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No “Box to be Checked”: Environmental Justice in Modern Legal Practice

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NO "BOX TO BE CHECKED": ENVIRONMENTAL JUSTICE IN MODERN LEGAL PRACTICE

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ABSTRACT

For nearly thirty years, environmental justice has been part of our civic conversation and included in the mission of federal agencies. But while public attention to environmental justice has waxed and waned over time, environmental justice principles have endured and developed into rules of law. This development may be expected to continue and accelerate with recent events such as the nationwide outcry after the police killing of George Floyd in 2020, the disparate impacts of COVID-19 on people of color, and the express priorities of the Biden administration. This paper seeks to help legal practitioners and other interested parties comprehend the meaning and requirements of environmental justice, as revealed in part through developments in agency policy and case law over the last three decades. Through this understanding, legal counsel and community advocates may serve both their clients and the broader public interest as we collectively seek a more just society in a changing world.

"[E]nvironmental justice is not merely a box to be checked . . . ."[1]

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[1] Friends of Buckingham v. State Air Pollution Control Bd., 947 F.3d 68, 92 (4th Cir. 2020).

I. INTRODUCTION: HISTORY HAS ITS EYES ON US

Having survived the waxing and waning attention of five presidential administrations before the Biden administration,[2] the movement for environmental justice (EJ) in the United States is here to stay. The EJ movement is also gaining political power[3] and mainstream recognition,[4] which has been compelled by the growing

[2] For a quick review of EJ policy from the administration of President George H.W. Bush through Bill Clinton, George W. Bush, and Barack Obama, see Clifford J. Villa, *Remaking Environmental Justice*, 66 LOYOLA L. REV. 469, 487–505 (2020). For a review of EJ policy under Donald Trump, see Uma Outka & Elizabeth Kronk Warner, *Reversing Course on Environmental Justice Under the Trump Administration*, 54 WAKE FOREST L. REV. 393 (2019).

[3] The Biden administration has appointed advocates for environmental justice throughout the federal government. Such advocates include Michael Regan (Administrator of EPA), Deb Haaland (Secretary of the Interior), Brenda Mallory (Chair of the Council on Environmental Quality), and Marianne Engelman Lado (EPA Deputy General Counsel). *See* HANA VIZCARRA & HANNAH PERLS, HARV. ENV'T & ENERGY L. PROGRAM, BIDEN'S FIRST 100 DAYS OF CLIMATE ACTION, at 1 (May 11, 2021), http://eelp.law.harvard.edu/wp-content/uploads/Bidens-First-100-Days-FINAL.pdf.

[4] *See, e.g.*, Alejandra Borunda, *The Origins of Environmental Justice – And Why It's Finally Getting the Attention It Deserves*, NAT'L GEOGRAPHIC (Feb. 24, 2021), https://www.nationalgeographic.com/environment/article/environmental-justice-origins-why-finally-getting-the-attention-it-deserves; Jamil Smith, *Another Reason We Can't Breathe*, ROLLING STONE (Oct. 27, 2020), https://www.rollingstone.com/politics/politics-features/environmental-justice-joe-biden-plan-2020-analysis-1081802; Destiny Hodges, *The Mainstream Climate Movement Suppresses Black Voices*, TEEN VOGUE (Feb. 12, 2021), https://www.teenvogue.com/story/power-shift-2021-angela-davis.

reckoning with race discrimination in our country[5] and acknowledgement of the disparate impacts of climate change[6] and COVID-19 on people of color.[7] But what *is* "environmental justice"? And what will the renewed emphasis on environmental justice across the states,[8] in Congress,[9] and now atop the agenda for the Biden administration[10] mean for you and your practice? While "history has its eyes on us,"[11] will you be a part of the solution?

As a professor of law, I am bound to approach these questions with a hypothetical. So imagine this scenario. You are in-house

[5] By one account, the Black Lives Matter protests, which surged in 2020 in nearly 550 places across the United States after the police murders of Breonna Taylor, George Floyd, and other innocent Black citizens, constituted "the largest movement in the country's history." Larry Buchanan, Quoctrung Bui & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES, (July 3, 2020), https://nyti.ms/2ZqRyOU.

[6] *See, e.g.*, Maxine Burkett, *Just Solutions to Climate Change: A Climate Justice Proposal for a Domestic Clean Development Mechanism*, 56 BUFF. L. REV. 169, 178 (2008) (noting that, for example, "people of color would be more likely to die in a heat wave and to suffer more from heat-related stress and illness").

[7] For data and analysis documenting the disparate impacts of COVID-19 during the first 12 months of the pandemic, see *The COVID Racial Data Tracker*, THE COVID TRACKING PROJECT, https://covidtracking.com/race (Mar. 7, 2021) (concluding generally that "COVID-19 is affecting Black, Indigenous, Latinx, and other people of color the most").

[8] For an excellent summary of recent EJ legislation among the states, see Michael B. Gerrard & Edward McTiernan, *Emerging State-Level Environmental Justice Laws*, N.Y. L.J., May 13, 2021, at 3.

[9] Among the multiple pieces of EJ legislation recently introduced in Congress is the Environmental Justice for All Act, S. 4401, 116th Cong. (2020); H.R. 5986, 116th Cong. (2020). The legislation was reintroduced in both the House and Senate on March 18, 2021. *See* Environmental Justice for All Act, S.872, 117th Cong. (2021), H.R. 2021, 117th Cong. (2021); Yvette Cabrera, *A Groundbreaking Environmental Justice Bill Is Poised to Become Law*, GRIST (Mar. 19, 2021), https://grist.org/equity/democrats-congress-environmental-justice-tammy-duckworth.

[10] As one extraordinary demonstration of President Biden's commitment to environmental justice, the President signed an executive order within hours of his inauguration on Jan. 20, 2021, directing that "the Federal Government . . . must advance environmental justice." *See* Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis, Exec. Order No. 13,990, 86 Fed. Reg. 7037 (Jan. 20, 2021).

[11] *Cf.* Amanda Gorman, *The Hill We Climb* (the Biden-Harris inaugural poem) ("For while we have our eyes on the future / history has its eyes on us.").

counsel for a private company contracted to construct a pipeline to transport natural gas 600 miles across the southeastern United States. In order to move the natural gas over this distance, the pipeline will require a series of "compressor stations" powered by natural gas turbines. Turbine emissions, including nitrous oxides and fine particulate matter, will require permits from state agencies authorized to implement the federal Clean Air Act (CAA).[12]

In preparing the air permit applications, you note that construction of Compressor Station 1 is planned in a community of Bolling County where EPA data indicate there is a 39 percent "minority" population. However, an actual door-to-door survey of households within one mile of the planned Station 1 indicates the surrounding community is made up of 83 percent minority residents, including 62 percent Black residents. In public meetings on the draft air permit, members of the local community express strong opposition to the siting of Station 1 in their neighborhood. This is so even though your technical consultants assure the community that operation of Station 1 will not cause any exceedance of National Ambient Air Quality Standards (NAAQS)[13] in Bolling County. The Station 1 community forms a "Friends of Bolling County" group to oppose issuance of the Station 1 air permit, through litigation if necessary. As counsel for the pipeline construction company, how do you proceed?

As with any good hypothetical, this scenario is grounded in reality, and many readers will recognize it as based largely on the case of the Atlantic Coast Pipeline, proposed to transport natural gas 600 miles from West Virginia to North Carolina.[14] In related legal challenges by the Friends of Buckingham community organization, the project proponents and their supporters in government failed to

[12] *See* 42 U.S.C. § 7661a(d) (requiring the Governor of each State to "develop and submit to [EPA] a permit program" for purposes of implementing requirements of the Clean Air Act).

[13] For an accessible introduction to the National Ambient Air Quality Standards (NAAQS) program established by Section 109 of the Clean Air Act, see Thomas O. McGarity, *Science and Policy in Setting National Ambient Air Quality Standards: Resolving the Ozone Enigma*, 93 TEXAS L. REV. 1783 (2015).

[14] *See* Friends of Buckingham v. State Air Pollution Control Bd., 947 F.3d 68, 71 (4th Cir. 2020).

satisfy the demands of environmental justice.[15] As a result, the project encountered widespread community opposition and litigation, predictably resulting in numerous delays and excessive costs, and perhaps even killing the project.[16]

To paraphrase the famous words of Justice Potter Stewart in a different context, when it comes to environmental justice—or rather, environmental *injustice*—"you know it when you see it."[17] In the case of our not-very-hypothetical Compressor Station 1, we can see environmental injustice when a state agency ignores the health concerns of a potentially-impacted community with an 83 percent minority population. Some people still do not see that. *You* can do better.

This Article explores what environmental justice means in modern practice, as shaped over time by multiple forces, including agency policy and developing case law. Part II of this Article considers how federal policy has shaped the modern meaning of environmental justice, including through Executive Order 12,898 (1994) and the EPA definition of "environmental justice." Part III of this Article examines the case law that is developing in support of environmental justice based upon federal environmental statutes. Part IV examines the case law that is developing in support of environmental justice grounded in constitutional rights, civil rights legislation, and torts. Part V concludes with suggestions for legal practitioners in navigating the rapidly evolving law and policy of environmental justice, and with advice for how to genuinely pursue environmental justice in the communities where we live, learn, play, pray, and work.

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[15] *Id.* at 86 (noting that the state board which approved the air permit "thrice erred in performing its statutory dut[ies]" to ensure environmental justice). For further examination of how the state board failed to satisfy requirements of environmental justice in this case, see *infra* notes 130–36 and accompanying discussion.

[16] *See* Ivan Penn, *Atlantic Coast Pipeline Canceled as Delays and Costs Mount*, N.Y. TIMES, July 6, 2020, at 4.

[17] Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) ("I shall not today attempt further to define the kinds of material I understand to be embraced within [the term 'hard-core pornography']. But I know it when I see it, and the motion picture involved in this case is not that.").

II. ADVANCES IN ENVIRONMENTAL JUSTICE POLICY

Though attention to environmental justice has come and gone and come again under successive presidential administrations, over the last few decades, federal policy still has advanced EJ theory and practice. The most significant and enduring federal EJ policy is reflected in Executive Order 12,898, signed by President Bill Clinton in 1994.[18] Various policy statements by the U.S. Environmental Protection Agency followed E.O. 12,898, defining "environmental justice" and providing guidance on how environmental justice may be pursued in many contexts, including environmental permitting, enforcement targeting, and environmental work with tribal governments. Each of these policy developments will be discussed briefly in this section.

A. *Executive Order 12,898*

On February 11, 1994, President Bill Clinton signed Executive Order 12,898, *Federal Actions to Address Environmental Justice in Minority and Low-Income Populations*.[19] In the nearly 30 years since E.O. 12,898 was signed, the most significant feature of this presidential order has been its direction to "each Federal agency [to] make achieving environmental justice part of its mission . . . ."[20] The order tasked agencies with achieving this mission "by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of [the agency's] programs, policies, and activities on minority populations and low-income populations in the United States . . . ."[21] E.O. 12,898 further directed each agency to develop "an agency-wide environmental justice strategy" to identify and address these "disproportionately high and adverse human health or environmental effects."[22]

On reflection, the breadth of this presidential directive may appear staggering. Under the express terms of E.O. 12,898,

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[18] *See* Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 16, 1994).

[19] *See id.*

[20] *Id.* § 1-101.

[21] *Id.*

[22] *Id.* § 1-103.

environmental justice is not just the mission of EPA in enforcing environmental statutes. Environmental justice is also the mission of the U.S. Army Corps of Engineers (Corps) for approving work affecting navigable waters. It is the mission of the Federal Aviation Administration (FAA) for approving extensions to airport runways. It is the mission of the U.S. Air Force (USAF) in flight training over urban areas. It is the mission of the Federal Energy Regulatory Commission (FERC) when approving pipeline operations. It is the mission of the U.S. Bureau of Land Management (BLM) when approving oil and gas drilling on federal lands and the mission of the U.S. Forest Service (USFS) when approving mining and timber activities on Forest Service lands.

E.O. 12,898, like many federal policies, contains a common disclaimer, asserting that "[t]his order shall not be construed to create any right to judicial review" involving agency compliance or noncompliance with the order.[23] Even so, many courts—as this Article will explore further in Part III—have begun to compel agency consideration for environmental justice, consistent with the requirements of E.O. 12,898.[24] These standards may soon become strengthened, as the Biden administration has signaled an early interest in amending E.O. 12,898.[25] Accordingly, practitioners should keep eyes open for any new standards for environmental justice that may be applicable to federal agencies.

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[23] *Id*. § 6-609.

[24] *See, e.g.*, Vecinos Para el Bienestar de la Comunidad Costera v. Fed. Energy Regul. Comm., 6 F.4th 1321, 1330 (D.C. Cir. Aug. 3, 2021); Friends of Buckingham v. State Air Pollution Control Bd., 947 F.3d 68 (4th Cir. 2020); Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, 255 F. Supp. 3d 101, 136 (D.D.C. 2017); Communities Against Runway Expansion, Inc. v. Fed. Aviation Admin., 355 F.3d 678, 688–89 (D.C. Cir. 2004).

[25] In fact, the Biden administration effected a minor amendment to E.O. 12,898 just one week after inauguration. *See* Tackling the Climate Crisis at Home and Abroad, Exec. Order 14,008, 86 Fed. Reg. 7619, 7629–30 (Feb. 1, 2021) (amending E.O. 12,898 to create a "White House Environmental Justice Interagency Council"). E.O. 14,008 also created a "White House Environmental Justice Advisory Council," charging it with a mission to include making "recommendations for updating Executive Order 12898." *Id.* § 221(b). For the first such set of recommendations, see WHITE HOUSE ENV'T JUST. ADVISORY COUNCIL, FINAL RECOMMENDATIONS: JUSTICE40, CLIMATE AND ECONOMIC JUSTICE SCREENING TOOL, & EXECUTIVE ORDER 12,898 REVISIONS (May 21, 2021), https://www.epa.gov/environmentaljustice/white-house-environmental-justice-advisory-council-final-recommendations (last visited Nov. 27, 2021).

B. *EPA Definitions of "Environmental Justice"*

One of the most vexing questions in environmental justice practice has always been what exactly is meant by "environmental justice"—or even whether "environmental justice" is the best term to use. Early in the movement for environmental justice, "environmental racism" was used more commonly than "environmental justice."[26] "Environmental racism" did not gain widespread usage, however, at least in part due to recognition of the disparate environmental impacts experienced by other groups, as distinguished by characteristics such as age, gender, and income level.[27] For a brief time, EPA adopted the term "environmental equity."[28] However, "environmental equity" did not stick either, as environmental "equity" could be achieved literally by either *protecting* people equally or *poisoning* people equally.[29]

In 1994, E.O. 12,898 affirmed the common use of "environmental justice," and explicitly broadened the scope of concerns to include adverse impacts on "minority populations," "low-income populations," and "Native Americans."[30] While E.O. 12,898 established a general federal agency mission to identify and address "disproportionately high and adverse human health or environmental effects," the order did not suggest how such disproportionate effects

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[26] *See, e.g.*, Richard J. Lazarus, *"Environmental Racism! That's What It Is."* 2000 U. ILL. L. REV. 255, 260 (2000).

[27] *See* Villa, *supra* note 2, at 484–87 (discussing rise and fall of the term "environmental racism"). Of course, "environmental racism" is still in use and useful for describing the disparate environmental effects that remain associated with race. *See generally* HARRIET A. WASHINGTON, A TERRIBLE THING TO WASTE: ENVIRONMENTAL RACISM AND ITS ASSAULT ON THE AMERICAN MIND (2019); Machara McCall, *Environmental Racism: The U.S. EPA's Ineffective Enforcement of Title VI of the Civil Rights Act of 1964*, 13 S. J. POL'Y & JUST. 49, 49 (2019); Eric Jantz, *Environmental Racism with a Faint Green Glow*, 58 NAT. RES. J. 247, 249 (2018).

[28] *See, e.g.*, EPA, ENVIRONMENTAL EQUITY: REDUCING RISK FOR ALL COMMUNITIES (1992).

[29] *See* Mike Ewall, *Legal Tools for Environmental Equity vs. Environmental Justice*, 13 SUSTAINABLE DEV. L. & POL'Y 4, 4 (2012) (noting that "environmental equity" v. "environmental justice' "represents the fundamental difference between the concepts of "poison people equally" and "stop poisoning people, period!").

[30] Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 16, 1994) (applying order to "minority populations and low-income populations" as well as "Native American programs").

should be identified and addressed. Nor did E.O. 12,898 provide any standard for determining when environmental justice has been achieved. To develop this standard, many scholars and advocates have made efforts to define "environmental justice." One approach compiled lists of objectives, most notably, the "17 Principles of Environmental Justice" drafted during the First National People of Color Environmental Leadership Summit in Washington, D.C. in 1991.[31] Another approach suggested a methodology defining environmental justice according to articulated dimensions of justice, including "distributive justice," "procedural justice," and "corrective justice."[32] According to an influential 2000 article by environmental justice scholar Robert Kuehn, *distributive justice* focuses on "fairly distributed outcomes,"[33] while *procedural justice* "requires a focus on the fairness of the decisionmaking process, rather than on its outcome."[34] "Corrective justice" includes fairness in the assignment of punishment and damages, and, more broadly, requires that "injuries caused by the acts of another . . . be remedied."[35] Finally, "social justice" recognizes the interrelation of many social and political concerns, such as education, employment, and public infrastructure, all of which may be necessary in order to improve a community's quality of life.[36]

[31] PRINCIPLES OF ENVIRONMENTAL JUSTICE, PROCEEDINGS, THE FIRST NATIONAL PEOPLE OF COLOR ENVIRONMENTAL LEADERSHIP SUMMIT (Oct. 24–27, 1991), *reprinted in* CLIFFORD J. VILLA ET AL., ENVIRONMENTAL JUSTICE: LAW, POLICY & REGULATION 28–30 (2020). The 1991 Summit drew more than 650 national and grassroots leaders from across the fifty states, Puerto Rico, Mexico, Chile, and the Marshall Islands. Robert D. Bullard et al., *Toxic Wastes and Race at Twenty: Why Race Still Matters After All of These Years*, 38 ENV'T L. 371, 376–77 (2008). The geographical diversity of Summit participants reflected in an extraordinary scope of concerns within the 17 Principles, with breathtaking aspirations to include "the cessation of the production of all toxins," "universal protection from nuclear testing," and "a halt to the testing of experimental . . . vaccinations on people of color." VILLA ET AL. at 29.

[32] *See* Robert R. Kuehn, *A Taxonomy of Environmental Justice*, 30 ENV'T. L. REP. 10681, 10684, 10688 (2000).

[33] *Id*. at 10684.

[34] *Id*. at 10688.

[35] *Id*. at 10693–94.

[36] *Id*. at 10699. The influence of Kuehn's 2000 article reflects in legal scholarship that continues to cite to it today. *See, e.g.*, Rachael E. Salcido, *Retooling Environmental Justice,* 39 UCLA J. ENV'T L. 1, 7 (2021) (recognizing "Kuehn's

Beyond articulated dimensions of environmental justice, a third approach, favored by government and scholars,[37] has involved narrative descriptions identifying major elements of environmental justice. The most enduring and commonly applied definition is the one that has been established by EPA for at least twenty years. According to this "standard definition," the term "environmental justice" means "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."[38] For purposes of this definition, EPA defines the element of "fair treatment" to mean "no group of people should bear a disproportionate share of the negative environmental consequences resulting from industrial, governmental and commercial operations or policies."[39] EPA also defines the element of "meaningful involvement" to require, among other things, that community members have an opportunity to participate in processes and to influence decisions that may affect their environment.[40]

Together, according to the EPA definition, "fair treatment" and "meaningful involvement" form two major elements of

helpful taxonomy"); Hannah Lustman, *Sick Uncertainty: How Executive Threats to EPA Programs for the U.S.-Mexico Border Threaten Environmental Justice*, 10 ARIZ. J. ENV'T L. & POL'Y 465, 465 (2020) (applying "Kuehn's four-part framework for exploring environmental justice issues" to examine concerns for environmental justice along the U.S.-Mexico border); Villa, *supra* note 2, at 489.

[37] Michigan professor Bunyan Bryant, for example, defined "environmental justice" to mean "those cultural norms and values, rules, regulations, behaviors, policies, and decisions to support sustainable communities, where people can interact with confidence that their environment is safe, nurturing, and productive." Bunyan Bryant, *Introduction* to ENVIRONMENTAL JUSTICE: ISSUES, POLICIES, AND SOLUTIONS 6 (Bunyan Bryant ed., 1995).

[38] *Environmental Justice*, EPA, https://www.epa.gov/environmentaljustice (last visited Feb. 17, 2022).

[39] *Learn About Environmental Justice*, EPA, https://www.epa.gov/environmentaljustice/learn-about-environmental-justice (last visited Sept. 18, 2021). As with other definitions, EPA staff appear to have tinkered with the exact wording of the definition of "fair treatment." In one recent report, EPA appears to have balanced the definition's focus on "negative environmental consequences," by adding, "In implementing its programs, EPA has expanded the concept of fair treatment to include not only consideration of how burdens are distributed across all populations, but the distribution of benefits as well." EPA, EJ 2020 ACTION AGENDA 55 (2016).

[40] *Learn About Environmental Justice*, *supra* note 39.

environmental justice, with these foundational concepts adopted (often verbatim) by many state statutes[41] and policy statements.[42] As such, the concepts of "fair treatment" and "meaningful involvement" are keys to understanding environmental justice. Under the EPA definition, "fair treatment" does not mean *equal* treatment, recognizing that disproportionate burdens may sometimes require investing extra attention and resources to relieve overburdened communities. Likewise, as defined by EPA, "meaningful involvement" requires more the old one-way flow of "public information."[43] Meaningful involvement implies that the engaged public will have real opportunities to influence final decisions, i.e., that a dialogue

[41] *See, e.g.*, Washington Healthy Environment for All (HEAL) Act, S. 5141, 2021 Wash. Legis. Serv. ch. 314 (effective July 25, 2021) (defining "environmental justice" to mean "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, rules, and policies") (emphasis added); N.Y. ENV'T. CONSERV. LAW, § 48-0101 (Consol. 2021) (defining environmental justice to mean that "all people, regardless of race, color, religion, national origin or income, have a right to *fair treatment* and *meaningful involvement* in the development, implementation and enforcement of laws, regulations and policies that affect the quality of the environment") (emphasis added); CAL. GOV'T CODE § 65040.12(e) (Deering 2021) (defining environmental justice as "the *fair treatment* and *meaningful involvement* of people of all races, cultures, incomes, and national origins, with respect to the development, adoption, implementation, and enforcement of environmental laws, regulations, and policies") (emphasis added).

[42] *See, e.g.*, N.M. Exec. Order No. 2005-056 (Nov. 18, 2005) (noting that New Mexico is "committed to affording all of its residents, including communities of color and low-income communities, *fair treatment* and *meaningful involvement* in the development, implementation, and enforcement of environmental laws, regulations, and policies regardless of race, color, ethnicity, religion, income or education level") (emphasis added); MINN. POLLUTION CONTROL AGENCY, ENVIRONMENTAL JUSTICE FRAMEWORK 3 (2015) (providing that "The Minnesota Pollution Control Agency will, within its authority, strive for 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.") (emphasis added).

[43] For example, the National Oil and Hazardous Substances Pollution Contingency Plan, 40 C.F.R. pt. 300, provides, "[w]hen an incident occurs, it is imperative to give the public prompt, accurate information on the nature of the incident and the actions underway to mitigate the damage." 40 C.F.R. § 300.155(a) (2021). There is, however, no reciprocal "imperative" to respond to public concerns, only encouragement to ensure that "public and private interests" are "considered" throughout a response. *Id*.

will truly be "meaningful," unlike the old model of "public relations" that merely sought to "decide, announce, and defend."[44] Many concerns for environmental justice can be addressed simply through a genuine commitment to fair treatment and meaningful involvement.

Beyond fair treatment and meaningful involvement, a third major element of the EPA definition of "environmental justice" is its express application to "all people." Depending on your perspective, "all people" may be either a blessing or a curse. "All people" may signal the ultimate inclusivity, extending concerns for environmental justice to *all* people: all schoolchildren, single mothers, and elders; all diabetics and cancer survivors; all homeless people, transgender people, and undocumented persons. At the same time, "all people" also obscures any focus on traditionally overburdened and underserved communities. "All people," some might say, effectively dismisses the urgent call of "Black Lives Matter" with a lackadaisical "All Lives Matter."

One solution to this quandary may be to focus not on defined *classes* of people, but upon the specific *characteristics* that make them most vulnerable to environmental harms. For example, while Puerto Ricans are often classified as a "minority" in the United States,[45] being Puerto Rican in Puerto Rico tells you little about who will survive the next major hurricane to strike the island. On the other hand, vulnerability to hurricanes may be most strongly correlated with pre-existing health conditions such as diabetes and heart

[44] *See* TERRY F. YOSIE & TIMOTHY D. HERBST, USING STAKEHOLDER PROCESSES IN ENVIRONMENTAL DECISIONMAKING: AN EVALUATION OF LESSONS LEARNED, KEY ISSUES, AND FUTURE CHALLENGES 24 (1998) (observing that "projects that are presented to stakeholder groups without their previous participation are largely perceived as traditional 'decide, announce, and defend' tactics that have generated a great deal of opposition").

[45] *See, e.g.*, 48 C.F.R. § 52.222-27(a)(4) (2021) (Affirmative Action Requirements for Federal Acquisition Regulation) ("Minority means . . . Hispanic (all persons of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish culture or origin, regardless of race)"); 24 C.F.R. § 81.2(b) (2004) (Housing and Urban Development) ("Minority means any individual who is included within any one or more of the following racial and ethnic categories . . . Hispanic or Latino – a person of Cuban, Mexican, Puerto Rican, South or Central American, or other Spanish culture or origin, regardless of race . . . .").

disease.[46] In this example—as before, not very hypothetical—it may be critical to understand that "all people" includes people with particular health conditions, and to prepare emergency plans accordingly.

C. *Federal EJ Policies*

Beyond defining environmental justice, EPA over the last twenty years has issued many guidance documents and tools for promoting environmental justice. Many of these documents and tools have been developed with the assistance of the National Environmental Justice Advisory Council ("the NEJAC"),[47] an official advisory body to the U.S. EPA Administrator. Other developments have been inspired by EPA leaders, especially Lisa Jackson, President Obama's first EPA Administrator.[48] The discussion below will highlight three areas of federal EJ policy development: (1) electronic mapping; (2) EJ in Indian country; and (3) EJ implementation plans, as means of promoting environmental justice outside of legislative or litigative endeavors.

1. Electronic Mapping

Along with the meaning of "environmental justice," another longstanding question is the meaning of "environmental justice community." The question is a natural one. If you, our hypothetical in-house counsel for a pipeline construction company, want to know whether or not a proposed construction site is likely to raise concerns for environmental justice, how will you determine that? Ideally, there would be an electronic database or GIS platform that would tell you "yes" or "no" when you ask whether a particular site

[46] For a review of studies confirming this particular dimension of heightened vulnerability, see Villa, *supra* note 2, at 513, 513 n.204.

[47] NEJAC was established by EPA in 1993 pursuant to the Federal Advisory Committee Act, 5 U.S.C. App. §§ 1–16, to provide EPA with independent "advice and recommendations . . . from all stakeholders involved in the environmental justice dialogue," to include representatives from community organizations, government, academia, and industry. *National Environmental Justice Advisory Council*, EPA, https://www.epa.gov/environmentaljustice/national-environmental-justice-advisory-council (last visited June 4, 2021). For more on NEJAC, including a collection of its formal recommendations over the years, see *id.*

[48] Among other things, Administrator Jackson revived the EPA practice of developing EJ implementation plans that were called for under E.O. 12,898. *See infra* note 76 and accompanying text.

is located within an "EJ community." Efforts to develop such tools have been made, but experience has shown that the question often cannot be answered with a simple yes or no. In fact, the very idea of an "EJ community" may be illusory or misleading.

Imagine this scenario: an old waterfront district along an urban river is being redeveloped. As property values rise and gentrification sets in, low-income communities and people of color have been forced out by rising rents and property taxes. Now the majority of residents along the waterfront are high-income, white people. However, the majority of people who continue to use the river for fishing and swimming are low-income people of color. Would electronic mapping identify this waterfront as an EJ community based upon recreational use by people of color or reject such identification based upon the concentration of wealthy white property owners? Another scenario: replacement of a gathering line[49] on the North Slope of Alaska will require displacement of residents in an Alaska Native Village for three months. The village only has twelve residents, producing a statistically insignificant population density compared to the 94,796 square miles of the North Slope Borough. Is the village an EJ community?

Community leaders and members may reject designation as an "EJ community," recognizing the adverse consequences such designation could bring, such as stigma, redlining, and the discriminatory lending practices that this country has long struggled to eradicate.[50] On the other hand, some communities have sought designation as an EJ community, anticipating that such designation

[49] A "gathering line" generally collects oil or gas extracted from separate wells for transport via larger pipeline to "downstream" holding refineries or processing facilities. *See* Kurt L. Krieger, *Gathering and Transporting Marcellus and Utica Shale Natural Gas to the Market and the Regulation of Midstream Pipeline Companies – The Case for a Uniform Federal and State Definition of "Gathering" in the Context of Economic and Siting Regulation*, 19 TEX. WESLEYAN L. REV. 49, 53 (2012).

[50] For a thorough overview of race discrimination in housing in the United States, often officially supported by the federal government, see RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA (2017). For GIS representation of select areas of historical housing discrimination in the United States, see *Mapping Inequality: Redlining in New Deal America,* U. RICH. DIGIT. SCHOLARSHIP LAB, https://dsl.richmond.edu/panorama/redlining/#loc=5/39.1/-94.58 (last visited Nov. 22, 2021).

would draw public attention and resources.[51] In California and elsewhere, designated communities have indeed reaped financial benefits under state law.[52] This flow of benefits may accelerate under the Biden administration's "Justice40" initiative,[53] intended to direct 40 percent of certain federal investments to the benefit of disadvantaged communities.[54] To facilitate such federal investments, the White House Council on Environmental Quality recently launched a new mapping tool, the Climate and Economic Justice Screening Tool (CEJST).[55] Through this new mapping tool, any user may locate any geographic area in the United States (e.g., by zip code or street address) and quickly receive a visual display of whether or not the census tract is within a "disadvantaged community"[56] as

[51] *See, e.g.*, MULTICULTURAL ALL. FOR A SAFE ENV'T, ENVIRONMENTAL JUSTICE POLICY STATEMENT (2015), https://swuraniumimpacts.org/wp-content/uploads/2016/01/EJ-statement.pdf (arguing that New Mexico's "Grants Mining District must be designated as an *Environmental Justice Zone* by all regulators").

[52] *See* Charles Lee, *A Game Changer in the Making? Lessons from States Advancing Environmental Justice Through Mapping and Cumulative Impact Strategies*, 50 ENV'T L. REP. 10,203 (2020) (observing that disadvantaged communities in California have received a share of approximately $12.14 billion to date under state law designating 25 percent of proceeds from the Greenhouse Gas Reduction Fund established under the state's Global Warming Solutions Act of 2006).

[53] *See* Exec. Order 14,008, 86 Fed. Reg. 7619, 7629–30 (Feb. 1, 2021). Specifically, the "[f]ederal investments" described in the order shall focus on "the areas of clean energy and energy efficiency; clean transit; affordable and sustainable housing; training and workforce development; the remediation and reduction of legacy pollution; and the development of critical clean water infrastructure."

[54] For an update on the Justice40 initiative, including a link to interim guidance to federal agencies, see Shalanda Young, Brenda Mallory & Gina McCarthy, *The Path to Achieving Justice40*, WHITE HOUSE (July 20, 2021), https://www.whitehouse.gov/omb/briefing-room/2021/07/20/the-path-to-achieving-justice40.

[55] *See Climate and Economic Justice Screening Tool*, COUNCIL ON ENV'T QUALITY, https://screeningtool.geoplatform.gov/en (last visited Mar. 12, 2022). For a brief analysis of this new tool, see *Biden Administration Rolls Out New Climate, Economic, and Environmental Justice Tools*, NAT'L L. REV. (Feb. 28, 2022), https://www.natlawreview.com/article/biden-administration-rolls-out-new-climate-economic-and-environmental-justice-tools.

[56] "Communities identified as disadvantaged by the tool are those that are marginalized, underserved, and overburdened by pollution . . . ." *Explore the Tool*, *Climate and Economic Justice Screening Tool*, COUNCIL ON ENV'T QUALITY,

determined by combinations of environmental burdens and socioeconomic indicators.[57] As of March 2022, the new CEJST tool remains qualified as "beta," although further developments over time may certainly be anticipated.

While new mapping tools such as the CEJST will likely continue to emerge, the mapping tool used most commonly for identifying areas of EJ concern is known as "EJScreen."[58] EJScreen reflects years of development by the NEJAC to produce a mapping tool that would *not* place labels on communities, but would still allow ready access to data about certain communities to allow for more informed decision-making. As described by EPA, EJScreen "should not be used to identify or label an area as an 'EJ Community.' Instead, EJScreen is designed as a starting point, to highlight the extent to which certain locations may be candidates for further review or outreach."[59] Through EJScreen, users can drop a virtual pin at any geographic location and quickly obtain demographic and environmental data on the surrounding community. EJScreen also provides instant analyses comparing that local data to other averages for the state, EPA region, and nation. For example, a highly diverse and overburdened community might appear in the 98th percentile nationally for "Superfund Proximity," the 90th percentile nationally for "People of Color Population," and the 89th percentile nationally for "Linguistically Isolated."[60] Taking these data as a "starting point," one may reasonably envision a community with a high level

https://screeningtool.geoplatform.gov/en/cejst#20.78/35.1614951/-106.5402998 (last visited Mar. 5, 2022).

[57] For example, under the defined criteria, a community would be "identified as disadvantaged" if it was "at or above the 90th percentile for diesel particulate matter exposure or traffic proximity and volume AND is above the 65th percentile for low income AND at or below 20% for higher ed enrollment rate." *Methodology*, *Climate and Economic Justice Screening Tool*, COUNCIL ON ENV'T QUALITY, https://screeningtool.geoplatform.gov/en/methodology#3/33.47/-97.5 (last visited Mar. 5, 2022).

[58] *See EJScreen: Environmental Justice Screening and Mapping Tool*, EPA**,** https://www.epa.gov/ejscreen (last visited Feb. 23, 2022).

[59] EPA, TECHNICAL DOCUMENTATION FOR EJSCREEN 9 (2019), https://www.epa.gov/sites/production/files/2017-09/documents/2017_ejscreen_-technical_document.pdf.

[60] *See, e.g.*, *EJScreen*, *supra* note 58 (search: "East San Jose Elementary School, Albuquerque, New Mexico").

of racial diversity, proximity to Superfund sites, and need for translation services.

In February 2022, EPA released "EJScreen 2.0," which, among other things, updated demographic data based upon the latest U.S. Census, expanded socioeconomic indicators such as unemployment, and added new health equity metrics such as asthma and life expectancy.[61] Of course, however recently updated, EJScreen data must always be ground-truthed and tailored to the specific characteristics and concerns of each community.[62] Failure to do so may result in false positives (issues that are not really there) as well as false negatives (issues that *are* really there, but overlooked by the data set and analysis).[63] In the recent case concerning the Atlantic Coast Pipeline, the Virginia Department of Environmental Quality presented an EJScreen report indicating a minority population around the compressor station of 37–39 percent.[64] However, a door-to-door survey of nearby households found a minority population of 83.5 percent, more than double the EJScreen estimate.[65] Failure to confirm EJScreen results can lead to frustration, delay, and legal vulnerabilities. On the other hand, proper applications of EJScreen, along with many similar platforms being developed by individual states,[66] can lead to better understanding of communities and community concerns.

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[61] *See* Stephen Lee, *New Features Part of EPA's Environmental Justice Screening Tool*, BLOOMBERG L. (Feb. 18, 2022), https://news.bloomberglaw.com/social-justice/new-features-part-of-epas-environmental-justice-screening-tool.

[62] As EPA advises, "EJSCREEN's initial results should be supplemented with additional information and local knowledge whenever appropriate, for a more complete picture of a location." TECHNICAL DOCUMENTATION FOR EJSCREEN, *supra* note 59, at 9.

[63] At one time, for example, EJScreen routinely missed EJ issues in Alaska because of low population densities. *See EJScreen*, *supra* note 58 (search: "Alaska"). However, community members in Alaska, including Native Alaskans, have indeed expressed concerns for environmental justice. *See infra*, notes 120–123 and accompanying text (*In re:* Shell Offshore, Inc.).

[64] *See* Friends of Buckingham v. State Air Pollution Control Bd., 947 F.3d 68, 89 (4th Cir. 2020).

[65] *See id.* at 88–89.

[66] California, for example, has developed its own sophisticated GIS platform known as CalEnviroScreen. *See CalEnviroScreen*, CAL. OFF. OF ENV'T HEALTH HAZARD ASSESSMENT, https://oehha.ca.gov/calenviroscreen (last visited Mar. 14,

2. Environmental Justice in Indian Country

Environmental justice can present unique challenges when an activity may adversely impact indigenous peoples, tribal resources, or Indian lands collectively described as "Indian country."[67] The Standing Rock Sioux Tribe's long-running litigation opposing the Dakota Access Pipeline[68] presents one stark example of environmental justice concerns affecting indigenous people and Indian country. In this case, a spill from the Dakota Access Pipeline, just outside of the Standing Rock Indian Reservation, may directly affect water resources and tribal members on the reservation. Environmental justice concerns in Indian country reflect many of the common concerns in other locations, which are often centered around failures of fair treatment and meaningful involvement. But environmental justice considerations in Indian country may raise special concerns as well, such as considerations of history, culture,

2022). The State of Washington also recently developed a GIS platform, known as the Washington Environmental Health Disparities Map. *See Washington Tracking Network*, WASH. STATE DEP'T OF HEALTH, https://fortress.wa.gov/doh/wtn/-WTNIBL (last visited Mar. 14, 2022).

[67] "Indian Country" may have many conceptions and definitions in different contexts, but it "is most usefully defined as country within which Indian laws and customs and federal laws relating to Indians are generally applicable." COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 3.04[1] (Nell Jessup Newton et al. eds., 2012). Congress defined "Indian country" more strictly, as "all land within the limits of any Indian reservation," together with "all dependent Indian communities" within the United States and "all Indian allotments." 18 U.S.C. § 1151. For a broad overview of the particular challenges and opportunities for "[e]nvironmental [j]ustice in Indian [c]ountry", see VILLA ET AL., *supra* note 31, ch. 9 ("Environmental Justice in Indian Country").

[68] *See, e.g.*, Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, 985 F.3d 1032 (D.C. Cir. 2021); Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, 440 F. Supp. 3d 1 (D.D.C. 2020); Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, 255 F. Supp. 3d 101 (D.D.C. 2017).

sacred sites,[69] tribal sovereignty, and the federal trust responsibility.[70]

Principles of tribal sovereignty raise particular challenges for environmental justice. As sovereign governments, tribes have the authority to regulate the use of their lands and natural resources and to engage in government-to-government consultation on matters that may affect their lands and members.[71] But what if tribal members find that their own tribal government is unable or unwilling to secure environmental justice for them? Does tribal sovereignty mean those tribal members cannot be helped? Or does the application of environmental justice to "all people" mean that all indigenous people are entitled to environmental justice, with or without the support of their tribal government?

[69] Among many concerns for protecting sacred sites in Indian country is the potential for industrial projects to impair viewsheds with special value to tribes or tribal members. In one case, the Quechan Tribe of the Fort Yuma Indian Reservation challenged federal approval of a utility-scale wind energy project in the Ocotillo Desert of southern California, arguing, among other things, that the project area "lies at the bottom of Coyote Mountain . . . , which is an important cultural component to the Quechan cosmology . . . . [T]hat mountain is . . . held sacred in our Creation Story, songs, and other oral traditions." *See* Allison M. Dussias, *Room for a (Sacred) View? American Indian Tribes Confront Visual Desecration Caused by Wind Energy Projects*, 38 AM. INDIAN. L. REV. 333, 376 (2014) (quoting Complaint of Quechan Indian Tribe for Declaratory and Injunctive Relief at 2, Quechan Tribe v. U.S. Dep't of the Interior, 927 F. Supp. 2d 921 (S.D. Cal. 2013)). Under the deferential standard of the Administrative Procedure Act, the plaintiff's arguments based on viewshed protection were ultimately dismissed. *See* Quechan Tribe v. U.S. Dep't of the Interior, 927 F. Supp.2d 921, 935–39 (S.D. Cal. 2013). While no reported cases appear to accept viewshed protection as the sole basis for disapproving a proposed project in Indian country, such challenges retain potential for delaying or even terminating proposals in the future unless addressed consistently with applicable law and principles of environmental justice.

[70] For an excellent overview of a number of special factors affecting environmental justice in Indian country, see Elizabeth Kronk Warner, *Environmental Justice: A Necessary Lens to Effectively View Environmental Threats to Indigenous Survival*, 26 TRANSNAT'L L. & CONTEMP. PROBS. 343 (2017).

[71] EPA was one of the first federal agencies to establish a written policy requiring government-to-government consultations with tribes. *See* WILLIAM D. RUCKELSHAUS, EPA, EPA POLICY FOR THE ADMINISTRATION OF ENVIRONMENTAL PROGRAMS ON INDIAN RESERVATIONS (1984), https://www.epa.gov/sites/default/files/2015-04/documents/indian-policy-84.pdf. This policy is known widely as the "1984 Indian Policy."

In 2011, that question was put to the NEJAC, which responded with a report to the EPA Administrator in 2013.[72] Embracing many of the NEJAC's recommendations, the EPA Administrator issued a policy in 2014: the *EPA Policy on Environmental Justice for Working with Federal Recognized Tribes and Indigenous Peoples*.[73] The 2014 policy not only reaffirmed EPA's commitment to consultation with federally recognized tribes, but also—as indicated in the title—acknowledged a responsibility for ensuring environmental justice for "indigenous peoples in all areas of the United States," whether or not they resided in Indian country.[74] Under this policy, environmental justice obligations would extend, for example, to Diné people, whether they lived on or off lands of the Navajo Nation. Environmental justice obligations would also extend to members of the Standing Rock Sioux Tribe, whether or not their tribal government supported construction of the Dakota Access Pipeline.[75]

3. EPA EJ Implementation Plans

A third set of policies that shape environmental justice activities today was issued by EPA during the Obama administration. Recognizing and reviving the E.O. 12,898 direction to all federal agencies to make achieving environmental justice part of their mission, EPA issued its own revised EJ implementation plan in 2011,

[72] *See* NAT'L ENV'T JUST. ADVISORY COUNCIL, RECOMMENDATIONS FOR FOSTERING ENVIRONMENTAL JUSTICE FOR TRIBES AND INDIGENOUS PEOPLES (2013).

[73] *See generally* EPA, POLICY ON ENVIRONMENTAL JUSTICE FOR WORKING WITH FEDERALLY RECOGNIZED TRIBES AND INDIGENOUS PEOPLES (2014).

[74] *Id*. at 1.

[75] As suggested by the case caption, the Standing Rock Sioux Tribe did, as a tribal government, oppose construction of the Dakota Access Pipeline. *See* Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers, 205 F. Supp. 3d 4 (D.D.C. 2016); *see also* David Archambault II, *Taking a Stand at Standing Rock*, N.Y. TIMES, Aug. 24, 2016, at 19 (former chairman of the Standing Rock Sioux Tribe observing, "Our tribe has opposed the Dakota Access pipeline since we first learned about it in 2014"). The stance of the tribe was not without controversy, however, and Chairman Archambault was voted out of office in September 2017. *See Tribal Head Who Led the Fight Against the Dakota Access Pipeline Voted Out of Office*, L.A. TIMES (Sept. 28, 2017), https://www.latimes.com/nation/nation-now/la-na-sioux-leader-ouster-20170928-story.html.

known as *Plan EJ 2014*.[76] *Plan EJ 2014* called for the agency to address environmental justice through its full suite of programs, including rulemaking, permitting, enforcement, and financial assistance to states, tribes, and underserved communities.[77] *Plan EJ 2014* also called for the agency to develop tools to assist with achieving environmental justice, including information tools (e.g., EJSCREEN), science tools (e.g., air quality monitoring), and legal tools (e.g., Title VI of the Civil Rights Act of 1964). The legal tools initiative resulted in public release of an internal EPA guidance document, known as *EJ Legal Tools*,[78] which provides a useful—though incomplete[79]—compendium of legal authorities (e.g., under Superfund, the Clean Air Act, and the Federal Insecticide, Fungicide, and Rodenticide Act) that EPA and other parties may use to pursue environmental justice in appropriate circumstances.

Following the development and implementation of *Plan EJ 2014*, EPA updated its EJ implementation plan with the release of the *EJ 2020 Action Agenda*[80] at the end of the Obama administration.[81] While the Trump administration failed to update the EJ plan—and indeed effectively attempted to abolish the EPA Office

[76] *See* EPA, PLAN EJ 2014 (2011), https://www.epa.gov/environmentaljustice/plan-ej-2014. The "2014" signaled aspirations for where EPA wanted to be with EJ implementation by the year 2014, the 20th anniversary of E.O. 12,898's signing.

[77] *See id.*

[78] *See* EPA OFF. OF GEN. COUNS., PLAN EJ 2014: LEGAL TOOLS (Dec. 2011), https://www.epa.gov/sites/default/files/2015-02/documents/ej-legal-tools.pdf.

[79] Ironically, the EPA Headquarters Office of General Counsel released *EJ Legal Tools* in 2011 without allowing for any meaningful involvement by community members or experienced practitioners, including attorneys in EPA's own regional offices. As a result, *EJ Legal Tools* failed to identify and critically analyze significant authorities for pursuing environmental justice, including CERCLA removal authority. *See* PLAN EJ 2014: LEGAL TOOLS, *supra* note 78, at 53 (claiming falsely that "EPA may simply choose to study and/or clean up any contaminated non-NPL sites"). For a more comprehensive (and accurate) analysis of the use of CERCLA for pursuing environmental justice, see VILLA ET AL., *supra* note 31, ch. 8 ("Environmental Justice and Contaminated Sites").

[80] *See* EPA, EJ 2020 ACTION AGENDA: THE U.S. EPA'S ENVIRONMENTAL JUSTICE PLAN FOR 2016-2020, at iii (2016), https://www.epa.gov/environmentaljustice/ej-2020-action-agenda-epas-environmental-justice-strategy.

[81] For a closer review of Plan EJ 2014 and the EJ 2020 Action Agenda under the Obama EPA, see Rachael E. Salcido, *Reviving the Environmental Justice Agenda*, 91 CHICAGO-KENT L. REV. 115 (2016).

of Environmental Justice[82]—the Biden administration has made environmental justice a priority from day one.[83] Under Biden's EPA Administrator, Michael Regan, new and more vigorous EJ implementation plans may be expected and should be observed closely.

III. EJ CASE LAW GROUNDED IN ENVIRONMENTAL STATUTES

Three decades after environmental justice arrived on the national agenda, there is still no federal environmental justice statute comparable to the National Environmental Policy Act (NEPA),[84] the Clean Water Act (CWA),[85] the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),[86] or other landmark federal environmental legislation. Proposals for federal environmental justice legislation have been introduced in both houses of Congress, repeatedly, since at least 1992,[87] but all proposals have failed so far. In the absence of federal environmental

[82] *See* Uma Outka & Elizabeth Kronk Warner, *Reversing Course on Environmental Justice Under the Trump Administration*, 54 WAKE FOREST L. REV. 393, 400 (2019) (observing that Trump's fiscal year 2018 budget proposal would eliminate "all of [the] staff positions" within EPA's Office of Environmental Justice).

[83] *See supra* note 10 (President Biden signing Exec. Order 13,990 within hours of inauguration).

[84] *See* National Environmental Policy Act of 1969, 42 U.S.C. §§ 4331–47.

[85] *See* Clean Water Act of 1972, 33 U.S.C. §§ 1251–1388.

[86] *See* Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601–75.

[87] *See, e.g.*, Environmental Justice for All Act, S.4401, 116th Cong. (2020); H.R. 5986, 116th Cong. (2020); Environmental Justice Act of 2019, S. 2236, 116th Cong. (2019); Environmental Justice Act of 2017, S.1996, 115th Cong. (2017); Environmental Justice Act of 1992, H.R. 5326, 102d Cong. (1992). For a review of proposed federal EJ legislation, see Jeremy Orr, *Environmental Justice Act of 2017: A Fighting Chance for Frontline Communities*, 24 HASTINGS ENV'T L.J. 303 (2018).

justice legislation, many local governments[88] and state legislatures[89] have recently entered this arena. For example, in March 2021, Massachusetts passed legislation providing: "[a]n environmental impact report shall be required for any project that is likely to cause damage to the environment and is located within a distance of 1 mile of an environmental justice population . . . ."[90] Two months later, in May 2021, the State of Washington passed the Healthy Environment for All (HEAL) Act, which among other things will require state agencies to conduct an "environmental justice assessment" for certain proposed state actions, to include evaluation of "cumulative impacts" in a community.[91] A month after Washington's new EJ

[88] In 2017, for example, New York City passed two new local laws on Environmental Justice, which among other things required city agencies to incorporate environmental justice planning into their decision-making process. N.Y.C. Local Law No. 60 of 2017; N.Y.C. Local Law 64 of 2017. For further analysis on these local N.Y.C. statutes, see Rebecca Bratspies, *Protecting the Environment in an Era of Federal Retreat: The View from New York City*, 13 FLORIDA INT'L U. L. REV. 5 (2018). In 2020, the City of Albuquerque, New Mexico, passed an ordinance requiring a "cumulative impacts analysis" for any proposed action within a list of transportation or industrial activities where the proposed action would be located within an overburdened community of Albuquerque's South Valley. *See* ALBUQUERQUE, N.M., ORDINANCES ch. 14, art. 16, § 6-4(H) (2020).

[89] So far, state EJ legislation appears to be concentrated on the coasts. In 1999, California passed its first piece of EJ legislation, which among other things required the California Environmental Protection Agency to conduct its programs "in a manner that ensures the fair treatment of people of all races, cultures, and income levels." CAL. PUB. RES. CODE § 71110 (1999). In New York, the state passed legislation in 2019 that among other things established a statewide policy "that all people, regardless of race, color, religion, national origin or income, have a right to fair treatment and meaningful involvement in the development, implementation and enforcement of laws, regulations and policies that affect the quality of the environment." N.Y. ENV'T CONSERV. L. § 48-0101 (2019). In New Jersey, the governor signed legislation in 2020 requiring the New Jersey Department of Environmental Protection to identify the state's "overburdened communities" and only grant or renew permits for covered facilities upon a finding that there is no disproportionate, cumulative environmental impact on those communities. N.J. STAT. ANN. §§ 13:1D-157-161 (2020). For more on the New Jersey legislation, see Julius M. Redd & Hilary Jacobs, *New Jersey Passes Landmark Environmental Justice Legislation*, NAT'L L. REV. (Sept. 1, 2020), https://www.natlawreview.com/article/new-jersey-passes-landmark-environmental-justice-legislation.

[90] An Act Creating a Next-Generation Roadmap for Massachusetts Climate Policy, 2021 Mass. Acts ch. 28, at 1.

[91] Washington Healthy Environment for All (HEAL) Act, 2021 Wash. Sess. Laws ch. 314, § 14 (effective July 25, 2021).

statute, Maine took one modest step toward state-wide EJ legislation with a law directing the state Office of Policy Innovation and the Future, in consultation with other state offices and agencies, to "[d]evelop definitions for 'environmental justice,' 'environmental justice populations,' 'frontline communities,' and any other terms determined by the office to be necessary for the incorporation of equity considerations in decision making" by the state.[92]

As such legislative measures take root, EJ practice may be increasingly guided by state and local requirements. At this time, however, the effectiveness of state and local legislation for addressing concerns for environmental injustice remains largely untested.[93] At the same time, and reaching back over the last thirty years, significant case law has developed supporting environmental justice in legal challenges involving federal and state environmental statutes. This Part will provide notes on a selection of such federal and state cases, in chronological order. These cases demonstrate the emergence of legal principles for environmental justice, including the requirement for conducting an adequate EJ analysis.

A. *Case Examples*

***In re* Chemical Waste Management of Indiana (EAB 1995).**[94] In this early administrative case from 1995, the EPA Environmental Appeals Board (EAB) upheld a permit for a landfill in Indiana issued by EPA Region 5 under the Resource Conservation and Recovery Act (RCRA),[95] deferring to the "highly technical

[92] An Act to Require Consideration of Climate Impacts by the Public Utilities Commission and to Incorporate Equity Considerations in Decision Making by State Agencies, 2021 Me. Laws ch. 279, at 1–2.

[93] In 2016, for example, with much fanfare, the City of Newark, New Jersey, passed the Environmental Justice and Cumulative Impact Ordinance, requiring development proposals to include information about the cumulative impacts of the proposed action on the local community. *See* Newark, N.J., Ordinance No. 6PSF-E (July 7, 2016) (codified at NEWARK, N.J. CODE ch. 41:20 (2021)). For a review of this "first of its kind" ordinance, and ensuing bureaucratic challenges to its implementation, see Kristen Burby, *Making It Stick: Local Environmental Review Statutes*, 44 U.C. DAVIS ENVIRONS: ENV'T L. & POL'Y J. 63, 64, 81 (2021).

[94] *See* Chemical Waste Mgmt. of Ind., Inc., 6 E.A.D. 66 (EAB 1995).

[95] *See* 42 U.S.C. §§ 6901–92k.

judgment" of Regional experts.[96] However, citing E.O. 12,898, signed the year before, the EAB also stated that

> we hold that when a commenter submits at least a superficially plausible claim that operation of the facility will have a disproportionate impact on a minority or low-income segment of the affected community, the Region should, as a matter of policy, exercise its discretion under [RCRA] to include within its health and environmental impacts assessment an analysis focusing particularly on the minority or low-income community whose health or environment is alleged to be threatened by the facility.[97]

With this "holding," the EAB established the permitting requirement for conducting what would come to be known as an "environmental justice analysis" and would come to be subject to judicial review, as indicated in the cases below.

***In re:* American Marine Rail (N.Y. DEC 2000)**.[98] In another early administrative case decided in 2000, an administrative law judge (ALJ) for the New York Department of Environmental Conservation considered challenges to several environmental permits needed for construction and operation of a barge-to-rail solid waste transfer station along the East River in the South Bronx. Under the State Environmental Quality Review Act,[99] the New York State Department of Environmental Conservation determined that the project was not likely to have a significant adverse effect on the environment and thus did not require preparation of an environmental impact statement. In a subsequent hearing attended by more than 300 people, however, the ALJs heard concerns about bringing an "[additional] 5,200 tons of solid waste [per day] to an area where poor and minority people reside and that is already the site of a number of transfer stations and other waste-related facilities."[100] Community members also expressed concerns for "increased truck

96 Chemical Waste Mgmt. of Ind., 6 E.A.D. at 67–68, 80.

97 *Id*. at 75.

98 *See* Am. Marine Rail, LLC, 2000 WL 1299571 (N.Y. Dep't of Env't Conservation) (Aug. 25, 2000). For further background and context on the American Marine Rail decision, see Michael B. Gerrard, *Reflections on Environmental Justice*, 65 ALB. L. REV. 357, 361 (2001). *See also* Jacalyn R. Fleming, *Justifying the Incorporation of Environmental Justice into the SEQRA and Permitting Processes*, 6 ALB. L. ENV'T OUTLOOK J. 55, 71 (2002).

99 N.Y. ENV'T CONSERV. L. § 8 (McKinney 2000).

100 Am. Marine Rail, LLC, 2000 WL 1299571 at *2.

traffic" and "the potential for odors, vectors, and increased air pollution," along with many other potential impacts on their environment.[101]

After hearing and considering the public testimony, the ALJ reviewed the then-existing text of the State Environmental Quality Review Act, including requirements to consider potential impacts to "land, air, water, minerals, flora, fauna, noise, objects of historic or aesthetic significance, existing patterns of population concentration, distribution, or growth, and existing community or neighborhood character."[102] From these required factors, the ALJ observed, "This is a very broad mandate and would appear to encompass the concerns of environmental justice that arise with respect to this application."[103] The ALJ thus concluded, based upon factors including "the size of the project [and] the potential for cumulative impacts related to odors and air pollution," that an environmental impact statement was required in this case.[104] After more than twenty years, the decision in *American Marine Rail* remains undisturbed as precedent for the authority of a New York ALJ to require an Environmental Impact Statement (EIS) based upon concerns for environmental justice. The case may have also inspired pending proposals to codify this requirement in state law.[105]

Communities Against Runway Expansion, Inc. v. F.A.A. (D.C. Cir. 2004).[106] In this case, community organizations challenged an order by the FAA approving an expansion of Boston's Logan Airport. Among other claims, plaintiffs argued that the FAA had failed to meet obligations under NEPA because the environmental justice analysis included within its environmental impact

101 *Id*.

102 *Id.* at *61 (citing N.Y. ENV'T. CONSERV. L. §§ 8-0105(6), 8-0109 (2000)).

103 *Id*.

104 *Id*. at *7.

105 On March 3, 2021, the New York State Senate passed a bill that would amend the N.Y. Environmental Conservation Law, requiring any EIS to evaluate "effects of any proposed action on environmental justice communities, including whether the action may cause or contribute to … a disproportionate and inequitable pollution burden on an environmental justice community." S. 1031B, 2021–22 Reg. Sess. (N.Y. 2021). Similar legislation has also been introduced in the N.Y. State Assembly. *See* A.B. 6251, 2021–22 Reg. Sess. (N.Y. 2021).

106 *See* Cmtys. Against Runway Expansion, Inc. v. Fed. Aviation Admin., 355 F.3d 678 (D.C. Cir. 2004).

statement relied on flawed methodology. On appeal, the D.C. Circuit Court of Appeals denied the challenge on the merits but agreed with plaintiffs that the FAA's EJ analysis was still subject to "arbitrary and capricious" review under the federal Administrative Procedure Act.[107] Importantly, while recognizing the argument that E.O. 12,898 "expressly . . . [does] not create a private right to judicial review,"[108] the D.C. Circuit allowed and established a precedent for allowing legal challenges to federal actions based upon inadequate consideration of environmental justice concerns.[109]

Colonias Development Council v. Rhino Environmental Services, Inc (N.M. 2005).[110] In September 2001, more than 300 people attended a public hearing in Chaparral, New Mexico, to consider an application for a new landfill proposed to be sited in this unincorporated community near the U.S.-Mexico border. Representing an overwhelmingly minority and low-income community,[111] the vast majority of hearing participants opposed the landfill.

[107] *Id*. at 689. Applying the deferential standard of "arbitrary and capricious" review, the court upheld the FAA's EIS, finding that its methodology "was reasonable and adequately explained." *Id*.

[108] *Id*.

[109] *See* Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, 440 F. Supp. 3d 1, 9 (D.C. Cir. 2020) (observing that, "in this Circuit, NEPA creates, through the [APA], a right of action deriving from Executive Order 12,898"). *See also* Latin Americans for Soc. & Econ. Dev. v. Fed. Highway Admin., 756 F.3d 447, 465 (6th Cir. 2014) (allowing review of environmental justice study incorporated in NEPA documentation); Coliseum Square Ass'n Inc. v. Jackson, 465 F.3d 215, 232 (5th Cir. 2006) (reviewing Dept. of Housing and Urban Development's consideration of environmental justice concerns surrounding a proposed housing project). In a case preceding *Communities Against Runway Expansion*, however, the Ninth Circuit Court of Appeals rejected consideration of environmental justice concerns in the context of an EIS review. *See* Morongo Band of Mission Indians v. Fed. Aviation Admin., 161 F.3d 569, 575 (9th Cir. 1998) (rejecting tribe's challenge to EIS evaluating potential impacts from changes in flight pattern surrounding Los Angeles International Airport). For analysis, see Andrew J. Doyle, *Environmental Justice on the Move*, 62 FED. LAW. 3 (2015).

[110] *See generally* Colonias Dev. Council v. Rhino, 117 P.3d 939 (N.M. 2005). For background and thorough analysis of this case, see Kristina G. Fisher, *The Rhino in the Colonia: How* Colonias Development Council v. Rhino Environmental Services, Inc. *Set a Substantive State Standard for Environmental Justice*, 39 ENV'T L. 397 (2009).

[111] According to Census data, the local community at the time was 82 percent Hispanic with a 49 percent poverty rate. *See* Fisher, *supra* note 110, at 402.

They expressed fear that Chaparral "was in danger of being overrun by industrial sites and turned into a dumping ground" and "expressed general concerns that the landfill would increase health risks by bringing more dust, flies, noise, traffic, and pollution" to their community.[112] While the hearing officer allowed community members to speak into the early morning, she nevertheless rejected consideration of their testimony in her decision, perceiving her duty as "confined to overseeing the technical requirements of the permit application."[113] Based on this narrow view of authority under the New Mexico Solid Waste Act,[114] the New Mexico Environment Department granted the permit application.[115]

On appeal, the New Mexico Supreme Court reversed, finding that the hearing officer had erred in dismissing the community concerns. The court observed that the state legislature "clearly believed public participation is vital to the success" of the state solid waste program and that public testimony cannot be limited to "technical experts."[116] The court pointedly noted that "[c]ontrary to the Department's position, the impact on the community from . . . the proliferation of landfills, appears highly relevant to the permit process."[117] The court therefore instructed the Department to "reconsider the public testimony opposing the landfill," concluding that "we [] require, as the Act itself requires, that the community be given a voice, and the concerns of the community be considered in the final decision making . . . ."[118]

The landmark holding in *Colonias Development Council* demonstrated the substantive difference between mere opportunity for public comment and the *meaningful* involvement required by environmental justice. It also demonstrated the authority of state agencies and state courts to consider community concerns such as socioeconomics and cumulative impacts in environmental decisionmaking. As most federal environmental statutes—in this case,

112 *Colonias Dev. Council*, 117 P.3d at 942.

113 *See id*.

114 *See* N.M. STAT. ANN. § 74-9-1 to -43.

115 *See Colonias Dev. Council*, 117 P.3d at 942.

116 *Id*. at 945.

117 *Id*. at 947.

118 *Id*. at 950.

RCRA—are designed to be implemented primarily by states, *Colonias Development Council* highlighted the potential for pursuing environmental justice through state permitting actions.[119]

***In re* Shell Offshore, Inc. ("*Shell II*") (EAB 2010).**[120] In this administrative case, Alaska Natives challenged permits issued by EPA under the CAA to authorize the operation of massive drill rigs that Shell Gulf of Mexico, Inc. and Shell Offshore, Inc. (collectively, "Shell") intended to use for oil exploration on the Outer Continental Shelf of the Arctic Ocean. In response to this challenge, the EAB recognized a number of prior EAB decisions holding that "environmental justice issues must be considered in connection with the issuance of . . . permits" under the CAA's Prevention of Significant Deterioration (PSD) program.[121] Breaking with prior precedent, the EAB denied EPA's argument that compliance with the CAA's NAAQS indicates "de facto compliance" with E.O. 12,898.[122] The EAB emphasized that EPA must independently evaluate whether or not a proposed action will have disproportionately high and adverse human health or environmental effects on a potentially affected minority or low-income population. With this decision, the EAB also established a precedent for remanding an environmental permit to EPA "to reconsider the adequacy of its environmental justice analysis . . . ."[123]

***In re* Avenal Power Center, LLC (EAB 2011).**[124] In the immediate wake of *Shell II*, the EAB considered a challenge to another EPA PSD permit brought by community organizations opposed to a natural gas-fired power plant proposed to be located in

[119] *See, e.g.*, Eagle Env't II, L.P. v. Commonwealth Dept. of Env't. Prot., 884 A.2d 867 (Pa. 2005) (upholding EJ criteria for waste siting despite absence of specific statutory mandate).

[120] *See* Shell Offshore Inc., 15 E.A.D. 103, 2010 WL 5478647 (EAB 2010).

[121] *Id*. at *28.

[122] *Id*. at *31.

[123] *Id*. at *32. After EPA updated its EJ analysis and corrected some mistakes, the EAB declined to provide further review for the Shell CAA permits. However, the delay plus other challenges of working within the harsh Arctic environment eventually convinced Shell to abandon its proposed offshore exploration. *See* Terry Macalister, *Shell Abandons Alaska Arctic Drilling*, GUARDIAN (Sept. 28, 2015), https://www.theguardian.com/business/2015/sep/28/shell-ceases-alaska-arctic-drilling-exploratory-well-oil-gas-disappoints.

[124] *See* Avenal Power Center, LLC, 15 E.A.D. 384, 2011 WL 4881823 (2011).

California's Central Valley. The impacted area included a large percentage of Latino and low-income residents and was already designated in "extreme nonattainment" for NAAQS criteria pollutants.[125] Nevertheless, the EAB upheld the permit, contrasting this case with the facts of *Shell II.* The EAB noted that, "[c]ontrary to the lack of an environmental justice analysis . . . in *Shell II*, the Agency in this instance provided a 31-page environmental justice analysis coupled with a reasoned explanation" for analysis it was unable to complete.[126]

Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers (D.C. Cir. 2016–21).[127] This saga of cases began with the U.S. Army Corps of Engineers' 2016 decision to issue various approvals allowing for construction of the Dakota Access Pipeline (DAPL), an approximately 1,172-mile pipeline that would transport crude oil from the Bakken oil fields in North Dakota to market in southern Illinois. At one time, the pipeline route was considered to run north of Bismarck, North Dakota, whose population is 90 percent white, but was rerouted to the south to avoid potential impacts to Bismarck's water supply.[128] The Corps of Engineers "did not show similar concern for the Tribe's water source when they approved the route that went directly under Lake Oahe on the Missouri River."[129] The pipeline was eventually constructed within half a mile of the Standing Rock Indian Reservation and was tunneled

[125] *Id*. at *11.

[126] *Id*. at *14. Part of the plaintiffs' challenge in this case concerned the EPA's failure to reach conclusive findings concerning the potential short-term impacts of NO_2 on local minority communities. EPA recognized the "limited data available" from the air monitors located closest to the proposed facility but concluded that NO_2 levels "in the general area of the facility are not disproportionately high as compared to communities throughout the state." *Id*. at *12. The EIB deemed this limited analysis "permissible, particularly in light of the facts of this case and the discretion afforded to federal agencies under the Executive Order." *Id*. at *14.

[127] For background on this case, along with sage advice on how to avoid future conflicts, see Jeanette Wolfley, *Embracing Engagement: The Challenges and Opportunities for the Energy Industry and Tribal Nations on Projects Affecting Tribal Rights and Off-Reservation Lands*, 19 VT. J. ENV'T L. 115 (2018). *See generally* Troy A. Eid, *Beyond Dakota Access Pipeline: Energy Development and Imperative for Meaningful Tribal Consultation*, 95 DENV. L. REV. 593 (2018).

[128] *See* Carla F. Fredericks et al., *Social Cost and Material Loss: The Dakota Access Pipeline*, 22 N.Y.U. J. LEGIS. & PUB. POL'Y 563, 569 (2019).

[129] *Id*.

beneath Lake Oahe on the Missouri River, which the reviewing court recognized "plays an integral role in the life" of members of the Standing Rock Sioux Tribe.[130] Notwithstanding the scale of the project and potential impacts to the Tribe, the Corps declined to conduct an EIS under NEPA, instead relying upon an Environmental Assessment (EA) that concluded with a Finding of No Significant Impact.[131]

Upon challenge to the Corps' approvals by the Standing Rock Sioux Tribe, the U.S. District Court for the District of Columbia denied the Tribe's request for preliminary injunction, allowing the pipeline company to complete construction and begin transporting oil.[132] However, the next year, the same court found that the Corps had failed to satisfy its "environmental-justice responsibilities under NEPA."[133] In particular, the court found that the EJ analysis from the Corps "covers only construction impacts, not spill impacts."[134] In failing to consider spill impacts, the Corps had failed to take a "hard look" at potential impacts from the pipeline, as required by NEPA.[135] After more intervening decisions, the district court finally required the Corps to prepare a full EIS, concluding that "too many questions remain unanswered."[136] The same court later granted the Tribe's petition to vacate the Corps' approvals and ordered that DAPL "be shut down within 30 days."[137] On appeal, the D.C.

[130] Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, 205 F. Supp. 3d 4, 13 (D.D.C. 2016).

[131] *See* U.S. ARMY CORPS OF ENG'RS – OMAHA DIST., ENVIRONMENTAL ASSESSMENT, DAKOTA ACCESS PIPELINE PROJECT, CROSSING OF FLOWAGE EASEMENT AND FEDERAL LANDS (July 2016). For background on NEPA and requirements for an EIS, Environmental Assessment (EA), and Finding of No Significant Impact (FONSI), see JOEL A. MINTZ ET AL., A PRACTICAL INTRODUCTION TO ENVIRONMENTAL LAW ch. 3 (2017) ("Taking the Environment into Account: The National Environmental Policy Act").

[132] *See generally Standing Rock Sioux Tribe*, 205 F. Supp. 3d.

[133] Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, 255 F. Supp. 3d 101, 140 (D.D.C. 2017).

[134] *Id*. at 139 (emphasis in original).

[135] *See id*. at 140.

[136] Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, 440 F. Supp. 3d 1, 8 (D.C. Cir. 2020).

[137] Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, 471 F. Supp. 3d 71, 75, 88 (D.D.C. 2020) (finding that, "[c]lear precedent favoring vacatur . . .

Circuit reversed the order to shut down the pipeline, but upheld the vacatur of the Corps' approvals.[138]

Hausrath v. U.S. Dep't of the Air Force (D. Idaho 2020).[139] In a challenge by local residents to military flight training over urban areas of Idaho, the district court found that the USAF had failed to take a "hard look" at potential disruptions to local communities and required that the USAF complete an EIS to ensure compliance with NEPA.[140] In specific response to plaintiff arguments grounded in environmental justice, the district court observed that there is "no cause of action created by Executive Order 12898."[141] Nevertheless, the court concluded that "the USAF's consideration of environmental justice impacts are too cursory," failing in particular to evaluate potential noise impacts to disadvantaged populations.[142]

Friends of Buckingham v. Virginia Air Pollution Control Board (4th Cir. 2020).[143] In this citizen challenge to the Atlantic Coast Pipeline, the Virginia Air Pollution Control Board, acting under an authorized program of the federal Clean Air Act, approved a permit for a gas-fired compressor station in the "predominantly African-American community" of Buckingham County, Virginia.[144] In vacating and remanding the permit, the Fourth Circuit Court of Appeals concluded that the Board had "thrice erred."[145] First, the Board had "failed to make any findings regarding the character of the local population . . . in the face of conflicting evidence" that had been gathered by community advocates through door-to-door

coupled with the seriousness of the Corps' deficiencies outweighs the negative effects of halting the oil flow for the thirteen months that the Corps believes the creation of an EIS will take").

138 *See* Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, 985 F.3d 1032 (D.C. Cir. 2021).

139 *See* Hausrath v. U.S. Dep't of the Air Force, 491 F. Supp. 3d 770 (D. Idaho 2020).

140 *See id*. at 804.

141 *Id*. at 795 (citing Protect our Communities Found. v. Salazar, 2013 WL 5947137, at *15 (S.D. Cal. Nov. 6, 2013), *aff'd sub nom*. Backcountry Against Dumps v. Jewell, 674 F. App'x 657 (9th Cir. 2017)).

142 *Id.*

143 Friends of Buckingham v. State Air Pollution Control Bd. 947 F.3d 68 (4th Cir. 2020).

144 *Id.* at 71.

145 *Id.* at 86.

surveys.[146] Second, the Board had "failed to individually consider the potential degree of injury to the local population independent of NAAQS and state emission standards."[147] And third, the Board relied upon evidence that was "incomplete or discounted by subsequent evidence."[148] Given all of these demonstrable errors, the Fourth Circuit admonished the Board with words that no doubt will go down in EJ history: "environmental justice is not merely a box to be checked . . . ."[149] Moreover, in addition to strengthening judicial requirements for EJ analyses, the "landmark" ruling in *Friends of Buckingham* may also inspire legislative efforts for codifying such EJ requirements.[150]

Vecinos Para el Bienestar de la Comunidad Costera, *et al*., v. Federal Energy Regulatory Comm. (D.C. Cir. 2021).[151] In this recent decision from the D.C. Circuit Court of Appeals, members of a Latino community organization challenged FERC approvals for construction and operation of two 135-mile pipelines and three export terminals for shipping liquified natural gas (LNG) from Brownsville, Texas. Before approving the projects, FERC conducted an EJ analysis finding that all communities within a two-mile radius of each project site were "minority or low-income," but

146 *Id. See* TECHNICAL DOCUMENTATION FOR EJSCREEN, *supra* note 59 and accompanying text (noting that, while EJScreen indicated a nearby minority population of 37–39 percent, an actual door-to-door household survey indicated a local minority population of 83.5 percent).

147 As the Fourth Circuit patiently explained, "Even 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 – an 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.

148 Among other things, the Board relied upon a site evaluation conducted by the Virginia Department of Environmental Quality that consisted of a single page that checked only "Forest" (not "Residential") for the land use surrounding the proposed compressor station, ignoring the some "60 homes within one mile of the proposed site boundary." *Id.* at 93.

149 *Id.* at 92.

150 *See* Nina H. Farah, *Landmark EJ Ruling Sparks Legislative Reckoning in Va*., E&E NEWS (Oct. 4, 2021), https://www.eenews.net/articles/landmark-ej-ruling-sparks-legislative-reckoning-in-va.

151 Vecinos Para el Bienstar de la Comunidad de Costera v. Fed. Energy Regul. Comm'n., 6 F.4 1321 (D.C. Cir. Aug. 3, 2021).

concluding that the projects "would not have disproportionate adverse effects on minority and low-income residents in the area."[152] As petitioners pointed out, however, FERC offered no reason for limiting its EJ analysis to a two-mile radius of each project. Indeed, FERC's own analysis identified that "impacts on air quality from each project could occur within 31 miles."[153] The D.C. Circuit therefore concluded that FERC's decision to limit its EJ analysis to a two-mile radius was arbitrary.[154] Accordingly, the court remanded the case back to FERC to make specific findings on whether FERC's conclusions that the projects "would not have disproportionate adverse effects on minority and low-income residents in the area" were still justified.[155]

Center for Community Action & Environmental Justice v. Federal Aviation Admin. (9th Cir. 2021).[156] In perhaps the most recent federal appellate decision directly concerning environmental justice, a two-to-one panel of the Ninth Circuit Court of Appeals rejected arguments from community advocates, labor unions, and the State of California challenging a proposed air cargo facility at the San Bernardino airport in Southern California. The facility would include a new 658,000-square-foot building for sorting and distributing of cargo to and from the airport,[157] potentially requiring 3,823 daily truck trips.[158] Despite the huge predicted increase in truck traffic through an area that has long suffered some of the worst air pollution in the country,[159] within a community that is 73 percent Latino and 13 percent Black,[160] the FAA declined to conduct an EIS under NEPA. Instead, the FAA issued an EA concluding with a

[152] *Id*. at 1330.

[153] *Id*.

[154] *Id*. at 1330–31.

[155] *Id.* at 1331.

[156] Center for Cmty. Action & Env't Just. v. Fed. Aviation Admin.,18 F.4th 592 (9th Cir. 2021).

[157] *Id*. at 597.

[158] *Id*. at 698 (state estimate).

[159] According to EJScreen 2.0, the area around the San Bernardino airport ranks in the 97th percentile nationwide for ozone, 94th percentile nationwide for particulate matter, and 92nd percentile for air toxics respiratory risk.

[160] *Center for Cmty. Action & Env't Just.*, 18 F.4th at 614 (Rawlinson, J., dissenting).

Finding of No Significant Impact, which the Ninth Circuit panel affirmed as not demonstrably arbitrary and capricious.[161]

The panel decision drew a scathing dissent from Judge Johnnie Rawlinson, who began, "I do not say this lightly, but it must be said. This case reeks of environmental racism . . . ."[162] In addition to pointing out the extreme air pollution afflicting the local racial and ethnic population, Judge Rawlinson also noted the high levels of both poverty and asthma in the area.[163] For Judge Rawlinson, the FAA's Finding of No Significant Impact "would be laughable if the consequences were not so deadly to the population of San Bernardino County."[164] Among other legal arguments, she assailed the FAA's limited definition of the "General Study Area" as "significantly smaller" than the surrounding areas likely to the impacted by the air cargo facility, and she also found multiple faults with the FAA's analysis of cumulative impacts.[165] Pointing directly at the financial beneficiary of this "Amazon Project," Judge Rawlinson concluded, "Does anyone doubt that this Environmental Analysis would not see the light of day if this project were sited anywhere near the wealthy enclave where the multibillionaire owner of Amazon resides? Certainly not. The same standard should apply to the residents of the San Bernardino Valley . . . . Their lives matter."[166]

B. *Key Takeaways for Practitioners*

While Judge Rawlinson's scathing dissent did not carry the day in the challenge to the "Amazon Project" in San Bernardino, in the next case it may. Through the sampling of cases above, practitioners can see how legal principles of environmental justice have emerged and developed over time, in both federal and state courts. While there is still no federal regulation that requires agencies to conduct an EJ analysis, courts have invalidated federal and state actions for failure to fully analyze EJ concerns and incorporate EJ analysis into decision-making. In the absence of clear statutory and regulatory

161 *Id.* at 592, 597 (majority opinion).

162 *Id*. at 614 (Rawlinson, J., dissenting).

163 *Id*. (noting that local asthma rates "are among the highest 2% in California and more than 95% of the community lives below the poverty level").

164 *Id*.

165 *Id*. at 618–19.

166 *Id*. at 622.

requirements, practitioners must be prepared to conduct legal research related to environmental justice in their applicable jurisdictions.

One challenge with such legal research is that published cases involving EJ concerns often make no explicit mention of "environmental justice." In some cases, the EJ concerns are obvious, as in the case of *Weinberger v. Romero-Barceló*,[167] where the U.S. Navy used the Puerto Rico island of Vieques for munitions training,[168] over sustained objections from the island residents and the Governor of Puerto Rico.[169] In other cases, however, the EJ concerns may not be obvious. For example, in *Burlington Northern & Santa Fe Railway v. United States*,[170] one of the few Superfund cases to reach the U.S. Supreme Court, the Court in 2009 considered the meaning of "arranger" liability under CERCLA and schemes for allocating responsibility among parties liable for releases from the Brown & Bryant Superfund Site in Arvin, California.[171] As the case proceeded through the judicial system for six years, neither the Supreme Court nor any lower courts ever mentioned the character—or

[167] *See* Weinberger v. Romero-Barcelo, 456 U.S. 305, 308–10 (1982) (declining to uphold injunction against the U.S. Navy for uncontested violations of the Clean Water Act).

[168] After the Navy's munitions training at Vieques Island finally ceased, large portions of the island and surrounding waters were designated in 2005 as a federal Superfund site, the Atlantic Fleet Weapons Training Area, principally to address concerns for the thousands of acres of unexploded ordnance littered across the land and water. For site background and status of the munitions cleanup, see *Atlantic Fleet Weapons Training Area Vieques, PR*, EPA, https://cumulis.epa.gov/supercpad/SiteProfiles/index.cfm?fuseaction=second.Cleanup&id=0204694 (last visited Nov. 27, 2021).

[169] For a thoughtful critique of the American colonialism underlying this case, see Valeria M. Pelet del Toro, *Beyond the Critique of Rights: The Puerto Rico Legal Project and Civil Rights Litigation in America's Colony*, 128 YALE L.J. 792, 824 (2019).

[170] *See* Burlington N. & Santa Fe Railway v. United States, 556 U.S. 599 (2009).

[171] Among the wealth of legal commentary on *Burlington Northern*, mostly focused on the question of the CERCLA liability scheme, readers may consult the following: Derek Wetmore, *Joint and Several Liability After* Burlington Northern*: Alive and Well*, 32 VA. ENV'T. L.J. 27 (2014); William C. Tucker, *All Is Number: Mathematics, Divisibility and Apportionment Under* Burlington Northern, 21 FORDHAM ENV'T. L. REV. 479 (2010); Steve Gold, *Dis-Jointed? Several Approaches to Divisibility After* Burlington Northern, 11 VT. J. ENV'T. L. 307 (2009).

even *existence*—of the residential neighborhood surrounding the Arvin site. However, in a visit to the site in April 2019, the author learned that the local community surrounding the Arvin site is predominantly lower income and Spanish-speaking, with a public school immediately next to the industrial facility.[172] The community is also surrounded by additional industrial operations, including oil and gas extraction and agricultural fields with pesticide application.[173] In another words, the Arvin site is located within a classic EJ community—without any recognition in any published judicial opinions.

Another challenge is that many important cases remain unreported but still provide useful experience and principles for other cases. In one recent unreported case, a state court judge considered a challenge by community advocates to air permits issued by state regulators for a new petrochemical facility proposed by Formosa Plastics in St. James Parish, Louisiana.[174] From the bench, the state judge rebuked the state regulators, pointedly observing, "An environmental justice analysis is more than [the state] going through the motions of soliciting public comment, and then . . . giving lip service to an analysis . . . . And then, take it a little further, just ignor[ing] or discard[ing] community input."[175] In other words, the judge recognized that environmental justice is not just about public comment, but about *meaningful involvement*. Because research in this area is challenging, counsel should maintain awareness through

[172] Interview with staff from the Center on Race, Poverty and the Environment and local community members, in Arvin, Cal. (Apr. 17, 2019).

[173] *Id*.

[174] The petrochemical complex proposed by Taiwanese company Formosa Plastics would contribute to existing pollution and health concerns within the 85-mile industrial corridor between New Orleans and Baton Rouge known as "Cancer Alley." For background on the Formosa controversy, including vociferous opposition from the local Black community, see Rachel Ramirez, *'This Is Environmental Racism': Activists Call on Biden to Stop New Plastics Plants in 'Cancer Alley,'* GUARDIAN (May 17, 2021), https://www.theguardian.com/us-news/2021/may/17-/st-james-parish-formosa-complex-biden-cancer-alley.

[175] Hearing Transcript at 5, Rise St. James v. La. Dept. of Env't Quality, Suit C694029, 19th Jud. Dist. Ct. (Nov. 18, 2020) (on file with author). *See also* Pamela King, *Judge Rebukes La. Regulators for Approving Chemical Plant*, GREENWIRE (Nov. 20, 2020), https://www.eenews.net/articles/judge-rebukes-la-regulators-for-approving-chemical-plant.

periodicals and services such as *Greenwire*,[176] state bar bulletins, and networks of attorneys, including state bar sections and national member organizations.[177]

IV. EJ CASE LAW GROUNDED IN CONSTITUTIONAL, CIVIL RIGHTS, AND TORT LAW

Beyond cases arising under environmental statutes, many cases brought in search of environmental justice are grounded in legal theories including constitutional law, civil rights legislation, and tort law. The field of "toxic torts" is a world unto itself and will be addressed below only glancingly.[178] Constitutional law is also, of course, an enormous field, but can be narrowed somewhat for purposes of environmental justice. The most obvious provision of the U.S. Constitution for pursuing environmental justice may be the Equal Protection Clause of the Fourteenth Amendment: "nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws."[179] According to a literal reading of the Equal Protection Clause, all states must provide equal protection to all people under "the laws," which would include all environmental statutes. However, the U.S. Supreme Court has failed to interpret the text of the Equal Protection Clause literally. Instead, the Supreme Court has invented a test that requires proof of *intent* to discriminate in order to establish an Equal Protection violation.[180] The judicial requirement to prove intent to discriminate has proven a significant obstacle to using the Equal Protection Clause for pursuing

176 *See* GREENWIRE, https://www.eenews.net/gw (last visited Nov. 24, 2021).

177 *See, e.g.*, *Section of Environment, Energy, and Resources (SEER)*, ABA, https://www.americanbar.org/groups/environment_energy_resources (last visited Mar. 14, 2022); THE FOUNDATION FOR NATURAL RESOURCES AND ENERGY LAW (formerly ROCKY MOUNTAIN MINERAL LAW FOUNDATION), https://www.fnrel.org (last visited Mar. 14, 2022).

178 For a comprehensive introduction and overview of this field of practice, see ROBIN CRAIG, ET AL., TOXIC AND ENVIRONMENTAL TORTS: CASES AND MATERIALS (2010).

179 U.S. CONST. amend. XIV, § 1. Beyond applicability to the states, Equal Protection requirements have been extended to the federal government through the Due Process Clause of the Fifth Amendment. *See* Bolling v. Sharpe, 347 U.S. 497, 500 (1954).

180 *See* Washington v. Davis, 426 U.S. 229, 240–42 (1976).

environmental justice in federal court.[181] As such, other constitutional theories have been pursued more often, along with claims under civil rights legislation such as Civil Rights Act Title VI and 42 U.S.C. § 1983, as the selection of cases, again in chronological order, demonstrates below.

A. *Case Examples*

Bean v. Southwestern Waste Management Corp. (S.D. Tex. 1979).[182] In one of the first reported cases seeking environmental justice, residents of Northwood Manor, a predominantly Black, middle-class neighborhood in Houston, Texas, brought a class-action lawsuit to oppose the siting of a new municipal landfill in their community.[183] The plaintiffs endeavored to prove that the Texas agency approving the new Whispering Pines landfill violated the Equal Protection Clause by intending to discriminate on the basis of race.[184]

The district court recognized Supreme Court guidance for establishing discriminatory intent through factors identified in the 1977 case of *Village of Arlington Heights v. Metropolitan Housing Development Corp*.[185] The district court in particular recognized that "[s]tatistical proof can rise to the level that it, alone, proves

[181] Importantly, Equal Protection rights under *state* constitutions do not necessarily embrace the federal requirement to prove intent to discriminate, providing opportunities for Equal Protection challenges in state courts that may never prevail in federal courts. *See, e.g.*, Rodríguez v. Brand West Dairy, 378 P.3d 13 (N.M. 2016) (holding that exemption of farm workers from benefits under New Mexico Workers' Compensation Act violated Equal Protection Clause of the New Mexico Constitution). For further discussion of *Rodriguez v. Brand West Dairy* and consideration of how it may apply to expanding other rights for farmworkers, see Annie Swift, *Surviving in the Field: How to Provide the Bare Minimum for Farm Workers in New Mexico*, 52 N.M. L. REV. 214 (2022).

[182] Bean v. Sw. Waste Mgmt. Corp., 482 F. Supp. 673 (S.D. Tex. 1979), *aff'd mem.*, 782 F.2d 1038 (5th Cir. 1986).

[183] For background on this seminal case in environmental justice, *see* ROBERT D. BULLARD, DUMPING IN DIXIE: RACE, CLASS, AND ENVIRONMENTAL QUALITY 44 (1990).

[184] *See Bean*, 482 F. Supp. at 677.

[185] *See* Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 267–68 (1977).

discriminatory intent . . . ."[186] However, even after plaintiffs' presentation of statistical evidence for eleven days, the court remained unconvinced of the state agency's intent to discriminate in the siting of the Whispering Pines landfill in the Northwood Manor neighborhood. The court found some offered evidence not statistically significant.[187] The court found other statistical evidence inconclusive.[188] Nevertheless, the court suggested that "more particularized data"[189] could succeed in indicating intent to discriminate in the siting of waste facilities in minority communities, establishing *Bean* as a seminal case in environmental justice.

The *Select Steel* Administrative Decision (EPA OCR 1998).[190] If *Bean* represented an immediate loss for EJ plaintiffs, the *Select Steel* decision represented a historical low in EJ jurisprudence, offering useful instruction on many ways to get environmental justice wrong. The case arose procedurally under Title VI of the Civil Rights Act, which generally prohibits recipients of federal financial assistance from discriminating on the basis of "race, color, or national origin."[191] Regulations implementing Title VI do not require proof of intent to discriminate, but instead prohibit conduct that has "the effect of subjecting individuals to discrimination."[192] Under Title VI, petitioners alleging discriminatory effects of federal

[186] *Bean*, 482 F. Supp. at 677 (citing Yick Wo v. Hopkins, 118 U.S. 356 (1886); Gomillion v. Lightfoot, 364 U.S. 339 (1960)).

[187] Among other things, the plaintiffs argued that "100% of the type I municipal landfills" were located within the "target area" that was 70% minority in population. However, the court observed that the Whispering Pines landfill was one of only two such municipal landfills in the city. *Bean*, 482 F. Supp. at 678.

[188] Among other things, the court recognized that "67.6% of the [waste] sites are located in the eastern half of the city, where 61.6% of the minority population lives." *Id*. However, that apparent disparity could be explained because the eastern half of the city "is where Houston's industry is." *Id*. at 678–79.

[189] In this case, the court suggested that "more particularized data" might show that waste sites "approved in predominantly Anglo census tracts were actually located in minority neighborhoods." *Id*. at 677.

[190] *See* Letter from Ann E. Goode, Dir., EPA Off. of Civ. Rights, to Father Phil Schmitter, Co-Dir., Saint Francis Prayer Ctr., Sister Joanne Chiaverini, Co-Dir., Saint Francis Prayer Ctr., & Russell Harding, Dir., Mich. Dep't of Env't Quality (Oct. 30, 1998) (on file with EPA) [hereinafter Goode Letter].

[191] 42 U.S.C. § 2000d-1. For a broad overview of Title VI, see VILLA ET AL., *supra* note 31, at 140–57.

[192] *See, e.g.*, 40 C.F.R. § 7.35 (2018) (EPA Title VI implementing regulations).

funding may file administrative complaints with the funding agency.[193]

In *Select Steel*, petitioners filed an administrative complaint with the EPA Office of Civil Rights,[194] alleging that a steel mill proposed near Flint, Michigan, and permitted by the State of Michigan would adversely impact minority communities.[195] The EPA Office of Civil Rights (OCR), however, found no evidence of adverse impacts—and thus no discriminatory effects—related to the air permits issued by the State of Michigan.[196] In order to reach this conclusion, OCR made multiple errors of both law and fact. Among other things, OCR asserted that Genesee County, which includes Flint, was in compliance with the NAAQS, when in fact it was in violation of at least the NAAQS for ozone.[197] OCR also asserted that the NAAQS were protective of human health, when in fact the NAAQS for many criteria pollutants, including ozone, have had to be strengthened over time to protect human health.[198] Perhaps most fundamentally wrong, OCR equated compliance with the NAAQS—measured over the scale of counties and airsheds—with

[193] In 2001, the Supreme Court ruled that Title VI regulations do not give rise to a direct cause of action in federal courts. *See* Alexander v. Sandoval, 532 U.S. 275 (2001) (5-4 majority opinion by Justice Scalia). As such, Title VI violations must be addressed through administrative complaints filed with the funding agencies, such as EPA. *See, e.g.*, 40 C.F.R. § 7.120 (2012) (a "complainant may file a complaint at any EPA office").

[194] The functions of EPA's Office of Civil Rights in reviewing Title VI complaints have since been transferred to EPA's External Civil Rights Compliance Office within the EPA Office of General Counsel. *See External Civil Rights Compliance Office (Title VI)*, EPA, https://www.epa.gov/ogc/external-civil-rights-compliance-office-title-vi (last visited Feb. 14, 2022).

[195] For background on this case and the multiple mistakes made by the EPA Office of Civil Rights, see Luke W. Cole, *"Wrong on the Facts, Wrong on the Law": Civil Rights Advocates Excoriate EPA's Most Recent Title VI Misstep*, 29 ENV'T L. REP. 10775, 10775–76 (1999).

[196] *See* Goode Letter, *supra* note 190 ("For all of these reasons, EPA finds that the public participation process for the Select Steel facility was not discriminatory.").

[197] Cole*, supra* note 195, at 10777.

[198] *See generally* Arnold Reitze, Jr.*, The National Ambient Air Quality Standards for Ozone*, 6 ARIZ. J. ENV'T. L. & POL'Y 420 (2015) (providing a comprehensive history of ozone regulation through the NAAQS program).

protection of residents in the minority communities immediately adjacent to the proposed facility and thus most likely to be impacted.[199]

In addition to all these failures of "fair treatment," OCR also failed to ensure "meaningful involvement" for the impacted community.[200] OCR assumed, for example, that public notice could be provided adequately through newspaper publications, a mailing to eleven residents, and one hearing held at a school "in a predominantly white area."[201] Beyond these few, one-way communications by the government, OCR made no mention of the need to respond to community concerns in any way, much less "meaningfully." The *Select Steel* decision thus stands as a valuable standard for a complete failure to satisfy the demands of both "fair treatment" and "meaningful involvement," the twin pillars of environmental justice.

Rosemere Neighborhood Ass'n v. U.S. EPA (9th Cir. 2009).[202] After the *Select Steel* decision, the EPA Office of Civil Rights continued to fail supporting environmental justice through enforcement of Title VI. Plaintiffs in this case, residents of the minority and low-income Rosemere neighborhood, filed a Title VI complaint in 2003 alleging that the City of Vancouver, Washington, had discriminated in the provision of municipal services such as stormwater and septic system management.[203] OCR failed to respond to Rosemere's Title VI complaint in compliance with regulations requiring some response within twenty days.[204] On appeal, the Ninth Circuit Court of Appeals observed that not only was OCR's response to the Rosemere complaint untimely, but "discovery has shown that the EPA failed to process a single complaint from 2006

199 VILLA ET AL., *supra* note 31, at 147 ("Wrong –and *wronger*").

200 *See* EPA, *supra* note 38 and accompanying text (defining "environmental justice" to mean "the fair treatment and meaningful involvement of all people").

201 *See* Goode Letter, *supra* note 190, at 5.

202 *See* Rosemere Neighborhood Ass'n v. U.S. EPA, 581 F.3d 1169 (9th Cir. 2009).

203 *See* Rosemere Neighborhood Ass'n v. U.S. EPA, No. C07-5080BHS, 2007 WL 9728563, at *1 (W.D. Wash. Dec. 17, 2007).

204 *See* 40 C.F.R. § 7.120(d)(1)(i) (within 20 calendar days of acknowledging the complaint, EPA "will review the compliance for acceptance, rejection, or referral to the appropriate Federal agency"); *Rosemere*, 581 F.3d at 1175.

or 2007 in accordance with its regulatory deadlines."[205] The *Rosemere* case thus established a precedent for judicial supervision of OCR's compliance with Title VI regulations.

Californians for Renewable Energy (CARE)*, et al*. v. U.S. EPA (N.D. Cal. 2018).[206] In a final, selected case arising from Title VI, counsel for environmental justice organizations sued in federal court to compel the EPA Office of Civil Rights to respond to Title VI complaints that had been languishing for more than a decade each in California, Alabama, Michigan, New Mexico, and Texas. In light of EPA's "deplorable" record on responding to Title VI complaints,[207] the court in *CARE* granted summary judgment for the plaintiffs and ordered EPA to "timely process any pending and future Title VI complaints submitted by Plaintiffs . . . for a period of five years from the date judgment is entered."[208] Under continuing judicial supervision, EPA finally appeared to begin taking Title VI complaints seriously, helping to resolve many complaints through settlement agreements that provide schedules for remedial

205 *Rosemere*, 581 F.3d at 1175.

206 Californians for Renewable Energy v. U.S. EPA, No. 4:15-cv-03292, 2018 WL 1586211 (N.D. Cal. Mar. 30, 2018).

207 In an earlier case, alleging discrimination against Latinos in the siting and operation of toxic waste facilities in Kettleman City, California, the court characterized as "simply deplorable" the EPA's 17-year delay in responding to a Title VI complaint filed in 1994. Padres Hacia Una Vida Mejor v. McCarthy, 614 F. App'x 895, 897 (9th Cir. 2015). For background on the long struggle for environmental justice in Kettleman City, see Luke W. Cole, *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 ECOLOGY L.Q. 619, 674–79 (1992).

208 Californians for Renewable Energy v. U.S. EPA, No. 4:15-cv-03292, Amended Judgment, (N.D. Cal., Oct. 2, 2020). *See generally* Marianne Engelman Lado, *No More Excuses: Building a New Vision of Civil Rights Enforcement in the Context of Environmental Justice*, 22 U. PENN. J. L. & SOC. CHANGE 281 (2019) (further background on this case, authored by one of the plaintiff attorneys representing CARE).

actions.[209] This trend may be expected to continue with reforms in EPA's Title VI office[210] and recent changes in agency personnel.[211]

Boler v. Earley (6th Cir. 2017).[212] In 2014, when state officials switched the drinking water source for Flint, Michigan from the Detroit water system to the nearby Flint River in an attempt to save money, they instead poisoned thousands of Flint residents with contaminants including bacteria from the river and lead from lead pipes throughout Flint.[213] As a result, at least twelve people died from Legionnaires' Disease,[214] and a generation of children is now threatened with permanent cognitive impairment due to lead exposure.[215] Injured Flint residents filed class-action lawsuits against the State of Michigan and state officials, in both federal and state courts.[216] Plaintiffs in federal court filed claims under the Civil Rights Act, 42 U.S.C. § 1983, which authorizes private lawsuits against state officials who deprive any person of "rights . . . secured by the Constitution . . . ." Among other claims, these federal plaintiffs argued that by poisoning their drinking water, the State and state officials had deprived them of constitutional rights including

209 *See* VILLA ET AL., *supra* note 31, at 156 (noting Informal Resolution Agreements in New Mexico and Texas, and a Settlement Agreement in North Carolina).

210 Among other things, in 2017, the dysfunctional EPA Office of Civil Rights was relieved of duty for responding to Title VI complaints, with Title VI responsibilities now residing in the EPA External Civil Rights Compliance Office. *See* VILLA ET AL., *supra* note 31, at 142. The new office also produced a *Case Resolution Manual* in 2017 to facilitate more timely processing and responses to Title VI complaints. *Id*.

211 Among other extraordinary developments, the lead attorney prevailing in the *CARE* case, Marianne Engelman Lado, was appointed by President Biden as EPA's Deputy General Counsel, with supervisory responsibility for ensuring EPA's compliance with Title VI requirements.

212 *See* Boler v. Early, 865 F.3d 391 (6th Cir. 2017).

213 For complete background on the Flint Water Crisis, see ANNA CLARK, THE POISONED CITY: FLINT'S WATER AND THE URBAN AMERICAN TRAGEDY (2018).

214 *See* Nicholas J. Schroeck, *The Flint Water Crisis and Legionella: Harm to Public Health from Failure to Warn*, 18 J. L. SOC'Y 155 (2018).

215 Cognitive impairments due to childhood lead exposure are well-known and documented. *See, e.g.*, Bruce P. Lanphear, *Low-Level Environmental Lead Exposure and Children's Intellectual Function: An International Pooled Analysis*, 113 ENV'T. HEALTH PERSPS. 894 (2005).

216 *See* Mays v. Governor of Mich., 954 N.W. 2d 139 (Mich. 2020); *Boler*, 865 F.3d.

rights to substantive and procedural due process, impairment of the right to contract, and deprivation of property without just compensation.[217]

The U.S. District Court for the Eastern District of Michigan dismissed the plaintiffs' case,[218] holding that the plaintiffs' claims under § 1983 were precluded by the federal Safe Drinking Water Act.[219] The district court based this ruling upon the Supreme Court's decision in *Middlesex County Sewerage Authority v. National Sea Clammers Association*,[220] which held that private claims alleging injury to the fishing industry through water pollution were preempted by the federal Clean Water Act.[221] On appeal, however, the Sixth Circuit Court of Appeals distinguished *Sea Clammers* and reversed the district court's dismissal of this case.[222] The U.S. Supreme Court subsequently denied certiorari.[223] This decision was important because the Safe Drinking Water Act does not allow private recovery for personal injuries, while § 1983 does. By preserving the § 1983 claims, plaintiffs in this case maintained the pressure that helped produce the civil settlement noted below.

Mays v. Governor of Michigan (M.I. 2020).[224] In a parallel case to *Boler*, class-action plaintiffs in state court raised numerous claims, including claims based upon theories of direct violation of constitutional rights. In particular, plaintiffs argued that the state officials, by poisoning the drinking water of Flint, had violated plaintiffs' constitutional right to "bodily integrity" under the Due Process Clause of the Michigan Constitution.[225] The Michigan Supreme

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217 *See Boler*, 865 F.3d at 399.

218 *See* Boler v. Earley, No. 5:16-cv-10323, 2016 WL 1573272, at *3 (E.D. Mich. Apr. 19, 2016).

219 *See* 42 U.S.C. § 300f *et seq.*

220 *See* Middlesex City Sewerage Auth. v. Nat'l Sea Clammers Assoc., 453 U.S. 1 (1981).

221 *See* Boler v. Earley, No. 5:16-cv-10323, 2016 WL 1573272, at *2 (E.D. Mich. Apr. 19, 2016).

222 *See Boler*, 865 at 401–17.

223 *See* City of Flint v. Boler, 138 S. Ct. 1294 (2018) (mem.).

224 *See* Mays v. Governor of Mich., 954 N.W.2d 139 (Mich. 2020).

225 MICH. CONST. art. I, § 17 ("No person shall . . . be deprived of life, liberty or property, without due process of law."); *cf.* U.S. CONST. amend XIV, § 1 ("nor

Court in this case explained the right to bodily integrity in the following terms: "Violation of the right to bodily integrity involves 'an egregious, nonconsensual entry into the body which was an exercise of power without any legitimate governmental objective.'"[226] Applying this legal standard to the egregious facts of this case, the Michigan Supreme Court concluded that "[t]here is obviously no legitimate governmental objective in poisoning citizens."[227]

Given its losses in both federal court with *Boler* and in state court with *Mays*, the State of Michigan prudently decided to settle both cases,[228] agreeing to pay $600 million into a settlement fund that will disburse proceeds to injured claimants.[229] Beyond this massive civil liability, at least nine state officials are now facing criminal charges for their involvement in poisoning the drinking water of Flint and failing to respond when they had knowledge to do so. Among those indicted are Rick Snyder, the former governor of Michigan, charged with two counts of "willful neglect of duty," a one-year misdemeanor; Darnell Earley, the former state-appointed emergency manager for Flint, charged with three counts of "misconduct in office," each a five-year felony; and Nick Lyons, the former director of the Michigan Department of Health and Human Services, charged with nine counts of involuntary manslaughter, each a fifteen-year felony.[230]

McKiver v. Murphy-Brown, LLC (4th Cir. 2020).[231] As one reminder of the continuing power of tort law for pursuing environmental justice, a recent decision by the Fourth Circuit Court of

shall any State deprive any person of life, liberty, or property, without due process of law").

226 *Mays*, 954 N.W.2d at 184 (citing Rogers v. Little Rock, Ark., 152 F.3d 790, 797 (8th Cir. 1998)).

227 *Id.* at 159.

228 *See* Amended Settlement Agreement, ¶ 2.1.1, *In re* Flint Water Cases, No. 5:16-cv-10444 (E.D. Mich. Nov. 16, 2020) ("State Defendants shall pay $600,000,000").

229 *See* Julie Bosman, *Michigan to Pay $600 Million to Victims of Flint Water Crisis*, N.Y. TIMES (Aug. 19, 2020), https://www.nytimes.com/2020/08/19/-us/flint-water-crisis-settlement.html.

230 *See* Press Release, Dept. of Att'y Gen., Mich., *Nine Indicted on Criminal Charges in Flint Water Crisis Investigation* (Jan. 14, 2021), https://www.michigan.gov/ag/0,4534,7-359-92297_99936-549541—,00.html.

231 *See* McKiver v. Murphy-Brown, LLC, 980 F.3d 937 (4th Cir. 2020).

Appeals is instructive. This decision is one of many cases filed by local residents against operators of industrial hog farms in eastern North Carolina, which have created massive pollution problems[232] in surrounding communities of color.[233] Finding that the adverse conditions created by the hog farm in this case constituted a private nuisance under North Carolina law, the jury awarded plaintiffs both compensatory and punitive damages. On appeal, the Fourth Circuit remanded "for the limited purpose of determining the proper amount of punitive damages," but affirmed the jury finding of nuisance and the jury conclusion that both compensatory and punitive damages were proper in this case.[234]

Martinez v. City of Chicago (N.D. Ill. 2021).[235] In this recent decision, the federal court ruled that city approval to relocate a large, polluting scrap metal recycling operation from the affluent and largely white Lincoln Park neighborhood of Chicago to the majority-minority community of South Burley on the Southeast Side did not violate the Equal Protection Clause of the U.S. Constitution. In so holding, the court applied much the same Equal Protection analysis as in *Bean* (1979), concluding that "the Plaintiffs have not shown a discriminatory purpose behind the move of the facility from Lincoln Park to South Burley."[236]

Although a disappointing outcome for the plaintiffs in court, the decision highlighted the need for advocates to rely upon other legal theories and tactics in the pursuit of environmental justice. A year later, in February 2022, the plaintiffs effectively prevailed after the City of Chicago reviewed the findings of a Health Impact Assessment (HIA) and decided to deny the permit that would allow

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232 As one stark example, according to the court, the hog farm at issue in this case, Kinlaw Farms, annually maintained nearly 15,000 hogs, which generated approximately 153,000 pounds of feces and urine every single day. Much of this waste ends up in waste lagoons and spray fields. "Approximately eight million gallons of hog feces were sprayed in the air annually at Kinlaw Farms," allowing the aerial fecal matter to be inhaled and ingested, and adversely affect the lives of all surrounding residents. *Id*. at 947.

233 *See* Emily E. Harrison, *Odor in the Court! And It Smells Like Environmental Racism: How Big Pork Is Legally Abusing Poor Communities of Color in Eastern North Carolina*, 11 WAKE FOREST J.L. & POL'Y 433 (2021).

234 *McKiver*, 980 F.3d at 977.

235 *See* Martinez v. City of Chicago, 534 F. Supp. 3d 936 (N.D. Ill. 2021).

236 *Id*. at 951.

transfer of the facility to the minority community in Chicago's Southeast Side.[237]

B. *Key Takeaways for Practitioners*

From the rough start in *Bean* (1979) and *Select Steel* (1998), plaintiffs seeking environmental justice have found increasing success through a variety of legal theories, including tort, constitutional rights, and civil rights legislation, as indicated by recent cases including *Boler* (2017), *Mays* (2020), and *McKiver* (2020). Credible and increasing potential for liability under Title VI, § 1983, constitutional law, and tort law all add up to increasing leverage for environmental justice advocates to seek and negotiate settlement agreements, including injunctive relief to address environmental justice concerns.[238] Accordingly, while published cases must always be considered, savvy practitioners should always remain attuned to whether and how cases are settled.

V. CONCLUSION: WHAT NOW?

Returning to our not-very-hypothetical pipeline scenario from the Introduction, what would you do now, as earnest and competent in-house counsel for the pipeline company proposing to build Compressor Station 1 in a community of color? From the EAB decisions (e.g., *Shell II, Avenal*), you may see that getting an environmental permit will require an environmental justice analysis. From cases including *Communities Against Runway Expansion*, *Hausrath*, and *Friends of Buckingham*, you may see that your environmental justice analysis may be subject to judicial scrutiny. From the *Standing Rock* saga, you may see that any permit you obtain in violation of

[237] Letter from City of Chicago, Dept. of Public Health, to Hal Tobin, General III, LLC (d/b/a Southside Recycling) (Feb. 18, 2022). In denying the permit, the Chicago Department of Public Health "determined that there is an unacceptable risk that the proposed facility would produce an increase in particulate matter, noise, and diesel emissions, the negative effects of which are magnified in a population with the health vulnerabilities identified and documented in the HIA." *Id.*

[238] For example, resolution of a Title VI complaint against the State of North Carolina to address pollution from industrial hog farms in eastern North Carolina resulted in a settlement agreement in 2018 with the North Carolina Department of Environmental Quality. Among other things, the settlement agreement required local air and water quality monitoring, "carried out in partnership with the complaint community organizations." VILLA ET AL., *supra* note 31, at 156–57.

laws including NEPA and the APA could be subject to vacatur. From *Californians for Renewable Energy*, you may see that any state agency that violates Title VI may be subject to an administrative complaint and judicial supervision. From *Boler*, *Mays*, and *McKiver*, you may see how your company—and potentially individual officers—may become civilly and even criminally liable if someone gets hurt. And in almost any circumstance, you may see how a project gets delayed or even killed when it fails to address concerns for environmental justice.[239]

Judge Rawlinson, in dissent, urges that "[w]e must do better."[240] But how will you do that? You might start by taking seriously the commands of environmental justice for "fair treatment" and "meaningful involvement." Residents of Flint, Michigan, were not treated fairly when state-appointed managers decided to switch the City's water source to the Flint River in order to save money. Likewise, the Standing Rock Sioux Tribe was not provided meaningful involvement when the Corps of Engineers blasted emails at tribal staff instead of engaging in true government-to-government consultation with tribal leaders.[241] The Corps also failed to take the concerns expressed by the Tribe seriously, including concerns about

[239] In fact, after repeated delays and increasing costs, backers of the Atlantic Coast Pipeline announced in July 2020 the cancellation of the project. *See* Ivan Penn, *Atlantic Coast Pipeline Canceled as Delays and Costs Mount*, N.Y. TIMES (July 5, 2020) https://www.nytimes.com/2020/07/05/business/atlantic-coast-pipeline-cancel-dominion-energy-berkshire-hathaway.html. In like manner, on June 6, 2021, backers of the Keystone XL Pipeline announced they were terminating the controversial project that would have carried petroleum from the Canadian tar sands to Nebraska. *See* Carol Davenport, *The Keystone XL Pipeline Project Has Been Terminated*, N.Y. TIMES, (June 9, 2021), https://www.nytimes.com/2021/06/09/business/keystone-xl-pipeline-canceled.html.

[240] Center for Cmty. Action & Env't Just. v. Fed. Aviation Admin.,18 F.4th 592, 622 (9th Cir. 2021) (Rawlinson, J., dissenting).

[241] Based upon a limited record, the district court was at first seemingly impressed with the efforts made by the Corps of Engineers to consult with the Standing Rock Sioux Tribe. *See* Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, 205 F. Supp. 3d 4, 13–18 (D.D.C. 2016). However, that record was incomplete and potentially misleading, as the Tribe later pointed out. *See* STANDING ROCK SIOUX TRIBE, SETTING THE RECORD STRAIGHT: STANDING ROCK'S ENGAGEMENT IN THE DAKOTA ACCESS PIPELINE 3, https://earthjustice.org/sites/default/files/files/Setting-the-Record-Straight-2.23.17.pdf ("Ultimately, it's not how many meetings were held, or how many letters were sent . . . . The real issue is what the Corps does with that information . . . .").

the potential for oil leaks from the pipeline—a failure that led years later to vacatur of the Corps approvals for the project.[242] And even though the Dakota Access Pipeline, unlike the Atlantic Coast Pipeline, was completed and remains operational, the delay from the protests and litigation over DAPL reportedly cost investors substantially.[243]

Efforts to develop "best practices" for permit applicants working with communities of color have already begun[244] and will likely continue along with growing recognition of the need to address concerns for environmental justice. Ultimately, what may count most is listening, really *listening*, to concerns expressed by community members, and then working to address those concerns instead of simply defending a decision already made. In the *Friends of Buckingham* case, concerns about air emissions from the gas-fired compressor station might have been addressed by powering the station with clean, electric alternatives.[245] How much less would that alternative have cost, compared to the ultimate cost of litigation and time-delay of the project? And how much did the refusal to consider and adopt this alternative cost in the continued erosion of trust and goodwill in communities of color?

As the Louisiana judge acknowledged recently in the Formosa Plastics case, "[i]nherent . . . in a robust environmental justice analysis is the recognition that environmental racism exists . . . ."[246] Racism and environmental injustice continue to permeate public and private institutions. You have choices to do something about that,

242 *See supra* notes 127–138 and accompanying text.

243 By one estimate, the delays in DAPL construction caused by the widespread protest and litigation cost investors at least $750 million. *See* Eid, *supra* note 127, at 593.

244 *See, e.g.*, Activities to Promote Environmental Justice in the Permit Application Process, 78 Fed. Reg. 27,220, 27,226–33 (May 9, 2013); MICHAEL B. GERRARD, THE LAW OF ENVIRONMENTAL JUSTICE 511 (Michael B. Gerrard & Sheila R. Foster eds., 2008).

245 Friends of Buckingham v. State Air Pollution Control Bd., 947 F.3d 68, 71 (4th Cir. 2020) ("Petitioners contend the Board erred in failing to consider electric turbines as zero-emission alternatives to gas-fired turbines in the Compressor Station.").

246 Hearing Transcript at 4–5, Rise St. James v. La. Dept. of Env't Quality, Suit C694029, 19th Jud. Dist. Ct. (Nov. 18, 2020) (on file with author).

something different and better, because in modern legal practice, "environmental justice is not merely a box to be checked."