws. Proving intentional EJ discrimination in an environmental dispute, where a defendant has applied for and received a permit for the alleged technical activity causing the impacts, is nearly impossible. And if an agency takes a hard look at the EJ impacts of its actions, EJ plaintiffs are unlikely to prevail on intentional discrimination causes of action.

Second, the lack of clear EJ requirements under U.S. environmental statutes provides another limiting factor for EJ plaintiffs. For example, the Clean Water Act provides no guidance on considering downstream EJ impacts from "pollutant" discharges—and the Act doesn't even define a downstream community. Nor does the Clean Air Act include EJ-specific requirements for Title V or state air quality permits. As the case law shows, the closest thing to an "EJ-like requirement" comes under NEPA, but then EJ is only considered under the NEPA "hard-look" standard, and the often-related APA "arbitrary and capricious" standard discussed above. In EJ litigation, the lack of explicit EJ standards in environmental statutes makes EJ litigation tough sledding for plaintiffs.

Third, the lack of well-established definitions for fundamental EJ concepts and procedures challenges EJ plaintiffs and defendants alike, particularly the meanings of "impacted EJ community" and a "reference community," as clear from *Standing Rock Sioux Tribe* and *In re Annova*. And the concept of "impact" still remains open for dispute—does this mean any impact, or impact that only creates health impacts?

Another challenge is the norm of reliance on EPA's environmental screening and mapping tool, known as "EJSCREEN." For regulated industry, the EJSCREEN has been the gold standard for evaluating EJ impacts. But recent EJ litigation has made it clear that, for permittees preparing and submitting EJ assessments, just following EPA's EJSCREEN may not be enough. As the U.S. Court of Appeals for the Fourth Circuit found, the EJ analysis conducted by the Virginia Department of Environmental Quality using EPA's EJSCREEN was insufficient because it did not address the *near* residents more than *far* residents and only focused on meeting environmental permitting limits. *See Friends of Buckingham*, 947 F.3d at 87. At this point, the standards and best practices for spatial social analysis remain important evidentiary skirmishes in EJ litigation.

Fourth, because EJ litigation involves the concept of "justice," a host of unresolved, recurring ideological issues often transform EJ litigation into a mystifying integration of law and social policy for all concerned. One example is the evidentiary value of a validly issued environmental permit. If an agency, say EPA, follows its EJ guidance, conducts an EJ assessment using EJSCREEN, and concludes the issuance of a NPDES permit will not adversely affect a diverse downstream community significantly more than another, does this mean the EJ issues have been addressed fully and fairly? Historically, EPA's policy was that if a permit was validly issued, there was a "rebuttable presumption" EJ had been addressed, but that presumption has weakened, and continues to evolve. *See* Marianne E. Lado, *No More Excuses: Building a New Vision of Civil Rights Enforcement in the Context of Environmental Justice*, 22 U. Penn. J. Law & Soc. Change 281, 291 n. 62 (2019). In *Friends of Buckingham*, the most recent decision to address this question, the answer for the Fourth Circuit was "no," an issued permit did not equate to satisfying an EJ assessment. For the court, because the agency failed to address EJ *during* the permitting process properly, the permit was not the end all for the EJ analysis.

Ultimately, whether in the context of old or new facilities, what makes EJ litigation so raw and fundamental is the surface

tension between the impacts and benefits of an operating facility with known emissions or discharges, on one hand, and the impacts and benefits to a local minority or low-income community that often works at the operating facility, on the other hand.

Another emerging tension is the continued "routine" reissuance of environmental permits. Early EJ litigation focused on new landfill siting, new highway construction, and new projects, as has EJ litigation under NEPA. But assessing EJ for operating facilities is, or will be, far more challenging (and potentially more economically significant) than considering EJ in new project permitting. "Routine" permit renewals may be a thing of the past because of the increased focus on EJ.

And then there's the "who decides" issue. If an agency, during its EJ review of a new project, identifies disparate impacts, but only at a level slightly above an appropriate comparison group, and available scientific evidence shows no increase in disease incidence, how much should the economic benefits of the continued operation of the plant be considered in developing potential mitigation efforts for those disparate impacts? Even more uncomfortable, if noise impacts on nearby minority and low-income communities would require costly improvements to resolve or mitigate the identified minor disparate impacts, to an extent that it would not be economical to operate the plant, should the plant shut down—even when it's the main employer for minority and low-income residents?

For EJ proponents, the "who decides" issue is easy. A fundamental EJ tenet that local communities should participate in is the framing, assessment, and answering of environmental questions. If EJ has a central tenet, it is the broader neighborhood or pluralistic view of environmental impact assessment and how those impacts are mitigated or resolved. Yet for regulated industry, the new world of pluralistic decision-making process raises internal organization challenges, raising a concern that the more involved the permitting, the less likely a reasonable permit will be issued. The decision-maker for these questions may be judges and juries in EJ litigation.

For permittees, there's another legal uncertainty at play in EJ litigation. If an agency imposes EJ mitigation or operational constraints on discharges or emissions, or imposes additional EJ monitoring requirements on a permittee during permit reissuance—all based on agency guidance—would this be a violation of "notice and comment" requirements of the APA or constitute a regulatory taking if it prohibits a plant from operating as it had in the past, with no demonstrable effects on human health or the environment, as defined in environmental statutes? These questions remain to be answered.

Finally, and especially at this time in U.S. social history, future EJ litigation will not be limited to governmental permit decisions or agency project approvals. Next on the EJ litigation battlefront, depending on whether Title VI is amended and other proposed changes to EJ occur, is whether the EJ effects of other nonfederal and nonstate actions are legal from an EJ perspective. The increased focus on the environmental, social, and governance issues (ESG) in financial and lending transactions, whether by the Securities and Exchange Commission or state agencies, is perhaps one of the least appreciated, but most fundamental third-order results of EJ litigation to date. In the future, EJ may play out in a boardroom as often as it does in a courtroom.

Environmental Justice Litigation Is More Than Wins or Losses

The lack of unqualified wins for EJ plaintiffs over the past 40 years does not equate to EJ litigation losses. Early cases like *Bean*, *R.I.S.E.,* and *East-Bibb* are important if for no other reason than they heralded in EJ litigation. And, while plaintiffs in those early cases did not prevail in court, they increased attention and focus on environmental disparities, providing starter fuel for the broader EJ movement. After *Bean*, the City of Houston approved more stringent zoning, making it harder to site solid waste landfills around schools and other public facilities. And in the project development world, NEPA EJ litigation has rewritten major projects, mainly in forcing agencies to look fully and fairly at the EJ aspects of major projects.

For some EJ plaintiffs, the filing of an EJ lawsuit focuses attention on mission-central critical issues, develops platforms for new science, and tests legal and factual strategies aimed at achieving the plaintiffs' advocacy mission. In those cases, the battle itself may be as important as a win. *See* Richard J. Lazarus, *Pursuing "Environmental Justice": The Distributional Effects of Environmental Protection*, 87 Nw. U. L. Rev. 787, 857 (1993). But these slow wins underscore that filing of EJ lawsuits may not be the most effective legal tool to address "justice"—environmental or otherwise. Luke W. Cole, a pioneer in early EJ litigation and thought, concluded: "[b]ecause environmental justice struggles are at heart political and economic, not legal, a legal response is often inappropriate or unavailable." Luke W. Cole, *Environmental Justice Litigation: Another Stone in David's Sling*, 21 Fordham Urb. L.J. 523, 524 (1994).

If no changes are made to Title VI or to environmental statutes, and if agencies continue as they have with the tools they use, EJ litigation will remain a highly technical, largely administrative slog under NEPA over whether environmental permits should be issued or not—and little else. But now with EJ litigation approaching its fifth decade, the seemingly inevitable recognition of EJ regulatory changes, the growth of state-EJ litigation, and the undeniable importance of ESG for all things private, EJ litigation may become the energized legal vehicle the pathbreaking plaintiffs in *Bean*, *R.I.S.E.,* and *East-Bibb* envisioned all along.

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