



PROGRAM MATERIALS
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Environmental Justice and Infrastructure Siting in the Black Lives Matter Era

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Environmental Justice and Infrastructure Siting in the Black Lives Matter Era

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EMILY PITLICK MALLEN counsels clients in the natural gas, oil and products pipeline industries in federal regulatory and transactional matters. She helps her clients understand and comply with their obligations under energy and environmental laws, with particular focus on the Natural Gas Act (NGA), the Natural Gas Policy Act (NGPA), the Interstate Commerce Act (ICA) and the National Environmental Policy Act (NEPA). Emily has provided strategic advice to pipelines in over a dozen NGA Section 4 and 5 rate case proceedings. She works with in-house counsel to shepherd pipeline projects through the NGA Section 7 certificate process and provides advice on day-to-day regulatory compliance matters before the Federal Energy Regulatory Commission (FERC). She also has experience with proceedings before the Texas Railroad Commission and the federal courts, and advising energy industry and trade association clients working through emerging issues in energy and natural resources law. Emily focuses her pro bono efforts on representing military veterans in healthcare benefits proceedings and assisting 501(c)(3) tax-exempt entities.



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SIMONE JONES focuses on complex environmental litigation and internal investigations, particularly in the automotive sector. Her recent cases include defending original equipment manufacturers and senior executives in matters involving auxiliary emission control devices, fuel economy and onboard diagnostics before federal courts, EPA, CARB, DOJ, the FBI, the SEC and other agencies. Simone also has extensive experience in class action defense, white collar criminal defense, internal and government investigations, and general commercial litigation. In addition, Simone has experience successfully defending corporations in high-stakes consumer class action suits alleging consumer fraud, violations of the civil Racketeer Influenced and Corrupt Organizations Act (RICO) and other federal statutes, as well as violations of state laws. Simone maintains an active pro bono practice and was awarded the Award for Excellence in Pro Bono Service by the Judges of the United States District Court for the Northern District of Illinois and the Chicago Chapter of the Federal Bar Association and received the Thomas H. Morsch Award for Pro Bono Achievement.



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NICOLE NOËLLISTE is a member of the Environmental practice group in Washington, D.C., which is ranked Band 1 by Chambers USA in 2020. Nicole focuses her practice on advising clients on a wide range of complex environmental and energy matters, including regulatory compliance, enforcement actions, and rulemaking challenges. She also counsels the nuclear sector on transactional and regulatory approvals by the U.S. Nuclear Regulatory Commission (NRC), including NRC approvals for transactions involving radioactive materials. Prior to joining Sidley, Nicole was a lawyer at the NRC in the Office of General Counsel. In that position, Nicole counseled the agency staff on the development of the agency's first Tribal Policy Statement, and reviewed National Environmental Policy Act analyses of NRC permitting decisions. During law school, Nicole served as a law clerk at the Environmental Law Institute, an Honors Law Clerk at the EPA's Office of General Counsel and a law clerk within the Natural Resources Section of the DOJ's Environmental and Natural Resources Division.

Agenda

- Environmental Justice and the Emergence of the Black Lives Matter Movement
- Federal Environmental Justice Regulation
- Environmental Justice Litigation
- Environmental Justice and the Federal Energy Regulatory Commission
- Federal and State Environmental Justice Legislation
- Tips for Engagement



Environmental Justice and the Emergence of the Black Lives Matter Movement

What is Environmental Justice?

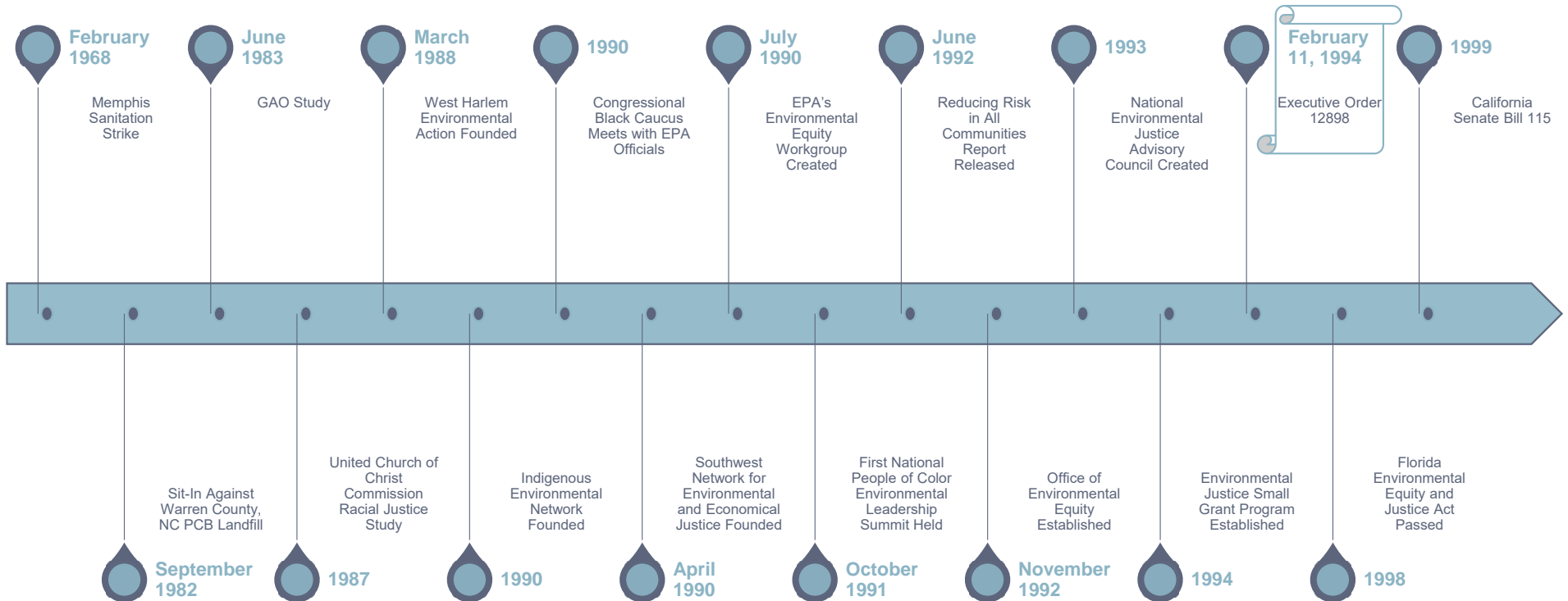
“[T]he **fair treatment** and **meaningful involvement** of all people regardless of race, color, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.”

- **Fair treatment**
 - No group should bear disproportionate share of negative environmental consequences resulting from industrial, governmental and commercial operations or policies.
- **Meaningful involvement**
 - People have opportunity to participate in decisions about activities that may affect their environment and/or health.
 - Public’s contribution can influence regulatory agency’s decision.
 - Community concerns will be considered in decision making process.
 - Decision makers will seek out and facilitate the involvement of those potentially affected.



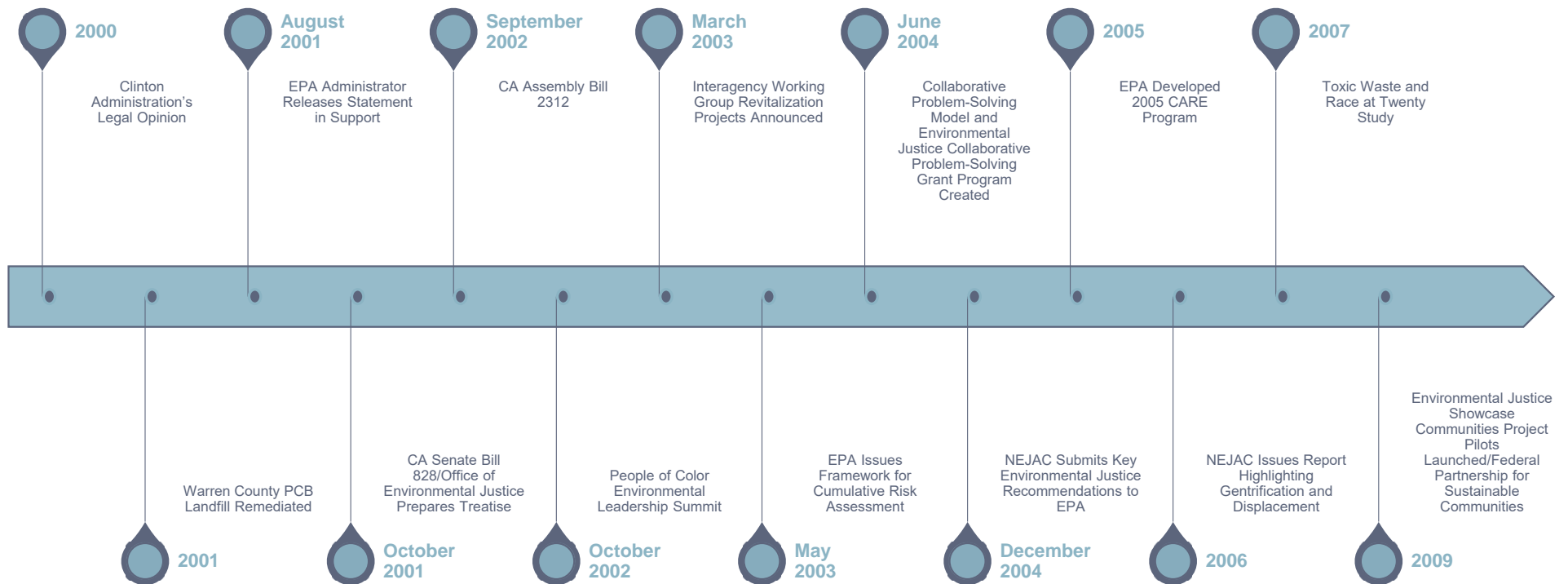
Environmental Justice History

"[W]hether by conscious design or institutional neglect, communities of color in urban ghettos, in rural 'poverty pockets,' or on economically impoverished Native-American reservations face some of the worst environmental devastation in the nation." – Robert Bullard



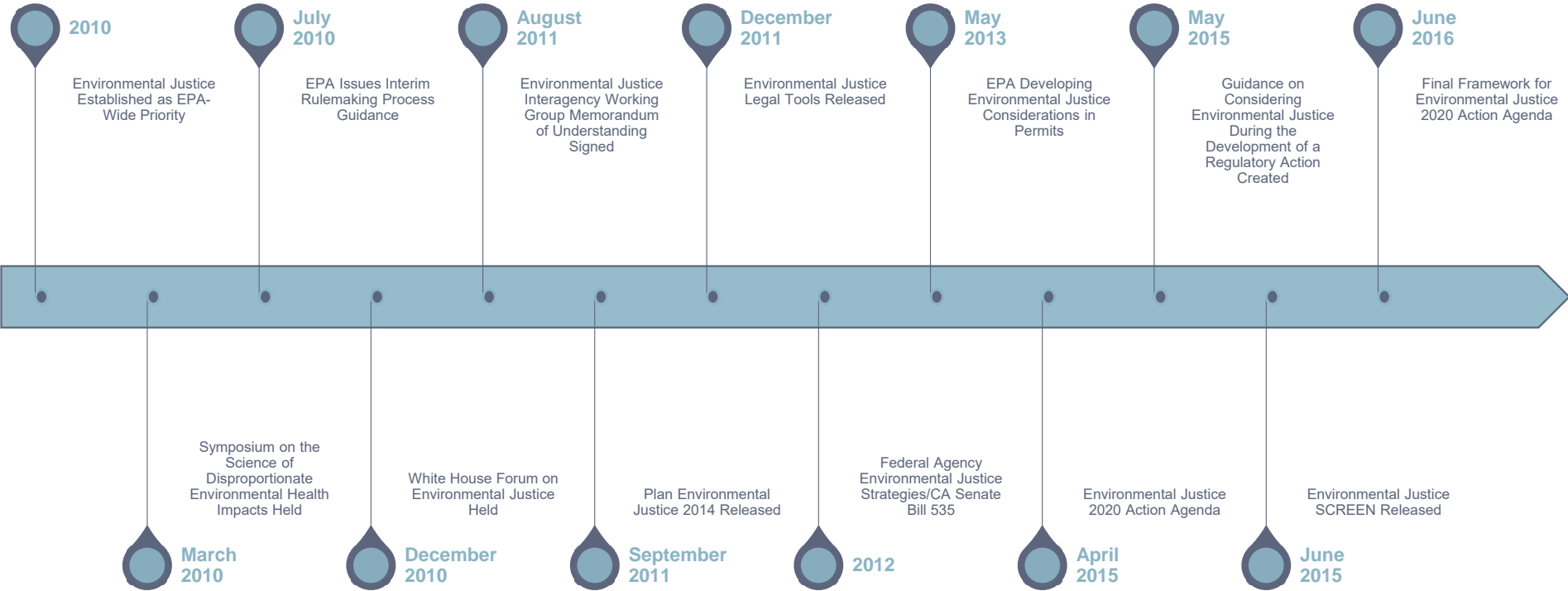
Source of information: <https://www.epa.gov/environmentaljustice>

Environmental Justice History (cont'd)



Source of information: <https://www.epa.gov/environmentaljustice>

Environmental Justice History (cont'd)



Source of information: <https://www.epa.gov/environmentaljustice>

The Increasing (and Express) Recognition that Black Lives Matter

The Black Lives Matter Movement

- Founded in 2013
 - Alicia Garza, Patrisse Cullors, Opal Tometi
 - In response to acquittal of individual who killed Trayvon Martin
- Achieved mainstream recognition in early 2020
 - George Floyd murder captured global attention
 - Captive audience created by COVID-19 global pandemic
 - Killing of Ahmaud Arbery
 - Brutality
- Corporate America has joined efforts to finally end systemic, structural racism
 - Largely distanced itself prior to this time; now many large corporations leading
 - Financial contributions to organizations combating racial injustice (e.g., NAACP Legal Defense Fund)
 - Partnerships with Black community



Federal Environmental Justice Regulation

National Environmental Policy Act (NEPA)

National Environmental Policy Act of 1969 (42 U.S.C.A. § 4321)

- Requires that federal agencies evaluate the environmental effects of major government actions.
- NEPA does not mandate particular results; instead, the statute imposes only procedural requirements.



Recent Changes to Regulations Implementing NEPA

- On September 14, 2020, the Council on Environmental Quality's ("CEQ") revisions to the rules implementing NEPA took effect. Some of the changes include:
- Directs each federal agency to revise their NEPA procedures, as necessary, to implement the new CEQ regulations by September 14, 2021.
- Prohibits agencies from imposing additional procedures or requirements beyond those set forth in the CEQ regulation.

Effects on Environmental Justice Considerations

- **Scope of Projects**: Allows agencies to develop categories of activities that do not require an environmental assessment at all.
- **Scope of Agency Review**: Eliminates the need for agencies to analyze a project's indirect or "cumulative" effects on the environment. Agencies are only required analyze "reasonably foreseeable" impacts.
 - Could have environmental justice implications if a number of projects are proposed in the same Environmental Justice Community
- **Scope of Public Comments**: Imposes limits on scope of comments, by prescribing page limits, timeliness, and specificity of comments.

Pending Challenges to the National Environmental Policy Act

- *Alaska Community Action on Toxics v. CEQ* (Northern District of California No. 20-5199)
- *California v. CEQ* (Northern District of California No. 20-6057) – Filed on behalf of 21 states and several territories, counties, and cities, including: California, Colorado, Connecticut, Delaware, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, Wisconsin, Guam, District of Columbia, New York City, and Harris County, Texas
- *Environmental Justice Health Alliance v. CEQ* (Southern District of New York No. 20-6143)
- *Wild Virginia v. CEQ* (Western District of Virginia No. 20-45)

Environmental Justice Litigation

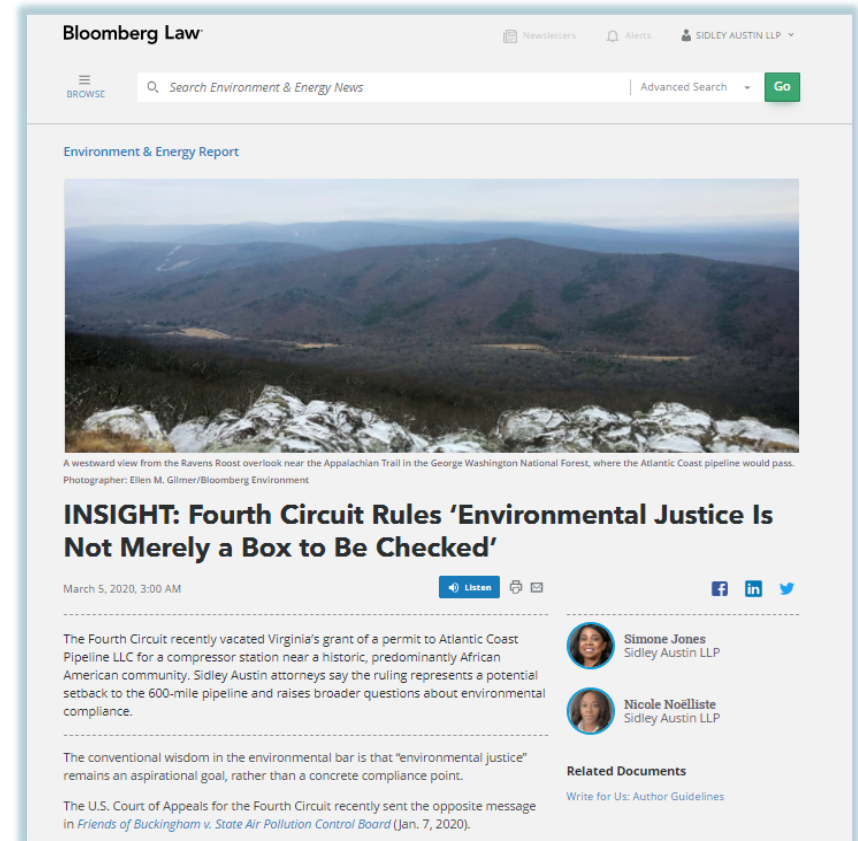
Potential Legal Bases

- Constitutional Claims
 - Equal Protection Clause of the Fourteenth Amendment
 - “No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws.”
 - See, e.g., *Bean v. Southwestern Waste Management Corp.*, 482 F. Supp. 673 (S.D. Tex. 1979); *East Bibb Tiggs Neighborhood Ass’n v. Macon-Bibb County Planning & Zoning Commission*, 706 F. Supp. 880 (M.D. Ga. 1989)
- Civil Rights Laws
 - Title VI of the 1964 Civil Rights Act, 42 U.S.C. § 2000d et seq.
 - Prohibits discrimination on the basis of race, color, national origin
 - *Guardians Ass’n v. Civil Service Commission*, 463 U.S. 582 (1983)
 - Title VI requires proof of intentional discrimination
 - *Alexander v. Sandoval*, 532 U.S. 275 (2001)
 - Title VI extends only to “intentional discrimination,” does not create a private right of action to enforce regulations based on disparate impact
- Environmental Laws
 - National Environmental Policy Act (NEPA), state laws
 - See, e.g., *Friends of Buckingham v. State Board Air Pollution*

‘Environmental Justice is Not Merely a Box to Be Checked’

Friends of Buckingham v. State Air Pollution Control Board (Jan. 7, 2020)

- United States Court of Appeals for the Fourth Circuit
- Vacated permit granted to Atlantic Coast Pipeline LLC (“ACP”) to construct and operate a compressor station intended to transmit natural gas through ACP’s pipeline
 - Compressor station was to consist of four natural gas-fired turbines that emit pollutants
 - Was to be located in historic, predominantly community largely occupied by descendants of freed slaves
- In response to challenge by community residents, Court found:
 - Granting authority had not determined whether community was a “minority” environmental justice community
 - Board failed to assess the compressor station’s potential for disproportionate health impacts on the community
- \$8 billion project abandoned due to legal challenges, delays



The screenshot shows a Bloomberg Law article page. At the top, there's a navigation bar with 'Bloomberg Law', 'Newsletters', 'Alerts', and 'SIDLEY AUSTIN LLP'. Below that is a search bar with the text 'Search Environment & Energy News' and a 'Go' button. The main content area features a large landscape photograph of a mountain range. Below the photo is a caption: 'A westward view from the Ravens Roost overlook near the Appalachian Trail in the George Washington National Forest, where the Atlantic Coast pipeline would pass. Photographer: Ellen M. Gilmer/Bloomberg Environment'. The article title is 'INSIGHT: Fourth Circuit Rules 'Environmental Justice Is Not Merely a Box to Be Checked'' with a date of 'March 5, 2020, 3:00 AM'. There are social media icons for Facebook, LinkedIn, and Twitter. Below the title, there are two author profiles: Simone Jones and Nicole Noëlliste, both from Sidley Austin LLP. A 'Related Documents' section is also visible at the bottom of the article preview.

Insight: Fourth Circuit Rules 'Environmental Justice is not Merely a Box to Be Checked', (March 2020) available at <https://news.bloomberglaw.com/environment-and-energy/insight-fourth-circuit-rules-environmental-justice-is-not-merely-a-box-to-be-checked>

Litigation in the Black Lives Matter Era



- Lawsuits being filed in increasing numbers across the country
- Plaintiffs potentially will have more tools at their disposal
- Increased, more diverse coalitions with louder voices
- Litigation avoided?
 - Black Lives Matter movement outgrowth
 - Increased attention to claims that corporations are contributing to racial disparities
 - Desire to avoid being tried and found liable in the court of public opinion due to unfavorable media coverage

Environmental Justice and the Federal Energy Regulatory Commission

The FERC Approach to Environmental Justice

FERC follows *EPA Guidance for Incorporating Environmental Justice Concerns in EPA's NEPA's Environmental Analysis*, a 3-step process:

- (1) Determine the existence of minority and low-income populations;
- (2) Determine if resource impacts are high and adverse; and
- (3) Determine if the impacts fall disproportionately on environmental justice populations.

Categorical thresholds for minority and low-income populations apply to a project-affected area if minority populations > 50% of total population, and incomes below poverty level is $\geq 20\%$.

- If no minority or low-income populations are found, there is no reason to then consider whether the resource impacts are high and adverse.
- Applies methodologies in the EPA's Federal Interagency Working Group on Environmental Justice and NEPA Committee's publication, *Promising Practices for Environmental Justice Methodologies in NEPA Review*.
- Based upon how data is sliced, such outcomes are possible.
- Considers impacts on human health and the environment, as associated ecological, aesthetic, historical, cultural, economic, social and health impacts to low-income and minority populations.
 - Minority groups: American Indian or Alaskan Native; Asian or Pacific Islander; Black, not of Hispanic origin; or Hispanic.

The FERC Approach to Environmental Justice

FERC's Environmental Justice considerations arise during NEPA review:

- NEPA is required when a Federal action is taken (such as the granting of a pipeline CPCN) that may have impacts on the human and natural environment.
- NEPA is disclosure statute, not an environmental protection statute (42 U.S.C. § 4332(2)(C)).
- Standard is to take a “hard look” at potential impacts on environmental justice communities, but no substantive outcome required.
 - Environmental consequences are considered and disclosed to the public.
 - Deficient disclosures are deemed arbitrary and capricious.

FERC is an independent agency not subject to Executive Order 12898:

- Requires federal agencies to identify and address disproportionately high and adverse human health or environmental effects of their actions on minority and low-income populations to the greatest extent practicable and permitted by law.
- Develop a strategy for implementing environmental justice.
- Promote nondiscrimination in federal programs that affect human health and the environment, as well as provide minority and low-income communities access to public information and public participation.

Atlantic Coast Pipeline LLC, 161 FERC ¶ 61,042 (2017), order on reh'g, 164 FERC ¶ 61,100 (2018)

Interstate natural gas pipeline in Virginia with compressor facilities

- Same facts as *Buckingham* with a different result
 - (1) Existence of Minority and Low-Income Populations: arguments made that FERC should have used smaller census blocks instead of larger census tracts should have been used in analysis, or dilutes the impacts to families in the Union Hill area, where 85% of adjoining landowners are African American.
 - (2) High and Adverse Resource Impacts: Environmental justice analysis focused on impacts that would be unique to impoverished and minority communities.
 - (3) Disproportionate Effect on Environmental Justice Populations: Considered health impacts from compressor station emissions. Although the Final EIS discusses the potential for the risk of impacts to fall disproportionately on minority communities, it noted that, in relation to comments received regarding Compressor Station 2's effects on African Americans, the census tracts around the station are not designated as minority environmental justice populations.
- Protestors in the case faulted FERC environmental justice review for:
 - Using geographic regions that were too large;
 - Collectively considering minority groups instead of differentiating among them; and
 - Failing to take into account risks to environmental justice communities that were higher than the general population's risks.
- FERC: "The Final EIS made the [environmental justice] information public and included discussion of it. No more is required."

Texas LNG Brownsville LLC, 169 FERC ¶ 61,130 (2019), order on reh'g, 170 FERC ¶ 61,139 (2020)

LNG export facility near Brownsville, Texas

- Minority/Low-income thresholds of environmental justice review met:
 - Within 5 census block groups within 2-mile radius of site, Hispanic or Latino population was 74 – 95% of total population; and poverty levels of 22-41% in all 5 areas.
 - Minority population/poverty levels consistent with all of Cameron County, TX (88% Hispanic or Latino and 35% poverty rate); Cameron County used as reference because it is where the facility would be located.
- “Because here all project-affected populations are minority or low-income populations, or both, it is not possible that impacts will be disproportionately concentrated on minority and low-income populations versus on some other project-affected comparison group.”
- Relies on NAAQS and finding that facility would not increase concentration of criteria pollutants above the NAAQS, except for ozone.
 - Finds that affected minority and low-income populations have a potential for multiple or cumulative exposure to environmental hazard of ozone, which could lead to health effects.
 - Compared hospitalizations and deaths among White and Hispanic populations related to asthma and chronic lower respiratory disease and found no disproportionately high or adverse impact to Hispanic communities vs. White communities.
- Dissent by Commissioner Glick faults FERC for dismissing environmental justice concerns because all surrounding communities are also environmental justice communities so no disproportionate impact. Example of FERC “shrug[ging] its shoulders.”

What's Next at FERC

- FERC is famously reactive to court orders – unlikely to change course on environmental justice review unless a court orders it to do so.
 - Changes in November could move the needle.
 - FERC reliance on EPA Guidance to implement Environmental Justice upheld in *Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017).
 - Holding that the "goal of an environmental-justice analysis is satisfied if an agency recognizes and discusses a project's impacts on predominantly-minority communities."
 - Court rejected Sierra Club's challenges to FERC's use of census tract data.
- FERC continues to follow its own methodology on environmental justice issues post-*Buckingham*.
- Environmental Justice could become next Greenhouse Gas Emissions fight:
 - Black Lives Matter movement puts spotlight on disproportionate impacts to Black communities; and
 - COVID-19 puts additional spotlight on health impacts from pollution exposure.
 - Additional guidance may inform how pipelines move forward on infrastructure projects.

Federal and State Environmental Justice Legislation

Proposed Federal Legislation: Environmental Justice for All Act

- Requires the Consideration of Cumulative Impacts: Explicitly adds cumulative impacts in permitting decisions under the Clean Water Act and Clean Air Act.
- Creates a working group to ensure compliance and enforcement and develop government-wide strategies.
- Requires early and meaningful involvement in actions impacting communities in the NEPA review process.
- Funds programs to study potentially harmful products marketed towards women and girls of color.
- Establishes programs to ensure more equitable access to parks and the outdoors.
- Establishes Environmental Justice Grant Programs for research, education, and projects to address environmental and public health issues.
- Establishes a Federal Energy Transition Economic Development Assistance Fund to support communities and workers as they transition away from fossil fuel-dependent economies.

Proposed Federal Legislation: Environmental Justice Legacy Pollution Cleanup Act

Prohibits new major source air pollution permits in communities that EPA has identified as already having a heightened risk of cancer due to air pollution and in communities currently overburdened by particulate matter (PM2.5) air pollution.

Prohibits renewal of major source air pollution permits in these communities beginning in 2025.

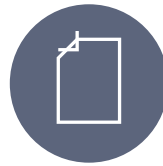
Invests billions of dollars in communities of color and low income communities:

- Invest \$35 billion to clean up the most dangerous toxic sites in the country, including Superfund sites, abandoned coal mines, Brownfields, and formerly used defense sites.
- Invest over \$30 billion to identify and cleanup lead-based paint and other housing-related health and safety hazards in low income and tribal communities.
- Invest \$20 billion to replace lead drinking water service lines.
- Invest \$10 billion to provide grants to low-income homeowners to install or repair wastewater disposal systems and drinking water wells.
- Invest \$3 billion to provide all American Indians and Alaska Natives with safe drinking water and adequate sewerage systems in their homes.

State Legislation: New Jersey S232



NJ DEP must identify the state's "overburdened communities," and only grant or renew permits for covered facilities after determining that there is no disproportionate, cumulative environmental impacts on those communities.



Imposes new requirements on permits for certain "covered facilities" located within the same Census tract as overburdened communities.



Applicants must conduct a public hearing in the overburdened community, accept oral and written comments from any interested parties, and submit a transcript of the public hearing to NJDEP.



Applicants must submit an environmental justice-specific impact statement and hold public hearings if the facility is located in or near overburdened communities

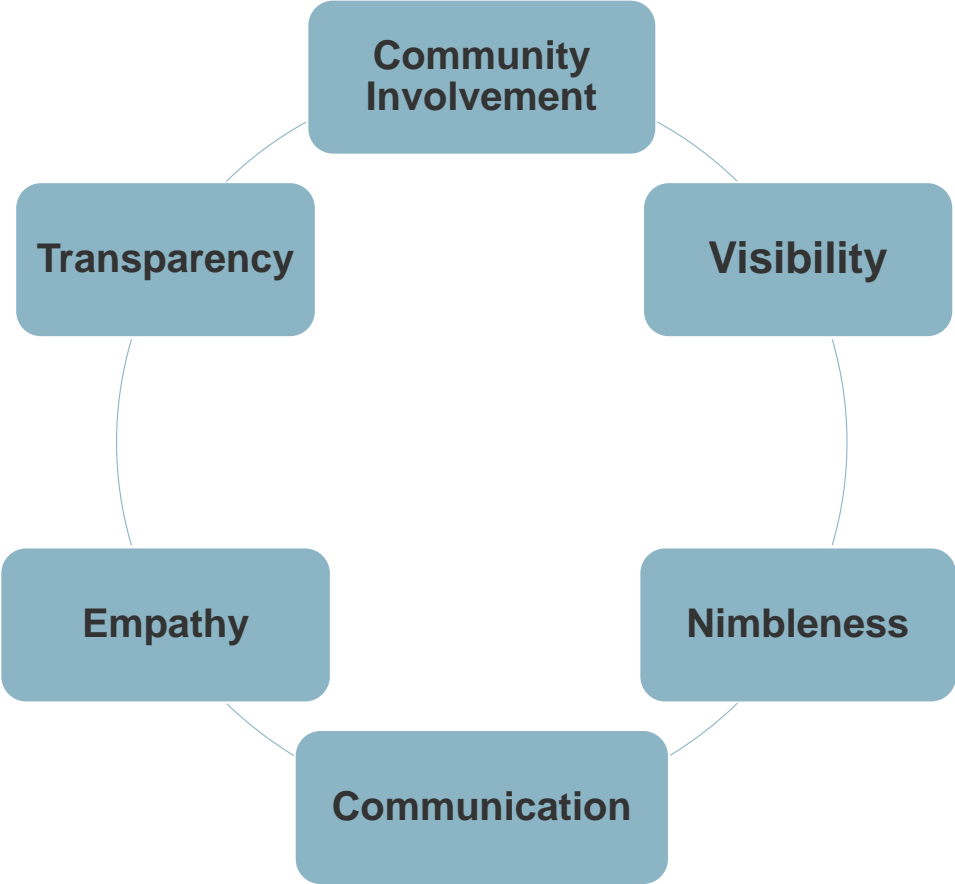
State Legislation: New Jersey S232

Affected permit applications:

- Major sources of air pollution (i.e., gas-fired power plants and cogeneration facilities);
- Resource recovery facilities or incinerators; sludge processing facilities;
- Sewage treatment plants with a capacity of more than 50 million gallons per day;
- Transfer stations or solid waste facilities;
- Recycling facilities that receive at least 100 tons of recyclable material per day;
- Scrap metal facilities;
- Landfills; or
- Medical waste incinerators, except those attendant to hospitals and universities.

Tips for Meaningful Engagement in Environmental Justice Communities

Meaningful Engagement



Beijing
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Brussels
Century City
Chicago
Dallas
Geneva
Hong Kong
Houston
London
Los Angeles
Munich
New York
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