State Laws Provide New Pathways for Environmental Justice Claims

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Environmental justice moved to the forefront of sociopolitical discussions in the country in 2020, receiving increased attention from politicians, community groups, and environmental agencies. Although this concept is not new, for decades plaintiffs have struggled to find an effective means of asserting environmental justice claims. This is largely due to the lack of a stand-alone, federal environmental justice statute. Instead, plaintiffs have attempted to incorporate the environmental justice concept into claims brought under other federal environmental statutes, such as the National Environmental Policy Act (NEPA) and the Clean Air Act (CAA). But these claims have been largely unsuccessful. Plaintiffs have also attempted to rely on another, nonenvironmental federal statute—the Civil Rights Act. But given that the statute requires a showing of discriminatory intent, environmental justice claims were ineffective. A shift occurred in 2020, with plaintiffs focusing on state laws as avenues to bring environmental justice claims. This article discusses three recent cases and the changes they have created in the litigation approach for environmental justice claims.

Environmental Justice Origins

Environmental justice was born out of the civil rights movement in the 1980s. Concerns that waste and industrial facilities were consistently being sited near low-income neighborhoods and communities of color ultimately led the federal government to issue Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations. 59 Fed. Reg. 7,629 (Feb.16, 1994). Although the Executive Order provided neither a definition for environmental justice nor a clear enforcement mechanism, it directed federal agencies to identify and address whether their actions would result in disproportionately high and adverse human health and environmental effects to minority and low-income populations. That language served as the groundwork for guidance documents developed by federal agencies in subsequent years. For example, in its 1998 guidance, the Environmental Protection Agency (EPA) defined environmental justice as "[t]he 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." EPA, *Final Guidance for Incorporating Environmental Justice Concerns in EPA's NEPA Compliance Analyses*, § 1.1.1 (1998). The Council on Environmental Quality (CEQ) established similar guidance. *See* CEQ, *Environmental Justice: Guidance Under the National Environmental Policy Act* (1997).

But neither Executive Order 12898 nor the guidance documents created—nor could they create—a cause of action aimed specifically at addressing environmental justice concerns. In fact, the Executive Order acknowledged a lack of mechanisms to address such claims. 59 Fed. Reg. at 7,632. A separate memorandum accompanying the Executive Order highlighted existing statutory authorities that could be used to address environmental racism. Mem. for the Heads of All Departments and Agencies (Feb. 11, 1994) (1994 Memorandum). Those authorities included the Civil Rights Act, NEPA, and, to a lesser extent, the CAA. Following the issuance of the Executive Order, federal agencies established policies addressing environmental justice, but only CEQ enacted regulatory provisions relating to environmental justice. As a result, up until now, plaintiffs' environmental justice claims relied upon the other federal statutes referenced in the 1994 Memorandum.

Historical Approach to Environmental Justice Litigation

Initially, plaintiffs brought environmental justice claims under Title VI of the Civil Rights Act. Under that Act, "no person . . . shall,

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on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance." 42 U.S.C. § 2000d. Not only federal, but also state agencies that receive federal funding must comply with this prohibition. At first, plaintiffs attempted to rely on Title VI to rectify alleged intentional acts of environmental injustice by agencies, for example, by challenging permitting decisions that allow industrial facilities to locate and emit pollutants in minority or low-income areas, often compounding the emissions from other existing facilities. But due to an incredibly high burden of proof in Title VI cases, their claims were largely fruitless. Plaintiffs then tried bringing Title VI claims alleging acts of unintentional discrimination that led to disparate impacts, hoping for a less strict evidentiary threshold. In 2001, however, the U.S. Supreme Court ruled that a private right of action for unintentional discrimination was not available under the statute. *Alexander v. Sandoval*, 532 U.S. 275, 293 (2001). This holding meant that plaintiffs could file complaints regarding agency actions with the agency granting federal funds, such as EPA, but could not bring lawsuits against these agencies.

Environmental justice plaintiffs' focus then shifted to bringing claims under another statute identified in the 1994 Memorandum: NEPA. In general, NEPA requires federal agencies to consider the impacts of their major actions on the human and natural environment. 42 U.S.C. § 4332(2)(C). The NEPA process obliges federal agencies to perform a detailed analysis of the project's environmental impacts and document results in a detailed statement. 40 C.F.R. § 1500.1. Additionally, federal agencies must provide meaningful opportunities for public participation under NEPA, including an opportunity to comment on the proposed project and its environmental impacts. *Id.* The 1994 Memorandum mandated that during the NEPA process, each federal agency must make achieving environmental justice part of its mission by identifying and addressing disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority and low-income populations. But while NEPA requires a robust public participation process and a "hard look" at issues raised, it does not require any particular action or outcome on the basis of that assessment. As one court noted, NEPA only prohibits "uninformed, not unwise, agency action." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351 (1989). For this reason, environmental justice claims asserted under NEPA have been largely unsuccessful.

Traditionally, claimants have centered NEPA challenges around a project's impacts on water, air, or wildlife resources. Relying on NEPA, plaintiffs started augmenting their lawsuits challenging agency analysis by claiming their failure to consider the project's impacts on low-income, minority, and other environmental justice communities. But as a statute that primarily focuses on process and not substance, these claims by themselves have only rarely resulted in the courts remanding the NEPA analysis back to the agency for further consideration. Moreover, given that environmental justice claims have often been paired with more traditional NEPA claims focusing on impacts to natural resources, the courts have tended to remand the analysis based on those other, more familiar claims unrelated to environmental justice. *See*, *e.g.*, *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 440 F. Supp. 3d 1, 26–27 (D.D.C. 2020). Thus, in practice, NEPA has not proven an effective avenue for bringing environmental justice claims. This is not to mention the fact that NEPA requirements only apply to federal projects or federal permitting actions.

Without an enforceable environmental justice standard under federal law, states have started enacting their own laws to address the issue.

In addition to Title VI of the Civil Rights Act and NEPA, the 1994 Memorandum also pointed to the CAA as another tool to address environmental justice concerns. Under that statute, EPA has a duty to review and comment on the environmental impacts of federal agency actions. 42 U.S.C. § 7609. While EPA has taken that opportunity to raise concerns regarding project impacts on disadvantaged communities, it has done so by pointing back to the NEPA analysis for the project rather than suggesting changes to the air permit under review. Similarly, private parties have filed complaints with EPA under Title VI of the Civil Rights Act asserting that an air permit creates a disproportionate impact on environmental justice communities. Those complaints have largely languished at EPA, in part because EPA previously determined that permits that satisfy the federal air emission standards cannot be found to cause a disproportionate impact. Letter from A. Goode to Fr. P. Schmitter re EPA File No. 5R-98-R5 (Select Steel Complaint) (Oct. 30, 1998).

State Laws Present New Environmental Justice Opportunities

Without an enforceable environmental justice standard under federal law, states have started enacting their own laws to address the issue. A few states, for instance, adopted explicit environmental justice laws, while others have read environmental justice into existing provisions relating to site suitability or public health protection. Another group of states passed comprehensive energy policies that strive to address disproportionate impacts of pollution and climate change on low-income and minority communities. But even before states started enacting targeted environmental justice legislation, plaintiffs began recognizing opportunities to address their concerns through state regulatory programs. In this section we discuss three recent environmental justice cases brought by plaintiff groups under state laws.

In *Friends of Buckingham v. State Air Pollution Control Board*, a case that is now considered a groundbreaking moment in environmental justice litigation, local citizen and environmental advocacy groups challenged a minor source air permit for a compressor station associated with a natural gas pipeline. 947 F.3d 68 (4th Cir. 2020). The project proponent planned to locate the compressor station in the historic and predominantly African American community of Union Hill in Buckingham County, Virginia. As part of their challenge to the air permit, petitioners included environmental justice claims, alleging that the Virginia Air Pollution Control Board (Board) (1) failed to assess the compressor station's potential for disproportionate health impacts on the Union Hill community and (2) failed to independently evaluate the suitability of the site for the compressor station. *Id*. at 71. Petitioners based their claims on language in the Virginia air permitting rules requiring the Board to consider the suitability of the proposed activity to the area in which it is located and the character and degree of injury to health when issuing air permits. Va. Code Ann. § 10.1-1307(E).

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In addition, petitioners relied on broad language in the Commonwealth Energy Policy, adopted into law in 2006. That Policy ensures "that development of new, or expansion of existing, energy resources or facilities does not have a disproportionate adverse impact on economically disadvantaged or minority communities." *Id.* § 67-102(A)(8). Furthermore, one of the Policy's energy objectives is to develop energy resources and facilities "in a manner that does not impose a disproportionate adverse impact on economically disadvantaged or minority communities." *Id.* § 67-101(10). Petitioners argued this broad language required the Board to consider the project's impacts on environmental justice communities like that of Union Hill. The Board's position was that the community would not experience significant adverse impact because the air pollutants in the community would remain below the National Ambient Air Quality Standards (NAAQS). NAAQS, by definition, the Board argued, would protect the community within an adequate margin of safety. *Friends of Buckingham*, 947 F.3d at 72, 92. Note that this position is consistent with that previously articulated by EPA in Select Steel Complaint.

The court unanimously agreed with petitioners and vacated the permit. It concluded that Virginia law, including the Commonwealth Energy Policy and factors outlined in Virginia's air permitting rules, "require[s] the Board to consider the potential for disproportionate impacts to minority and low income communities." *Friends of Buckingham*, 947 F.3d at 87. As a result, the court held that the Board's analysis of the project was insufficient. *Id.* What is more, the court found that the Board failed to make a formal finding regarding whether Union Hill was an environmental justice community. *Id.* at 88. The court also concluded that the Board's reliance on NAAQS, without individually considering the risk that the specific emissions from the compressor station would present to the Union Hill community, independent of the NAAQS and state emission standards, led to a flawed analysis. *Id.* at 86, 90–91. As the court put it, "environmental justice is not merely a box to be checked." *Id.* at 92. In light of these flaws, the court took the unprecedented remedy of vacating and remanding the permit back to the Board for a more comprehensive environmental justice analysis.

Around the same time, the town of Weymouth, Massachusetts; various other municipalities; and citizen groups brought a similar challenge against the Massachusetts Department of Environmental Protection (MA DEP) for issuing a minor source air permit for a compressor station planned to be built in Weymouth, Massachusetts. *Town of Weymouth v. Mass. Dep't of Env't Prot.*, 961 F.3d 34, 38 (1st Cir. 2020). Although the environmental justice claims mirrored those in *Friends of Buckingham*, the outcome was quite different. This dissimilarity is attributable to the project's layout, the MA DEP's thorough environmental justice analysis, and the specific language of state guidance governing that analysis.

Petitioners in the *Town of Weymouth* case based their environmental justice claims on broad language in the state Environmental Justice Policy (EJ Policy), first adopted in 2002 and most recently updated in 2017. *Environmental Justice Policy of the Executive Office of Energy and Environmental Affairs* (2017). The EJ Policy, as the court explained, states that "all people have a right to be protected from environmental pollution and to live in and enjoy a clean and healthful environment," regardless of "race, ethnicity, class, gender, or handicap." *Town of Weymouth*, 961 F.3d at 54. The EJ Policy imposes several requirements on state agencies charged with approving environmental permits. First, agencies are required to engage in an enhanced public participation process for projects that meet certain criteria. These criteria include the project's location within five miles (for air pollutants) of an environmental justice population and the project's exceedance of certain emission thresholds under the Massachusetts Environmental Protection Act (MEPA). Second, agencies are required to engage in an enhanced analysis and review of impacts and mitigation for projects that meet the first of these criteria (located within five miles of an environmental justice population) and where emissions will exceed another threshold under MEPA.

Although both parties in the case agreed that the proposed compressor station was located within five miles of an environmental justice community—a question the Board in *Friends of Buckingham* never formally answered—the court agreed that the emissions did not exceed either of the MEPA thresholds. *Id.* Thus, the First Circuit concluded that the project did not trigger the EJ Policy's requirements. Still, due to the controversial nature of the project, MA DEP, on its own initiative, followed the EJ Policy by providing enhanced public participation opportunities and developing an in-depth, scientific analysis of the project's impacts on the health of environmental justice communities. *Id.* at 39, 55.

Despite these enhanced efforts, petitioners still faulted the agency for not doing more. Relying on dicta from a 2014 Massachusetts court case, petitioners argued that the EJ Policy required state agencies to develop strategies "to proactively promote environmental justice." *Id.* at 54–55 (citing *City of Brockton v. Energy Facilities Siting Bd.*, 469 Mass. 196, 174 n.17 (2014)). Because MA DEP had not developed any such strategies, they maintained that the agency violated the EJ Policy and thus requested that the court invalidate the air permit for the compressor station. But unlike in *Friends of Buckingham*, the court rejected their challenge, concluding that MA DEP did what it was required to do, and even more. While the agency could have voluntarily gone even further to address the issue, the court reasoned, the EJ Policy did not require it to do so. Naturally, petitioners cited *Friends of Buckingham* as an important precedent for the court to consider, but the court distinguished the Massachusetts EJ Policy from the Virginia state requirements. The court explained that a violation of one state's policy, even on similar facts, would not necessarily be a violation of another state's policy. And while the Virginia law may have required an environmental justice review, based on the facts of the Massachusetts case, the Massachusetts EJ Policy did not require it. As a result, the court did not remand or vacate the permit on environmental justice grounds (although it did ultimately remand it without vacatur on another ground unrelated to environmental justice). *Town of Weymouth v. Mass. Dep't of Env't Prot.*, 973 F.3d 143 (1st Cir. 2020).

In addition to review of state law–based environmental justice claims by federal courts, state courts have also considered the issue. In early 2020, community groups and environmental organizations challenged one Prevention of Significant Deterioration and 14 Title V air operating permits issued by the Louisiana Department of Environmental Quality (LDEQ) for a proposed chemical manufacturing complex. Cmpl. at 1, *Rise St. James v. La. Dep't of Env't Quality*, No. C-694029 (La. Feb. 14, 2020). The project's site is adjacent to the historic African American community of Welcome and lies near another African American community of Union; the area of concern is a part of Louisiana's so-called Cancer Alley, an 85-mile corridor full of petrochemical and other industrial facilities.

In this case, petitioners based their environmental justice claims on language in the Louisiana Constitution. *Id.* at 12. Under that provision, LDEQ has a duty as a public trustee to protect the environment "insofar as possible and consistent with the health, safety, and welfare of the people." La. Const. art. 9, sec. 1. According to petitioners, the Louisiana Supreme Court has interpreted that language as requiring LDEQ "to determine that adverse environmental impacts have been minimized or avoided as much as possible consistently with the public welfare." *Save Ourselves v. La. Env't Control Comm'n*, 452 So. 2d 1152, 1157 (La. 1984). LDEQ must make this determination, they added, "before granting approval of proposed action affecting the environment." Cmpl. at 12, *Rise St. James* (La. Feb. 14, 2020). Petitioners also alleged that LDEQ failed to determine whether the harmful effects of air emissions "have been minimized to the maximum extent possible." *Id.* at 38. Additionally, they claimed that the agency's cost-benefit analysis failed to account for any costs that would be borne by the surrounding community. *Id.* at 37.

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After a November 2020 hearing, the Louisiana district court remanded the issue of pollution and health risk to LDEQ to conduct a more thorough environmental justice analysis. Judgment, *Rise St. James v. La. Dep't of Env't Quality*, No. C-694029 (La. Dec. 14, 2020); *see also* Minutes of Oral Hearing, *Rise St. James v. La. Dep't of Env't Quality*, No. C-694029 (La. Nov. 18, 2020). The court specifically directed the agency to reconsider its analysis by soliciting additional public comment, evaluating the facts and information received during public comment, and supplementing its administrative record and the basis for its decision. The court encouraged the parties to reach a consensus judgment but did not vacate or stay the permits in the meantime. *Id.* Following an appeal, on March 15, 2021, the state Court of Appeals concluded that the district court abused its discretion in remanding the matter to LDEQ, pointing to the broad nature of the district court's mandate. *Rise St. James v. La. Dep't of Env't Quality*, No. 2021 CW 0032, 2021 CW 0037 (consolidated) (La. Mar. 15, 2021). While the instructions to LDEQ on remand exceeded the district court's statutory authority, the Court of Appeals explained, it still left the district court with a possibility of remanding the matter to LDEQ to consider evidence when certain conditions are met.

Roughly around the same time as commencement of the *Rise St. James* case, the same petitioners mounted another challenge against the project in federal court. Cmpl., *Ctr. for Biological Diversity v. U.S. Army Corps of Eng'rs*, No. 1:20-cv-00103 (D.D.C. Jan. 15, 2020), ECF No. 1. There, plaintiffs argued that the Corps' issuance of a section 404 Clean Water Act (CWA) permit was unlawful. Alongside alleged violations of the CWA and several other environmental statutes, plaintiffs also asserted a NEPA-based environmental justice claim. In an interesting development days before the Louisiana court remanded the environmental justice analysis back to LDEQ in the state case, the Corps, on its own initiative, suspended the CWA section 404 permit and agreed to reevaluate its NEPA review in the federal case. Federal Def's Mot. for Voluntary Remand without Vacatur, *Ctr. for Biological Diversity v. U.S. Army Corps of Eng'rs*, No. 1:20-cv-00103-RDM (D.D.C. Dec. 2, 2020), ECF No. 71. And while we may not see how the NEPA-based environmental justice claim plays out here, as is often the case, further resolution of the state environmental justice claim in court is likely.

Common Themes and Trends

Without a stand-alone cause of action and clear environmental justice requirements and standards, plaintiffs have struggled to identify federal mechanisms that would effectively address environmental justice concerns. More recently, plaintiffs have turned to state laws as a basis for addressing environmental injustice. Even in states without specific environmental justice statutes—still the majority of states—the judiciary has begun to interpret language in existing state laws as requiring an environmental justice analysis, as evidenced by the three cases discussed above. For example, the Fourth Circuit interpreted Virginia law to assess environmental justice as a part of the site suitability evaluation required under Virginia's air rules. The First Circuit evaluated when and how environmental justice requirements are triggered under Massachusetts's EJ Policy. Finally, the preliminary rulings in the Louisiana state court case indicate that general language in a state constitution regarding protection of public health and welfare can be used to require an environmental justice analysis and serve as a basis for bringing environmental justice claims.

Where states have affirmatively enacted their own environmental justice statutes, plaintiffs' burden will likely be even easier. Many such state laws aim to provide greater clarity by defining core environmental justice terms, outlining how environmental justice must be addressed in permitting decisions, and establishing standards to enforce such claims. As a result of this activity at the state level, as well as the cases described above, plaintiffs' reliance on state law provisions to bring environmental justice claims will likely be a trend going forward. The outcomes of such cases will largely depend on the projects' parameters, robustness of the environmental justice analysis conducted by state agencies, and specific wording in state law provisions.

A potential for a new federal litigation opportunity is also on the horizon. The Biden administration has indicated it plans to address concerns of communities disproportionately harmed by pollution by creating a private right of action to sue in court under Title VI of the Civil Rights Act, which was previously precluded by the 2001 Supreme Court decision in *Sandoval*. See The Biden Plan to Secure Environmental Justice and Equitable Economic Opportunity, joebiden.com/environmental-justice-plan. And while this change could return the focus to bringing environmental justice claims under federal law, without clearer definitions and standards for addressing environmental justice concerns, such a change would still have only limited impact. Thus, state laws will continue to provide a more direct means for plaintiffs to effectively address environmental justice concerns.

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