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Recommended Citation

Irma S. Russell & Alexandra D. Dunn, *Inclusiveness: Advancing Environmental Justice in a Diverse Democracy*, 62 *The Judges' Journal* 6 (2023).

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Inclusiveness: Advancing Environmental Justice in a Diverse Democracy

By Alexandra Dapolito Dunn and Irma S. Russell



Today, environmental justice (EJ) is more than a significant and meaningful social movement. EJ has now emerged—after at least five decades—as a major initiative for the federal government and for many state governments.¹ Since the beginnings of the EJ movement, its proponents have sought redress for the disproportionate and negative impacts of generations of environmental policy and siting decisions that resulted in adverse effects on the health, environment, economics, and climate of disadvantaged communities. Scientific research and “big data” programs now provide evidence supporting community EJ claims, and laws such as the Bipartisan Infrastructure Law (BIL)² and the Inflation Reduction Act (IRA)³ provide funds for improved environmental infrastructure, monitoring, and engagement for overburdened communities. In seeking to correct past environmental harms and to reduce ongoing threats, EJ programs now seek to reduce environmental dangers for adversely impacted communities and society as a whole.

The development of EJ as a national goal, advances in science, and emerging

questions of the constitutional parameters of EJ combine to reveal that judges who understand EJ claims and facilitate reasonable decisions to advance holistic solutions in communities are needed now more than ever.

History

The EJ movement grew out of the civil rights movement, as communities of color and those overburdened with industrial activity and legacy pollution began to exercise their collective voice to seek redress. At the same time, studies verified their premise—that communities of color are statistically more likely to be located in more highly industrialized areas, which increases the exposure of members of these communities to environmental pollution and related stressors.

A case filed in 1968 on behalf of the Northeast Community Action Group in Houston, Texas, by Linda McKeever Bullard is widely regarded as the first lawsuit directly addressing EJ. The case, which alleged environmental discrimination in the siting of waste facilities, was not successful. Nevertheless, it led to Dr. Robert D. Bullard’s ground-breaking 1982 study

Solid Waste Sites and the Black Houston Community, documenting the disparate impact of Houston’s city-owned landfills on communities of color.⁴ The study found that 80 percent of municipal trash incinerators and 75 percent of privately owned dumps were located in majority Black neighborhoods although Black persons made up only 25 percent of Houston’s population. Subsequent studies, such as *Toxic Wastes and Race at Twenty*, further reinforced Dr. Bullard’s findings.⁵

Every administration since President Bill Clinton has invested in EJ, with the Biden administration advancing a “whole-of-government” approach.⁶ President Joseph Biden’s many EJ-oriented executive orders emphasize the importance of embedding fairness in the decision-making process of executive departments and agencies that consider EJ issues; addressing the disproportionate and cumulative health, environmental, economic, and climate impacts on disadvantaged communities; coordinating the implementation of equity initiatives; understanding the lived experience of communities of color including Tribal Nations; and conducting frequent assessments of these goals. The White House Office of Environmental Justice (OEJ) oversees these goals through various tools (including Federal Agency Equity Assessments, Action Plans, and Teams) and programs (including the Justice40 Initiative, discussed below, and the Environmental Justice Scorecard).

As EJ policy evolves, increasing judicial familiarity with EJ will facilitate reasonable decisions, advance positive environmental and community outcomes, and affirm the constitutional laws that support EJ. Likewise, the increasing diversity among the judiciary advances the capacity of the judiciary to assess issues raised in environmental justice litigation.

Today's Environmental Justice Definition: Broad and Inclusive

In an Earth Day 2023 Executive Order, the Biden administration proffered the broadest federal definition of EJ to date and captured the concept of holistic community health advocated by EJ leaders for decades. This definition of EJ encompasses

the just treatment and meaningful involvement of all people, regardless of income, race, color, national origin, Tribal affiliation, or disability, in agency decision-making and other Federal activities that affect human health and the environment so that people: (i) are fully protected from disproportionate and adverse human health and environmental effects (including risks) and hazards, including those related to climate change, the cumulative impacts of environmental and other burdens, and the legacy of racism or other structural or systemic barriers; and (ii) have equitable access to a healthy, sustainable, and resilient environment in which to live, play, work, learn, grow, worship, and engage in cultural and subsistence practices.⁷

This definition reflects the reality that holistically addressing EJ issues involves more lines of inquiry and consideration than prior definitions of EJ, which were procedurally rather than substantively oriented and largely focused on proximate fenceline issues and participation in decision-making.⁸ A contemporary understanding of EJ involves recognition of historic patterns of discrimination, lack of supportive infrastructure, and a holistic view of what comprises a healthy community, including consideration of cumulative impacts—i.e., the “totality of exposures to combinations of chemical and non-chemical stressors and their effects on health, well-being, and quality of life outcomes.”⁹ Notably, in early 2023, the U.S. Environmental Protection Agency (EPA) published a *Cumulative Impacts Addendum to EPA Legal Tools to*

Advance Environmental Justice, identifying the existing legal authorities to address cumulative impacts affecting EJ communities.¹⁰ Further advancing the consideration of the cumulative impacts and risks of concentrated industrial facilities on proximate communities, the EPA published a proposed cumulative risk assessment document and accepted comments through August 2023.¹¹

Federal Agency EJ Action and Enforcement

The EPA and the Department of Justice (DOJ) are among the federal agencies most active in the EJ arena today. EPA's new Office of Environmental Justice and External Civil Rights and DOJ's new Office of Environmental Justice oversee multiple EJ initiatives. For example, EPA's goals through fiscal year 2026 include taking “decisive action to advance [EJ] and civil rights” by, among other things, “embed[ding] EJ and civil rights into EPA's programs, policies, and activities” and “strengthen[ing] enforcement of civil rights and environmental laws in communities with [EJ] concerns.”¹² Similarly, DOJ's May 2022 Comprehensive Environmental Justice Enforcement Strategy “provides a roadmap for using the [DOJ's] civil and criminal enforcement authorities, working with EPA and other federal partners, to advance [EJ]. . . .”¹³ The strategy is grounded in core principles directing DOJ attorneys to (1) “prioritize cases that will reduce public health and environmental harms to overburdened and underserved communities,” (2) “make strategic use of all available legal tools to address [EJ] concerns,” (3) “ensure meaningful engagement with impacted communities,” and (4) “promote transparency regarding [EJ] efforts and their results.”¹⁴

There is no comprehensive federal environmental law that governs EJ in an explicit way yet—although bills are regularly introduced each Congress such as the “Environmental Justice for All Act.”¹⁵ Without a comprehensive EJ-specific statute, the federal government relies on guides and policies for the EJ considerations and

handling EJ claims. For example, *EPA Legal Tools to Advance Environmental Justice* is EPA's extensive compilation “of legal authorities available to EPA for identifying and addressing the disproportionate impact of pollution on underserved and overburdened communities, including communities of color, Indigenous peoples, and low-income communities.”¹⁶

For EJ claims, the federal government also frequently uses Title VI of the Civil Rights Act of 1964, which “prohibits discrimination on the basis of race, color, and national origin in programs and activities receiving federal financial assistance.”¹⁷ According to DOJ, while “Title VI itself prohibits *intentional* discrimination . . . [,] most funding agencies have regulations implementing Title VI that prohibit recipient practices that have the *effect* of discrimination on the basis of race, color, or national origin.”¹⁸ Through Title VI, the federal government has increased local community group power, as well as its own, to petition for redress when federally funded actions, permits, and projects are alleged to fail to consider and protect EJ interests.¹⁹ A 2022 investigation opened by the EPA under Title VI against Jackson, Mississippi, in response to a Title VI complaint filed by the National



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Association for the Advancement of Colored People (NAACP) illustrates the usefulness of Title VI for EJ claims. The ongoing investigation alleges that the City of Jackson failed to provide sufficient water investment to meet the needs of the community.²⁰ Similarly, in 2021, the DOJ on its own initiated an investigation against the Alabama Department of Public Health for insufficient wastewater investment in communities of color in Lowndes County. This investigation was resolved in May 2023 through the Alabama Department of Public Health's commitment to, among other steps, engage with the community, provide public health assessments, prioritize properties in need of sanitation service, and assess health risks.²¹

Federal Funding

Congress has supported EJ goals in both the 2021 BIL and the 2022 IRA, which make more resources available to EJ communities than ever before.²² According to the White House, one of the purposes of the BIL was to help communities across America that have faced “environmental injustices—from bearing the brunt of toxic pollution, underinvestment in infrastructure and critical services, and disproportionate exposure to the impacts of climate change.”²³ The White House similarly stated that the IRA will “improve public health, reduce pollution, and revitalize communities that are marginalized, underserved, and overburdened by pollution while increase [sic] access to affordable and accessible clean energy.”²⁴ The IRA advances President Biden's Justice40 Initiative, which aims to have 40 percent of the benefits of federal investments flow to disadvantaged and overburdened communities, with approximately \$40 billion for communities with EJ concerns.²⁵

State and Local Efforts

Notably, states are passing legislation to supplement existing federal EJ efforts and fill gaps. An online database, prepared by a coalition of educational institutions, including law schools, tracks developments in state law.²⁶ To date, many states

have established task forces and offices on EJ concerns, identify EJ communities, and engage in dialogue with them.²⁷

As an example, Vermont created an EJ Advisory Council and Interagency EJ Committee to implement the state's policy that “no segment of the population of the State should, because of its racial, cultural, or economic makeup, bear a disproportionate share of environmental burdens or be denied an equitable share of environmental benefits.”²⁸ States have also passed regulations requiring land use reforms for siting facilities in disadvantaged and disproportionately impacted communities. Examples include New Jersey's S.B. 232, Massachusetts's S.B. 9, Rhode Island's H.B. 5923, and New York's S.B. 2022. These reforms employ a variety of permitting and reporting requirements in addition to outright bans on siting in environmentally sensitive areas.²⁹ New York recently codified an Environmental Rights Amendment (or “Green Amendment”) to its constitution, which guarantees its citizens the right to “clean air and water, and a healthful environment.”³⁰ New Jersey has implemented regulatory infrastructure to consider cumulative impacts, which are the “totality of exposures to combinations of chemical and non-chemical stressors and their effects on health, well-being, and quality of life outcomes.”³¹

Tools to Identify EJ Communities

With the vast amount of publicly available information used to evaluate environmental impacts—known as “environmental big data”—communities are more likely to be able to determine, with supporting facts, whether their community is overburdened by pollution.³² Big data is exemplified by the most prominent tool, EPA's EJScreen, launched in 2015 and most recently updated in June 2023.³³ EJScreen 2.2 draws data from federal databases for 13 environmental indicators (focused on exposure and/or proximity to pollutants, risk, or hazards) and seven socioeconomic indicators (including income, race, and education). The tool allows users to see how different environmental burdens impact various communities. Another

resource is the Climate and Economic Justice Screening Tool (CEJST). CEJST is organized into eight categories: climate change, energy, health, housing, legacy pollution, transportation, water and wastewater, and workforce development.³⁴ CEJST was specifically developed to advance and support the Justice40 Initiative discussed above.

State and local governments also have developed EJ-focused mapping tools. California's tool provides a cumulative impact score for each census tract, making it easy to identify disadvantaged communities for investment opportunities and prioritized enforcement under state law.³⁵ As of 2022, 15 other states (Massachusetts, Connecticut, New York, New Jersey, Rhode Island, Pennsylvania, Maryland, Virginia, North Carolina, Michigan, Illinois, Minnesota, New Mexico, Oregon, and Washington) have similar geospatial tools.³⁶

Future Questions

The Supreme Court decision in the case *Students for Fair Admissions, Inc. v. President & Fellows of Harvard (SFFA)*³⁷ raises questions regarding the validity of EJ policies that use race as a factor for determining federal funding or enforcement actions. In *SFFA*, the Court declared that the college admissions policies of Harvard College and the University of North Carolina violated the Equal Protection Clause of the Fourteenth Amendment. The admission policies of the schools used affirmative action principles, which the Court found amounted to racial discrimination by government entities. In his concurring opinion, Justice Neil Gorsuch concluded that “Title VI prohibits a recipient of federal funds from intentionally treating one person worse than another similarly situated person because of his race, color, or national origin.”³⁸ This “discrimination,” he noted, is impermissible “without regard to any other reason or motive.”³⁹ The sweep of Justice Gorsuch's concurrence suggests that EJ may be vulnerable to challenge under the Equal Protection Clause of the Constitution. The majority opinion excludes military academies from its prohibition

on considering race in admissions.⁴⁰ In her dissent, Justice Sonia Sotomayor points out this exception in the majority opinion and argues that the importance of “racial . . . diversity in today’s increasingly complex global security environment” implicates civilian education as well as education of the military, stating that the majority “recognizes the compelling need for diversity in the military and the national security implications at stake, but it ends race-conscious college admissions at civilian universities implicating those interests anyway.”⁴¹ Given the concerns articulated prior to, and in, the *SFFA* case with using race as a factor to distribute federal funds and benefits, EJScreen 2.2 uses “Supplemental Indexes,” which exclude race from its community mapping capabilities. Similarly, CEJST omits race as a factor, intended to help the screening tool “endure” legal challenges.⁴²

Conclusion

Without question, the EJ movement, born of the civil rights era, is growing in scope, prevalence, and understanding. Many communities are now rediscovering their voice to raise to regulators, legislators, and the judiciary their concern that the presence of environmental stressors in their community is adversely affecting residents’ overall health and welfare. Not only do these communities have their voice, but they now also have access to funding and data to advance their pursuit of remedies.

Given these developments, increasing judicial familiarity with EJ will facilitate reasonable decisions, advance positive environmental outcomes, and affirm the constitutional laws that support EJ. Diversity among the judiciary increases the bench’s capacity to respond to issues raised around the environmental justice movement, its origins, and its current state.

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