

NOT A BOX TO BE CHECKED: ENVIRONMENTAL
JUSTICE AND *FRIENDS OF BUCKINGHAM V.*
STATE AIR POLLUTION CONTROL BOARD
(4TH CIR. 2020)

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INTRODUCTION

“They look for certain areas to build these structures in,” explains John Laury, of Buckingham County, Virginia.¹ “Usually they will find an area with people of color or poor people. They don’t expect them to have the resources to fight back. If they have money, more than likely they have political clout. You have politicians to fight on your behalf. So [they] choose these areas and [they] have less resistance.”²

Mr. Laury and his wife, Ruby Laury, live on Laury Lane, the property where generations of the Laury family have lived in Buckingham County.³ The property lies near the site of a proposed compressor station for the Atlantic Coast Pipeline (“ACP”), a proposed 604-mile natural gas pipeline promising to deliver natural gas from West Virginia to the northern Hampton Roads area in Virginia and to North Carolina.⁴ The gas would have needed to remain pressurized as it traveled from West Virginia to North Carolina—requiring three compressor stations.⁵ Duke Energy Corporation and Dominion Energy Corpo-

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1. Broken Ground, *Demand for Power*, SOUTHERN ENV’T L. CTR. (June 4, 2019), <https://perma.cc/88JM-Q9TP>.
2. *Id.*
3. *See id.*; see Chris Horne, *Court Ruling Reignites Battle Over Atlantic Coast Pipeline*, WAVY (Jan. 9, 2020), <https://perma.cc/BMF9-45Y6>.
4. Broken Ground, *supra* note 1.
5. *See Compressor Stations*, ATLANTIC COAST PIPELINE, <https://perma.cc/UHS4-T283>.

ration had planned to operate the three stations with natural gas-fired turbines⁶ that would emit nitrogen oxide, formaldehyde, hexane, and fine particle (PM_{2.5}) pollution, particulate matter known to cause and exacerbate asthma and lung cancer, with disproportionate impacts on African American populations.⁷

Union Hill in Buckingham County is a historically African American community, settled by formerly enslaved people in the late-19th century. In the mid-19th century, 350–400 enslaved people⁸ in Buckingham County worked on the Variety Shade plantation, cultivating tobacco and other agricultural products common to Virginia.⁹ After the 13th, 14th, and 15th Amendments were passed, the formerly enslaved people settled the surrounding area, constructing two churches, including the Union Hill Baptist Church; two schools; and multiple cemeteries, in addition to the existing cemetery on former plantation property.¹⁰ The Variety Shade land, however, remained in the hands of the Bondurant and Mosely families who had previously owned the plantation, and who ultimately passed it down to a holding company associated with Variety Shade Landowners of Virginia, Inc.¹¹ In 2015, Variety Shade Landowners, Inc. sold 68.5 acres to Atlantic Coast Pipeline, LLC (“ACP LLC”), for the construction of a compressor station for the new pipeline.¹²

Before constructing the pipeline, however, the ACP LLC was required to obtain a minor-source permit from the Virginia State Air Pollution Control Board (“the Board”).¹³ The Virginia Department of Environmental Quality

6. ATLANTIC COAST PIPELINE, COMPRESSOR STATIONS 1 (2016), <https://perma.cc/JFB3-BQ58>.
7. *See* Friends of Buckingham v. State Air Pollution Control Bd., 947 F.3d 68, 92 (4th Cir. 2020); *see generally* Am. Lung Ass’n, *Urban Air Pollution and Health Inequities: A Workshop Report*, 109 ENV’T HEALTH PERSP. 357 (2001).
8. Public records on the exact number of enslaved people at the time were destroyed by an arsonist in 1869, the day the 15th Amendment was passed, marking the county as one of Virginia’s many “burned counties,” and precluding the possibility of civil suits for restitution. *See* Comments of Dr. Lakshmi Fjord, Working with Union Hill Historic Preservation and Environmental Justice Partners Re: Atlantic Coast Pipeline and Supply Header Project Draft Environmental Impact Statement at n.3 in Appendix C, F.E.R.C. Docket No. CP-15-554, Accession No. 20170406-5734, filed Apr. 6, 2017, <https://perma.cc/XCQ7-URUQ> [hereinafter Comments of Dr. Lakshmi Fjord]; *see also* *General Information and Basic Historical Overview of Buckingham Landscapes, Structures and Cemeteries*, U. VA. INSTITUTE FOR PUB. HIST., <https://perma.cc/VYW2-N5JX>.
9. *See* Comments of Dr. Lakshmi Fjord, *supra* note 8.
10. *Id.* at 4.
11. *Id.*
12. *See* Jordan Miles, *Compressor Station Land Purchased*, FARMVILLE HERALD (Aug. 26, 2015), <https://perma.cc/2KGZ-YLF4>.
13. Under Article 6 of Chapter 80 of the Virginia Administrative Code, issued pursuant to Virginia’s State Implementation Plan for the Clean Air Act, 42 U.S.C. § 7410, the State Air Pollution Control Board issues permits for new and modified stationary sources of air emissions. 9 VA. ADMIN. CODE § 5-80-1160.

(“DEQ”) recommended that the Board approve the permit, despite years of protest from local residents and activist groups. One group that participated actively was Friends of Buckingham, a local group led in part by grassroots activist Chad Oba. This group acted in solidarity with The Reverend Dr. Lakshmi Fjord, a local historian and anthropologist, and Pastor Paul Wilson of Union Hill Union Grove Baptist Church.¹⁴ Friends of Buckingham, working with Virginia Interfaith Power and Light,¹⁵ the Poor People’s Campaign,¹⁶ Friends of Nelson,¹⁷ Appalachian Voices,¹⁸ and the Virginia Chapter of the Sierra Club,¹⁹ among others, organized protests²⁰ and advocated against the ACP in the media.²¹ These groups also participated extensively in the rulemaking process conducted by the DEQ, voicing their concerns during public hearings and in written comments.²² Despite this advocacy, four members of the seven-member Board voted to approve the permit on January 8, 2019, and the minor-source permit was issued.²³

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14. See An Open Letter Regarding the Threat of Environmental Racism and the Proposed Atlantic Coast Pipeline from Friends of Buckingham to the State Air Pollution Control Board (Dec. 27, 2018), <https://perma.cc/YMP3-GSM2>.
 15. See Press Release, Virginia Interfaith Power and Light, Air Pollution Control Board Approves Air Permit for the Buckingham Compressor Station (Jan. 8, 2019), <https://perma.cc/5W85-9BXC>.
 16. See Rev. Dr. William Barber Brings “Poor People’s Campaign” to Richmond; 100s “Standing up to Dominion Energy and Ecological Devastation and Poverty,” POOR PEOPLE’S CAMPAIGN (Sept. 29, 2018), <https://perma.cc/JA3F-RYTR>.
 17. See *About Us*, FRIENDS OF NELSON, <https://perma.cc/R5FY-BZ88>.
 18. See *Help Stop the Atlantic Coast and Mountain Valley Pipelines!*, APPALACHIAN VOICES, <https://perma.cc/DER2-9XEG>; see also Cat McCue, *History, Health at Stake in Buckingham County*, APPALACHIAN VOICES: FRONT PORCH BLOG (June 4, 2018), <https://perma.cc/VU4Y-7WZY>.
 19. See *Stop the Pipelines*, SIERRA CLUB VA. CHAPTER, <https://perma.cc/GL8G-VE7C>.
 20. See, e.g., *March with Union Hill; Stand with Appalachia*, FRIENDS OF NELSON (May 2, 2019), <https://perma.cc/WK56-PK73> (organizing a protest in May 2019 tracing a route across Richmond’s Robert E. Lee Bridge to march “for environmental justice in Union Hill, a historic black community in Buckingham County targeted for the Atlantic Coast Pipeline’s massive Virginia compressor station”).
 21. See, e.g., Stacy Lovelace, Opinion, *Dominion Energy’s Dominion over Virginia Goes Beyond Ralph Northam*, WASH. POST (Nov. 30, 2018), <https://perma.cc/WY5B-C8YW>.
 22. See, e.g., *Summary of Buckingham Compressor Station Air Permit Public Comments Made to DEQ*, FRIENDS OF BUCKINGHAM (Nov. 2, 2018), <https://perma.cc/D59R-72CY>; Appalachian Voices & Environmental Integrity Project, Comment Letter on Draft Stationary Source Permit to Construct and Operate Compressor Station 2 for Atlantic Coast Pipeline, LLC # 21599 (Sept. 21, 2018), <https://perma.cc/ENF9-W6H4>.
 23. See *Friends of Buckingham v. State Air Pollution Control Bd.*, 947 F.3d 68, 79 (4th Cir. 2020).

On February 8, 2019, Friends of Buckingham and the Chesapeake Bay Foundation brought a petition for the review²⁴ of the agency order before the Fourth Circuit, claiming that the Board had acted arbitrarily and capriciously in issuing the permit without conducting proper site suitability and environmental justice analyses as required under Virginia state law.²⁵

In *Friends of Buckingham v. State Air Pollution Control Board*,²⁶ the Fourth Circuit, reviewing the administrative decision, held that the decision to issue the permit was arbitrary and capricious because the Board—adopting the recommendations of the DEQ—had failed to conduct a proper environmental justice analysis as required by the Commonwealth Energy Policy and its duties under Virginia’s implementation of the federal Clean Air Act (“CAA”).²⁷

The Fourth Circuit noted that the Board’s failure to conduct a proper environmental justice²⁸ analysis made “extensions of public comments and additional meetings ring hollow.”²⁹ Despite evidence suggesting that Union Hill was more densely populated and had a greater proportion of minority residents than the county as a whole, the Board failed to make any findings as to the demographics of the area surrounding the proposed compressor station.³⁰ Moreover, though the Chairman of the Board and another Board member had asserted that they had “assume[d]” for the purpose of the decision that Union Hill was an environmental justice community, they had failed to evaluate the effects of the *specific* project at the *specific* site, as required both by the Commonwealth Energy Policy and under their duties in evaluating permit applications under Virginia state law.³¹ Instead, they seemed to have merely relied on the DEQ’s assurances that emissions levels would not surpass National Ambient Air Quality Standards (“NAAQS”), and that, thus, there *could* be no dis-

24. The Southern Environmental Law Center represented Friends of Buckingham; the Chesapeake Bay Foundation represented itself.

25. See Petition for Review at 3, *Friends of Buckingham v. State Air Pollution Control Bd.*, 947 F.3d 68 (4th Cir. 2020) (No. 19-01152); see also Petitioners’ Rule 30(c) Page-Proof Opening Brief at 23, *Friends of Buckingham*, 947 F.3d 68 (No. 19-01152).

26. 947 F.3d 68.

27. See *id.* at 92–93 (relying on VA. CODE ANN. § 67-101(12) (eff. July 1, 2012 to June 30, 2020); VA. CODE ANN. § 10.1-1306 (2020)). The court also held that the Board’s decision had been arbitrary and capricious because it had failed to articulate its reasons for refusing to consider electric turbines as part of its Best Available Control Technology analysis. *Id.* at 85.

28. This Comment uses the legal definition of environmental justice, in the context of energy, as defined by VA. CODE ANN. § 67-101(12) (2012) (amended 2020), articulating the goal of “[d]eveloping energy resources and facilities in a manner that does not impose a disproportionate adverse impact on economically disadvantaged or minority communities.” However, other statutes and grassroots environmental justice organizations define environmental justice differently.

29. *Friends of Buckingham*, 947 F.3d at 89.

30. See *id.* at 87–88.

31. *Id.* at 90.

proportionate impact on the community.³² In rejecting the decision, the Fourth Circuit noted that “environmental justice is not merely a box to be checked, and the Board’s failure to consider the disproportionate impact on those closest to the Compressor Station resulted in a flawed analysis.”³³

Friends of Buckingham demonstrates the power of state law to protect vulnerable communities, especially in the absence of federal statutory protections against environmental injustice and environmental racism. The application of Virginia’s Commonwealth Energy Policy in *Friends of Buckingham* marks a success in progressive federalism of which other state legislatures should take note. Part I of this Comment describes the history of the ACP in Union Hill and outlines the procedural posture and reasoning of *Friends of Buckingham*. Part II argues that *Friends of Buckingham* demonstrates the power of state environmental justice statutes to provide legal redress for public interest plaintiffs challenging agency decision-making where federal environmental justice laws and policies fail, and contrasts the Virginia Commonwealth Energy Policy with an analogous law in Massachusetts, concluding that the adequacy of state protection depends on strong legal language and state court interpretation.

I. *FRIENDS OF BUCKINGHAM*: BACKGROUND, PROCEDURAL POSTURE, AND REASONING

Union Hill, Virginia, is an unincorporated township located in Buckingham County, Virginia, home to approximately 17,000 residents and located sixty miles west of Richmond.³⁴ The community continues to be substantially populated by African Americans. Friends of Buckingham—a local group dedicated to “work[ing] with . . . county leaders to attract economic investment opportunities that benefit all of our residents, and that contribute to a sustainable healthy environment”³⁵—found in a door-to-door study that “about 84% of Union Hill residents are members of racial minority groups, most of African-American descent.”³⁶ The group also found that “of . . . 67 households . . . 42 (or 62.6%) are known descendants of formerly enslaved people from area plantations.”³⁷

In 2015, ACP LLC purchased a site in Union Hill to construct one of three compressor stations necessary to keep natural gas pressurized as it traveled from West Virginia to North Carolina. According to ACP LLC, the plot was

32. *See id.* at 90–92.

33. *Id.* at 92.

34. *See* Erik Ortiz, *How Money Stokes Divide of Historic Black Community in Virginia Pipeline Battle*, NBC NEWS (Dec. 7, 2018), <https://perma.cc/QR5X-2E7D>.

35. *About Us*, FRIENDS OF BUCKINGHAM, <https://perma.cc/63UJ-NJC9>.

36. *Friends of Buckingham*, 947 F.3d at 86 (paraphrasing the relevant portions of the study conducted by the group, Friends of Buckingham).

37. *Id.*

the only commercially available site that allowed for this connection and had not been ruled out by the Federal Energy Regulatory Commission (“FERC”).³⁸ The same year, ACP LLC applied for permits from the DEQ to power the compressor station with four natural gas-fired turbines that would account for 83% of the station’s nitrogen oxides emissions and 95% of its fine particle pollution, including PM_{2.5} and other known carcinogens.³⁹ The compressor station would also emit other toxic materials, including hexane and formaldehyde.⁴⁰ Because the compressor would constitute a “minor emitting source” under Virginia’s State Implementation Plan (“SIP”) of the CAA,⁴¹ the ACP required a permit from either the DEQ or the seven-member State Air Pollution Control Board to begin construction.⁴² The Board is appointed “without regard to political affiliation” by the governor and “make[s] or cause[s] to be made, such investigations and inspections and do such other things as are reasonably necessary” to fulfill its duties in approving Article 6 permits.⁴³ The Board can, and frequently does, call upon state agencies such as the DEQ to conduct notice-and-comment processes and conduct hearings.⁴⁴

Under Virginia’s Commonwealth Energy Policy, the Board must also consider the environmental justice implications of its permitting decisions. One of the “energy objectives” of the Commonwealth Energy Policy is to “[m]itigat[e] the negative impacts . . . the energy transition [has] on disadvantaged communities and prioritiz[e] investment in these communities.”⁴⁵ The Board, as a state agency, must “[e]nsure 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.”⁴⁶ To this end, the Board must “consider facts and circumstances relevant to the reasonableness of the activity involved and the regulations proposed to control it, including ‘[t]he character and degree of injury to, or interference with, safety [and] health; . . . [and] [t]he suitability of the activity to the area in which it is located.’”⁴⁷

38. *Id.* at 76. FERC reviews all major pipeline projects, and “considers applications from natural gas companies for construction and operation of interstate natural gas pipelines, storage facilities, compressor stations, other natural gas infrastructure, and liquefied natural gas (LNG) terminals.” *Landowner Topics of Interest*, FERC (Aug. 19, 2020), <https://perma.cc/VD3W-8B5P>.

39. *Friends of Buckingham*, 947 F.3d at 85.

40. *Id.*

41. 9 VA. ADMIN. CODE §§ 5-80-1100–1300.

42. *Friends of Buckingham*, 947 F.3d at 75 (“New minor stationary sources with emissions above a certain level must receive an air permit issued pursuant to Article 6 of Chapter 80 of the Virginia Administrative Code . . . by DEQ or the Board.”).

43. VA. CODE ANN. § 10.1-1306.

44. *Friends of Buckingham*, 947 F.3d at 75–76.

45. VA. CODE ANN. § 67-101(15).

46. *Id.* § 67-102(A)(8).

47. *Id.* §§ 10.1-1307(E)(1, 3).

As part of its permitting process, the Board consulted with the DEQ. The DEQ initially solicited comments on ACP LLC's proposed compressor station during a forty-day comment period after the completion of the initial application, and received more than 5,300 comments.⁴⁸ Many of the comments "express[ed] concerns about disproportionate impacts of the proposed facility on the African American population in Union Hill," citing Friends of Buckingham's door-to-door study conducted by Dr. Fjord, which found that demographically, by self-identification, racial "minorities make up 83% of residents" and that of 67 households with extended interviews, 35 reported "pre-existing medical conditions," in a population skewed towards the elderly and the very young.⁴⁹ Others expressed concerns about historical erasure of the historically African American community of Union Hill.⁵⁰ Finally, the Virginia Advisory Council on Environmental Justice ("ADEJ"), an independent group appointed by the governor and charged with "provid[ing] advice and recommendations to the Executive Branch on . . . [i]ntegrating environmental justice considerations throughout the Commonwealth's programs"⁵¹ formally urged the state agencies

48. *Friends of Buckingham*, 947 F.3d at 68, 77.

49. LAKSHMI FJORD, UNION HILL COMMUNITY HOUSEHOLD STUDY SITE AND METHODS REPORT, PART II: HOUSEHOLDS: DEMOGRAPHICS, HEALTH, LAND USE, FAMILY HERITAGE (2018), <https://perma.cc/5K8M-4CC2/>.

50. See Dr. Mary Finley-Brook, Comment Letter on the DEQ and State Air Pollution Control Board Minor Source Construction Permit for the Buckingham Compressor Station, <https://perma.cc/ZAE6-ZQRE> ("The proposed compressor station is sited in a historic Freedman community with many families directly descended from enslaved peoples who worked in the tobacco plantation and who have maintained ongoing and direct ties to Union Hill. The erasure of hundreds of African American Union Hill residents from project assessments first by the Federal Energy Regulatory Commission (FERC) and then by Virginian state agencies provides a faulty foundation for the entire permitting process."); Virginia Chapter NAACP and Buckingham NAACP, Comment Letter on the DEQ and State Air Pollution Control Board Minor Source Construction Permit for the Buckingham Compressor Station (Sept. 21, 2018), <https://perma.cc/3Y5Y-VFYU> ("Since the applicant did not accurately list the actual population living within close proximity to the compressor station site, the undercount allows the applicant to avoid adhering to federal and state mandated regulations used to identify and prevent disproportionate adverse impacts to minority and elderly populations. The portion of Union Hill which was omitted from the application submitted to the Federal Energy Regulatory Commission (FERC), is predominately African-American and consists of approximately 99 unreported homes, and several historic sites; including 2 historic black churches and cemeteries."); Peter Anderson and Appalachian Voices, Comment Letter on the DEQ and State Air Pollution Control Board Minor Source Construction Permit for the Buckingham Compressor Station (Nov. 2, 2018), <https://perma.cc/UVM2-E6P4> ("If the Department cannot demonstrate that the Buckingham Compressor Station will not have a disproportionate adverse impact on an environmental justice community, the Department and Board must reject the Draft Permit in order to act in a [matter] consistent with the Commonwealth Energy Policy.").

51. VA. EXEC. ORDER 73, Part IV (2017), <https://perma.cc/XC59-B7M2>.

to suspend permits.⁵² The ADEJ recommended this suspension pending the appointment of an emergency task force “to ensure that predomin[antly] poor, indigenous, brown and/or black communities do not bear an unequal burden of environmental pollutants and life-altering disruptions.” However, ADEJ lacks legal authority to shape the permitting process beyond making non-binding recommendations to permitting agencies.⁵³

The Board held its first hearing on November 8, 2018, at which the DEQ presented a summary of the public comments it had received, and more than eighty community members spoke and submitted public comments.⁵⁴ Several Board members made inquiries of the DEQ regarding the demographics of the community surrounding the proposed site, and expressed reservations as to site suitability given environmental justice concerns.⁵⁵ Based on the hearing, the Board deferred consideration of the permit.⁵⁶ One week later, Governor Ralph Northam removed two Board members without appointing replacements,⁵⁷ drawing sharp criticism from environmental and racial justice groups who saw it as an attempt to secure permit approval. After another Board member recused himself due to a conflict of interest, the four remaining members reconvened on December 19, 2018, and again deferred consideration, ordering a second period of public comment to discuss community demographics and site suitability.⁵⁸

During the hearings and comment periods, the Board received conflicting reports about the demographics of the surrounding area and about the danger posed to the community by the compressor station’s potential emissions. The Board heard evidence from the door-to-door study conducted by Friends of Buckingham and Dr. Lakshmi Fjord, which had reported that 83.5% of surrounding residents self-identified as members of racial minority populations.⁵⁹ In addition, however, the Board heard evidence derived from EPA’s “EJ-Screen,” a data visualization tool reporting that 37% to 39% of residents near

52. Gregory S. Schneider, *In Virginia, Governor and Appointees at Odds over Gas Pipelines*, WASH. POST (Aug. 28, 2018), <https://perma.cc/KEM4-HRTC>.

53. VA. EXEC. ORDER 72, Part II (2017), <https://perma.cc/8BFR-XHDG>.

54. *Friends of Buckingham v. State Air Pollution Control Bd.*, 947 F.3d 68, 77 (4th Cir. 2020).

55. *Id.*

56. *Id.*

57. See Gregory S. Schneider, *Northam Removes Two Board Members Ahead of Crucial Vote on Pipeline Project*, WASH. POST (Nov. 16, 2018), <https://perma.cc/H5E9-LLED>. The Virginia Chapter of the NAACP told the Washington Post that it was “deeply troubled” about the timing of the removal, and feared that “the governor’s action may signal to other Board members that asking too many questions about an influential utility’s potential impact on a vulnerable historic community may lead to their removal.” *Id.*; see also Patrick Wilson, *Northam Removes 2 Members from Air Board Before Buckingham Project Vote*, RICHMOND TIMES-DISPATCH, (Nov. 15, 2018), <https://perma.cc/UU72-KQ8M> (noting that the Southern Environmental Law Center, Sierra Club Virginia Chapter, and the Chesapeake Climate Action Network all objected to the removal).

58. *Friends of Buckingham*, 947 F.3d at 77–78.

59. *Id.* at 88.

the station were members of racial minority groups, and an Environmental Systems Research Institute (“ESRI”) study indicating that 22% to 30% of residents surrounding the site were members of racial minority groups.⁶⁰ The Board also reviewed FERC’s findings, based on 2013 census data, that concluded that “[n]one of the three census tracts within [one] mile of the [Compressor Station] are designated minority environmental justice populations.”⁶¹

The Board also heard evidence that the types of emissions produced by the compressor station “are known to increase the effects of asthma and may increase the risk of lung cancer,”⁶² as well as evidence from the study conducted by Dr. Fjord indicating a “prevalence of health conditions [in Union Hill] consistent with national data showing higher rates of respiratory sickness among the African-American population.”⁶³

The DEQ, however, repeatedly assured the Board that the levels of harmful particulate matter emitted by the compressor station would not result in air pollutant concentrations exceeding the NAAQS, and that therefore there could be no disproportionate impact on the African American population of Union Hill. The DEQ assured the Board that the compressor station’s emission levels would result in air pollutant concentrations consistent with “the health-based standards promulgated by the [EPA] as [NAAQS], as well as Virginia’s own health-based standards for toxic pollutants,” designed to protect public health and the environment.⁶⁴ The DEQ explained that the NAAQS were “designed to protect sensitive populations,” and that therefore, “there really [would be] no disproportionate impact, because everyone [would be] subjected to the same air pollution but well below health based standards.”⁶⁵ The remaining four members of the Board voted on January 8, 2019, to unanimously approve the ACP LLC’s permit application.⁶⁶

Two Board members, including the Chairman, made comments on the record asserting that they had assumed that the surrounding community may be “an environmental justice community.”⁶⁷ This would have been important for the purposes of its site suitability analysis pursuant to its duties under the Virginia SIP,⁶⁸ because it would entail consideration of the “prevalence of asthma” among African American communities, as suggested in an earlier FERC analysis.⁶⁹ This assumption would also be important because the Virginia Commonwealth Energy Policy required ensuring that the Board’s decision did not have a

60. *Id.* at 89.

61. *Id.* at 88.

62. *Id.* at 85 (internal citation omitted).

63. *Id.* at 86.

64. *Id.* at 90–91.

65. *Id.* at 91.

66. *Id.* at 79.

67. *Id.* at 79–80.

68. VA. CODE ANN. § 10.1-1306.

69. *Friends of Buckingham*, 947 F.3d at 88.

“disproportionate adverse impact on economically disadvantaged or minority communities.”⁷⁰

The same day, the Board issued a single-page statement on their decision to issue the permit.⁷¹ The one-page statement contained language asserting that the permit application “was prepared in conformance with all applicable statutes, regulations, and agency practices,” that the conditions in the permit “have been established to protect public health and the environment,” and that “all public comments relevant to the permit [were] considered.”⁷² The statement also contained a handwritten note stating that “the Board d[id] not adopt any legal views expressed by DEQ regarding the Board’s authority under Va. Code Section 10.1-1307.E”—the section detailing the Board’s responsibility to ensure that the site was suitable for the proposed project.⁷³

Friends of Buckingham and the Chesapeake Bay Foundation timely challenged the Permit before the Fourth Circuit Court of Appeals, which has original jurisdiction under the Natural Gas Act.⁷⁴

Judge Thacker, writing for the Fourth Circuit panel, invalidated the permit, concluding that the Board, ostensibly relying on the recommendations from the DEQ, had erred in failing to consider the potential for disproportionate impacts on the Union Hill community. Instead, the Board had improperly concluded that because the compressor station would not emit pollutants resulting in air pollutant concentrations exceeding the NAAQS, the Union Hill community would not be disproportionately impacted by the emissions.⁷⁵

The Fourth Circuit emphasized the parallelism between the federal Administrative Procedure Act (“APA”) and the Virginia counterpart to the APA, concluding that the standard of review under federal law was the same as the standard of review under state law.⁷⁶ Under both, agency decisions are set aside if they are “not . . . in accordance with the law.”⁷⁷ Though Virginia law states that a court may set aside an agency action if it is not substantially supported by evidence in the record, “[the] reviewing court may set [an] agency action aside, even if it is supported by substantial evidence, if the court’s review discloses that the agency failed to comply with a substantive statutory directive.”⁷⁸ The Fourth Circuit has previously interpreted the correct standard to be arbitrary and capricious review in a way consistent with the federal APA, and the Virginia Su-

70. VA. CODE ANN. § 67-102(12).

71. *Friends of Buckingham*, 947 F.3d at 88.

72. *Id.* at 80.

73. VA. CODE ANN. § 10.1-1307(E).

74. 15 U.S.C. § 717r(d)(1).

75. *Friends of Buckingham*, 947 F.3d at 83.

76. *Id.* at 81.

77. *See* VA. CODE ANN. § 2.2-4029; 5 U.S.C. § 706.

78. *Friends of Buckingham*, 947 F.3d at 81–82 (citing *Browning-Ferris Indus. v. Residents Involved in Saving the Env’t, Inc.*, 492 S.E.2d 431, 434 (Va. 1997)).

preme Court has indicated that the standards in the Virginia and Federal APAs are functionally equivalent.⁷⁹

The Fourth Circuit next analyzed whether the Board had fulfilled its statutory duty. The Board had a duty under the Virginia SIP to consider the “character and degree of injury to, or interference with, safety, health, or the reasonable use of property which is caused or threatened to be caused.”⁸⁰ The Commonwealth Energy Policy also charged the Board with “ensur[ing] 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.”⁸¹

First, the Court held that the Board had failed to fulfill this duty by making no findings of fact as to the “character of the local population,” and neglecting to explain how the decision to grant the permit complied with applicable law.⁸² In failing to provide “*any explanation*” as to the environmental justice issue in its one-page statement, the Board had failed to fulfill its statutory duty, and had “ma[de] its extensions of public comments and additional meetings ring hollow.”⁸³ The Fourth Circuit noted that the Board had been presented with multiple pieces of conflicting evidence as to the demographics of Union Hill and Buckingham County, and that it is the “job of the agency, as factfinder, to resolve those conflicts”—yet the Board had failed to make any such finding.⁸⁴ In expressly disclaiming the legal conclusions drawn by the DEQ, the Board had failed entirely to “provide a clear and concise statement explaining the reason for the variation [from the DEQ] *and how the Board’s decision [had been] in compliance with applicable laws and regulations,*” including, notably, the Commonwealth Energy Policy requiring an environmental justice analysis.⁸⁵

Second, the Fourth Circuit held that *even if* the Board had correctly assumed that the surrounding community was an environmental justice community, it had not properly analyzed the potential for disparate impacts on Union Hill’s residents as required under Virginia law.⁸⁶ The court held that the Board had erred in relying too heavily on NAAQS compliance to conclude that there was no potential for disparate impact on the local population, even if the Board assumed that Union Hill *was* an environmental justice community.⁸⁷ The Board Chairman had assured the Board that the NAAQS were designed to protect sensitive populations, and the compressor station’s emissions would not result

79. *Id.* at 81–82.

80. VA. CODE ANN. § 10.1-1307(E).

81. *Id.* § 67-102.

82. *Friends of Buckingham*, 947 F.3d at 87, 89–90.

83. *Id.* at 89.

84. *Id.* (internal citation omitted).

85. *Id.* (emphasis added) (internal citation omitted).

86. *See id.* at 90.

87. *Id.*

in a local concentration of PM_{2.5} that exceeded the NAAQS.⁸⁸ On this basis, the Board “rejected the idea of disproportionate impact.”⁸⁹ But the Fourth Circuit held that this rejection, based entirely on compliance with the NAAQS, was insufficient to show that there was no potential for disproportionate impacts from the PM_{2.5} emissions on the *specific* population residing in Union Hill—rather than the census tracts relied upon by FERC or the county-wide data relied upon by the DEQ.⁹⁰ Instead, “the Board accept[ed] without deciding that this area may be an [environmental justice] minority community with a high risk for asthma complications, and then d[id] not properly recognize the localized risk of the *very particulate matter* that exacerbates asthma.”⁹¹ The Fourth Circuit emphasized “environmental justice is not merely a box to be checked,” and held that “the Board’s failure to consider the disproportionate impact on those closest to the Compressor Station resulted in a flawed analysis.”⁹²

Third and finally, the Fourth Circuit held that the Board had erred in relying on the DEQ’s site suitability analysis because the DEQ’s analysis was based on “improper” and “incomplete” evidence.⁹³ The DEQ’s final site suitability analysis relied on an initial site evaluation, an approved zoning permit, and the NAAQS. The initial site evaluation was “rendered unreasonable” by the comments and hearings, which revealed that the evaluator had ignored sixty homes within a one-mile radius of the proposed site.⁹⁴ Moreover, compliance with zoning ordinances “d[id] not relieve the [B]oard of its duty under . . . § 10.1-1307.”⁹⁵ The court also reiterated that NAAQS were an insufficient basis for determining whether “*this* facility is suitable for *this* site, in light of [environmental justice] and potential health risks for the people of Union Hill.”⁹⁶

The Fourth Circuit therefore held that the Board’s decision to issue the permit was arbitrary and capricious and not supported by substantial evidence.⁹⁷ The permit was vacated and remanded to the Board for more complete findings as to the local population and the risk of injury to that population.⁹⁸

88. *See id.* at 91.

89. *Id.* at 91.

90. *See id.* at 91–92.

91. *Id.* at 92 (emphasis in original).

92. *Id.*

93. *Id.*

94. *Id.* at 93.

95. *Id.* (citing 9 VA. ADMIN. CODE § 5-80-1230).

96. *Id.* (emphasis in original).

97. *Id.* at 87.

98. *Id.* at 93.

II. FRIENDS OF BUCKINGHAM AND THE POWER OF STATE LAW

Judge Thacker's decision, applying Virginia state law, demonstrates the potential power of state law to protect communities from environmental injustice, especially in the absence of strong legal protections for environmental justice plaintiffs under federal environmental statutes.

Environmental justice litigation based on disproportionate health impacts has met with limited success in federal courts, under multiple federal environmental laws, traditional tort law, and constitutional law. Though several environmental statutes—the Comprehensive Environmental Response, Compensation, and Liability Act,⁹⁹ the CAA,¹⁰⁰ the Clean Water Act,¹⁰¹ and the Resource Conservation and Recovery Act¹⁰²—allow for citizen suits, nowhere do these statutes explicitly address disproportionate health impacts on low-income or minority communities. Thus, though such litigation can sometimes address individual nuisances related to past harm or help a community fight a locally undesirable land use, evidence of disparate impacts on a specific community is seldom sufficient to defeat a siting or permitting decision.¹⁰³ In traditional tort litigation—often involving claims based on nuisance law—plaintiffs have had difficulty establishing standing and justiciability.¹⁰⁴ Finally, in constitutional claims arising under the 14th Amendment, environmental justice plaintiffs have struggled to establish discriminatory intent, limiting their ability to make claims under the Equal Protection Clause.¹⁰⁵ Environmental

99. 42 U.S.C. § 9659.

100. *Id.* § 7604.

101. 33 U.S.C. § 1365.

102. 42 U.S.C. § 6972.

103. See Helen H. Kang, *Pursuing Environmental Justice: Obstacles and Opportunities—Lessons from the Field*, 31 WASH. U.J.L. & POL'Y 121, 137–40 (2009) (discussing whether litigation is the best strategy for solving neighborhood pollution problems, particularly in environmental justice communities of interest).

104. See, e.g., *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863 (N.D. Cal. 2009), *aff'd*, 696 F.3d 849 (9th Cir. 2012); see also Jeff Todd, *A "Sense of Equity" in Environmental Justice Litigation*, 44 HARV. ENVTL. L. REV. 169, 213 (2020) (citing *Juliana v. United States*, 217 F. Supp. 3d 1224 (D. Or. 2016)) (arguing that plaintiffs are *more* likely to succeed in tort claims if they frame their arguments in environmental justice terms, comparing *Kivalina* to *Juliana*, in which plaintiffs survived an initial motion to dismiss).

105. See, e.g., *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 270–71 (1977) ("Respondents simply failed to carry their burden of proving that discriminatory purpose was a motivating factor in the Village's decision. This conclusion ends the constitutional inquiry."); see also Richard J. Lazarus, *Pursuing "Environmental Justice": The Distributional Effects of Environmental Protection*, 87 NW. U.L. REV. 787, 828–33 (1992) (discussing the difficulties in pursuing Equal Protection claims in environmental justice litigation).

justice claims under Title VI of the Civil Rights Act of 1964 have been met with similar challenges.¹⁰⁶

Instead, litigation raising concerns over “disproportionate health impacts” on environmental justice communities typically arises under the National Environmental Policy Act (“NEPA”) and the APA, and involves challenging environmental justice analyses performed pursuant to Executive Order 12,898—but has been largely unsuccessful. Under NEPA, agencies must evaluate the environmental impacts of any “major federal actions significantly affecting the quality of the human environment.”¹⁰⁷ The Executive Order directs agencies to consider the potential environmental justice effects of their decisions,¹⁰⁸ and the CEQ’s interpretation of the order directs federal agencies to consider environmental justice, and in particular the potential for disproportionate health impacts on “minority and low-income communities,” and the “relevant public health data and industry data concerning the potential for multiple or cumulative exposure to human health or environmental hazards in the affected population and historical patterns of exposure to environmental hazards, to the extent such information is reasonably available.”¹⁰⁹ CEQ’s guidance also warns agencies that if “there may be disproportionately high and adverse human health or environmental effects on minority populations, low-income populations, or Indian tribes,” such a finding may *itself* trigger the NEPA process by signaling that the action may “significantly affect[] the quality of the human environment.”¹¹⁰ However, the guidance does not alter NEPA’s legal thresholds.¹¹¹ Neither the Executive Order itself nor the CEQ guidance create any right of action, nor are they enforceable in themselves.

Instead, plaintiffs may challenge environmental assessments (“EAs”) or Environmental Impact Statements (“EISs”) that do include such analyses, pursuant to the CEQ guidance, arguing that federal agency decisions are arbitrary and capricious because they insufficiently considered information contained in

106. See Robert J. Klee, *What’s Good for School Finance Should Be Good for Environmental Justice: Addressing Disparate Environmental Impacts Using State Courts and Constitutions*, 30 COLUM. J. ENV’T. L. 135, 148 (2005) (“[B]ecause the ‘one-two punch’ of *Sandoval* and *Gonzaga* forces private litigants to bring suit under the more restrictive intentional discrimination standard one could reasonably conclude that the federal courts are currently closed to environmental justice litigants wishing to address systemic discriminatory impacts.”).

107. 42 U.S.C. § 4332.

108. See Exec. Order No. 12,898 at § 1-101, 59 Fed. Reg. 7,629 (Feb. 16, 1994) (noting goals of “(1) promot[ing] enforcement of all health and environmental statutes in areas with minority populations and low-income populations; (2) ensur[ing] greater public participation; (3) improv[ing] research and data collection relating to the health of and environment of minority populations and low-income populations; and (4) identify[ing] differential patterns of consumption of natural resources among minority populations and low-income populations”).

109. See COUNCIL ON ENV’T QUALITY, ENVIRONMENTAL JUSTICE: GUIDANCE UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT 4 (1997).

110. See *id.* at 7–9; 42 U.S.C. § 4332.

111. See COUNCIL ON ENV’T QUALITY, *supra* note 109, at 10.

the administrative record about the environmental justice implications of their decisions. However, such attempts to litigate environmental justice analyses in EAs or EISs have often failed because of the deference afforded to agency decision-making and the lack of strong protection under NEPA and the CEQ guidance based on Executive Order 12,898.

For example, in *Communities Against Runway Expansion v. Federal Aviation Administration*,¹¹² the D.C. Circuit deferred to the Federal Aviation Administration's ("FAA's") environmental justice analysis despite the intervenor City of Boston's claim that the analysis was based on an unreasonable methodology.¹¹³ The City of Boston claimed that the FAA had improperly used the demographics of the actually affected area for comparison to the demographics of the surrounding county as opposed to using the demographics of the larger Boston metropolitan area that the airport would ultimately serve.¹¹⁴ The City of Boston argued that as compared to the larger Boston metropolitan area, the actually affected area had a proportionally higher minority population, which should have factored into an environmental justice analysis.¹¹⁵ The D.C. Circuit, however, held that the FAA's "choice among reasonable analytical methodologies [was] entitled to deference from th[e] court."¹¹⁶

The D.C. Circuit relied on this deferential standard in *Sierra Club v. FERC*,¹¹⁷ when it determined that FERC's environmental justice analysis in an EIS was not arbitrary and capricious when it concluded that because "the project would not have a 'high and adverse' impact . . . it could not have a 'disproportionately high and adverse' impact on any population, marginalized or otherwise."¹¹⁸ The conclusion paralleled the DEQ's conclusion in *Friends of Buckingham* that compliance with the NAAQS was sufficient to ensure that there would be no disproportionate impacts on the Union Hill community.¹¹⁹ Further, FERC had declined to label a community as an "environmental justice community" because it relied on a majority-white census tract for data, rather than the majority-African American block (a smaller geographical unit), just as how in *Friends of Buckingham*, the DEQ had relied on FERC's census tract and countywide data to reach a similar conclusion.¹²⁰ Nevertheless, the D.C. Circuit in *Sierra Club v. FERC* upheld the environmental justice analysis, holding that these concerns "elevate[d] form over substance,"¹²¹ and that the EIS had prop-

112. *Cmtys. Against Runway Expansion, Inc. v. Fed. Aviation Admin.*, 355 F.3d 678, 689 (D.C. Cir. 2004).

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* (citing *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 201 (D.C. Cir. 1991)).

117. 867 F.3d 1357 (D.C. Cir. 2017).

118. *Id.* at 1369 (internal citations omitted).

119. *Friends of Buckingham v. State Air Pollution Control Bd.*, 947 F.3d 68, 91 (4th Cir. 2020).

120. *Sierra Club*, 867 F.3d at 1370.

121. *Id.*

erly “acknowledged and considered the *substance*” of all of Sierra Club’s objections.¹²²

If *Friends of Buckingham* had turned on obligations under NEPA and the CEQ guidance, the Fourth Circuit may have reasoned that the Board had sufficiently examined the environmental justice issues implicated by the administrative record. Relying on analogous reasoning, the Fourth Circuit may have upheld the decision either because the Board had demonstrated some consideration by relying on the DEQ materials, which had rejected environmental justice community analysis, or because two Board members made the decision despite assuming that Union Hill was an environmental justice community. Instead, the directives of state law, including the Commonwealth Energy Policy, resulted in a decision that protected the Union Hill community.

Prior to the enactment of the Commonwealth Energy Policy, Virginia case law suggested that as long as substantial evidence in the record supported an agency’s decision, courts applying Virginia law would uphold the decision.¹²³ For example, in *Alliance to Save the Mattaponi v. Commonwealth Department of Environmental Quality*,¹²⁴ the Mattaponi Tribe claimed that the Virginia Water Control Board’s grant of a water use permit did not sufficiently analyze the “unique cultural uses of the Mattaponi River and d[id] not protect the Tribe’s fishing uses at specific locations,” in violation of its duties to consider aesthetic and cultural values of instream flows.¹²⁵ The Virginia Supreme Court upheld the State Water Control Board’s grant of the permit; despite “some evidence in the record concerning the manner in which the Tribe uses the River for gathering and religious uses,” the court would not overturn the decision, because there was a lack of “specific evidence regarding how those uses will be adversely affected.”¹²⁶ The Fourth Circuit could have applied this reasoning in *Friends of Buckingham* to argue that because there was *some* evidence in the record as to the demographics of the community and as to disproportionate health impacts on African American populations, the Board’s decision should have received deference.

Instead, however, the Fourth Circuit distinguished *Mattaponi* from *Friends of Buckingham*, reasoning that in this case, unlike in *Mattaponi*, there was *no* evidence that “the Board [had taken] into account the relevant facts and circumstances.”¹²⁷ Moreover, the enactment of the Virginia Commonwealth

122. *Id.* at 1371 (emphasis in original).

123. *All. to Save the Mattaponi v. Commonwealth Dep’t of Env’t. Quality ex rel. State Water Control Bd.*, 621 S.E.2d 78, 89–90 (Va. 2005) (citing Va. Code Ann. § 62.1-44.15:5(C) (repealed by Acts 2007, c. 659, cl. 3)). Notably, the decision was not subject to the Commonwealth Energy Policy requiring that agencies ensure that decisions do not disproportionately affect low-income and minority populations.

124. 621 S.E.2d 78.

125. *Id.* at 92–93.

126. *Id.* at 93 (emphasis added).

127. *Friends of Buckingham v. State Air Pollution Control Bd.*, 947 F.3d 68, 91 (4th Cir. 2020) (citation omitted).

Energy Policy in 2006 required that agencies develop energy resources in a way that does not have “disproportionate adverse impact on economically disadvantaged or minority communities.”¹²⁸ This enactment, though it may not have changed the standard of review or the level of deference afforded to state agencies, may have materially altered the Water Control Board’s statutory duties in *Mattaponi*.

Friends of Buckingham seems to heighten the requirements under *Mattaponi*, based in part on the relevant section of the Commonwealth Energy Policy, enacted a year later.¹²⁹ Two Board members had stated on the record that they had assumed that the Union Hill community was an environmental justice community, but the Fourth Circuit held that *even if* they had been correct, their decision had arbitrarily and capriciously failed to carry that assumption through their decision-making.¹³⁰ While *Mattaponi* and the previously noted NEPA cases involving environmental justice had held that any consideration of environmental justice—with any methodology for that consideration—was sufficient to fulfill requirements, *Friends of Buckingham* rejected that idea. Instead, the Fourth Circuit held that by “merely fall[ing] back on NAAQS and state air quality standards not tailored to this specific [environmental justice] community” the Board and the DEQ had insufficiently analyzed potential disproportionate impacts under the Commonwealth Energy Policy.¹³¹ The Fourth Circuit’s rejection of the reliance solely on the NAAQS, largely because of the comments and evidence provided to the Board rendering the DEQ’s evidence “unreasonable,” further signals that Virginia’s environmental justice protections are more stringent than agency requirements under federal environmental law.

Successful state law protections, however, depend on strong language and state courts that interpret the statutes and policies stringently. For example, the First Circuit, interpreting Massachusetts state law in *Town of Weymouth v. Massachusetts Department of Environmental Protection*,¹³² declined to extend the reasoning of *Friends of Buckingham* to invalidate the permit of a compressor station under Massachusetts’ Environmental Justice Policy (“the EJ Policy”).¹³³ The EJ Policy requires an enhanced participatory process for any project affecting air quality under the Massachusetts Environmental Policy Act that 1) “exceeds an Environmental Notification Form (ENF) threshold for air” and 2) “is located within . . . five miles of an EJ Population.”¹³⁴ The EJ Policy also requires enhanced analysis for projects that (1) “[exceed] a mandatory [Environmental Impact Report] threshold for air” and (2) “[are] located within . . . five

128. VA. CODE ANN. § 67–102(A)(8).

129. *Id.*; 2006 VA. ACTS 939.

130. *Friends of Buckingham*, 947 F.3d at 90 (citing *Mattaponi*, 621 S.E.2d at 92–93).

131. *Id.*

132. 961 F.3d 34 (1st Cir. 2020), *rev’d* 973 F.3d 143 (1st Cir. 2020).

133. *See id.* at 55.

134. MASS. EXEC. OFF. ENV’T AFFS., ENVIRONMENTAL JUSTICE POLICY OF THE EXECUTIVE OFFICE OF ENVIRONMENTAL AFFAIRS 8 (2002), <https://perma.cc/L38G-R8X3>.

miles of an EJ Population.”¹³⁵ The EJ Policy defines an environmental justice community as a “neighborhood whose annual median household income is equal to or less than 65 percent of the statewide median or whose population is made up 25 percent Minority, Foreign Born, or Lacking English Language Proficiency.”¹³⁶

The First Circuit, however, relying on state court interpretations of the EJ Policy, concluded that nothing in the Policy compelled the permitting agencies to “go beyond the two requirements set out in the EJ Policy,” though both parties agreed that the proposed compressor station was within five miles of an environmental justice community.¹³⁷ The Massachusetts Supreme Judicial Court had previously stated that “[t]he EJ policy does impose a general, but affirmative, requirement on all agencies covered by it . . . to develop strategies designed ‘to proactively promote environmental justice in all neighborhoods’ in a manner tailored to and consistent with that agency’s ‘specific mission,’” and that there “‘may be an argument that under this general requirement’” agencies must incorporate environmental justice principles into certain agency decisions for projects.¹³⁸ The First Circuit, despite being bound by the highest state court’s interpretation of state law, interpreted this language as dicta.¹³⁹ The First Circuit held that the Massachusetts Department of Environmental Protection had already provided an enhanced participatory process, and that any additional environmental justice requirements had not yet been articulated.¹⁴⁰ Therefore, though the proposed compressor station was within five miles of an environmental justice community under Massachusetts law, the First Circuit declined to require the state agency to do any additional analysis because the compressor station would not emit pollutants above the statewide thresholds under Massachusetts law.¹⁴¹

By contrast, though Virginia state courts had not interpreted the relevant requirement of the Commonwealth Energy Policy, the strong and clear statutory language at issue in *Friends of Buckingham* led the Fourth Circuit to conclude that the Board had failed in its duties under state law to ensure that the permitting decision would impose no disproportionate adverse impacts on the Union Hill Community. *Friends of Buckingham* and the Commonwealth Energy Policy demonstrate the potential of state environmental justice law; *Town of Weymouth* highlights the necessity of strong legal language and correspondingly strong court interpretation of such law.

135. *Id.*

136. *Id.* at 3.

137. *Town of Weymouth*, 961 F.3d at 54.

138. *City of Brockton v. Energy Facilities Siting Bd.*, 14 N.E.3d 167, 174 n.17 (Mass. 2014) (internal citations omitted).

139. *Id.* at 54.

140. See *Town of Weymouth*, 961 F.3d at 55 (citing MASS. EXEC. OFF. ENV’T AFFS., ENVIRONMENTAL JUSTICE POLICY OF THE EXECUTIVE OFFICE OF ENVIRONMENTAL AFFAIRS 9 (2017)).

141. *Id.* at 54–55.

On June 30, 2020, the Virginia State Legislature enacted the Virginia Clean Economy Act, additionally requiring the State Corporation Commission to “ensure that the development of new, or expansion of existing, energy resources or facilities does not have a disproportionate adverse impact on historically economically disadvantaged communities.”¹⁴² This seems to further strengthen the state’s environmental justice protections, though it notably lacks language specifically protecting groups based on race.

CONCLUSION

Friends of Buckingham requires agencies to make findings of fact as to environmental justice populations and to consider the impacts of the specific potential project on the specific affected population, if the agency identifies the community at issue as an environmental justice community. The case is significant in its powerful application of state law. In the absence of explicit federal statutory protections against environmental injustice and racism, state law is more important than ever in protecting vulnerable communities.

Many states have environmental justice statutes, policies, or initiatives that seek to effect environmental justice; these policies, however, must go beyond vague and symbolic¹⁴³ commitments to justice, and state courts must interpret such laws protectively. The Virginia Commonwealth Energy Policy provides concrete environmental justice protections for vulnerable communities, and other states should look to the language and interpretation of this Virginia law in shaping laws that work toward securing environmental justice for all communities.

142. VA. CODE ANN. § 56-585.1(A)(6).

143. Tonya Lewis and Jessica Owley focus on the New York state environmental justice policy, issued by the New York Department of Environmental Conservation, to argue that many state environmental justice laws and policies are largely symbolic. See Tonya Lewis & Jessica Owley, *Symbolic Politics for Disempowered Communities: State Environmental Justice Policies*, 29 *BYU J. PUB. L.* 183, 187–88 (2014).

