

# PRACTICING ON UNEVEN GROUND: RAISING ENVIRONMENTAL JUSTICE CLAIMS UNDER RACE NEUTRAL LAWS

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INTRODUCTION

The inauguration of President Joe Biden and Vice President Kamala Harris has ushered in new energy and focus on environmental justice in the Executive Branch. As candidates, Biden and Harris campaigned on the most forward-leaning justice platform, including environmental justice, of any previous candidates.<sup>1</sup> They committed to a whole-of-government approach to tackling the environmental injustices that many low-income communities and communities of color experience. With a bare majority in Congress, comprehensive legislation addressing environmental justice seems unlikely. The expectation, however, is that the new administration will leverage existing tools (statutes, regulations, guidance, and agency discretion) in new ways that benefit communities of color and low-income households while at the same time enriching the environment for all.

Advocates trying to bring relief to communities of color suffering from the disparate impacts of existing sources of pollution or facing the prospects of new sources of pollution have found ways to use existing tools for decades. With few examples of comprehensive environmental justice legislation in states, freshly examining existing tools can be the only option for redress.

In this Article, we describe several examples where the Southern Environmental Law Center (“SELC”) has worked with its partners to ensure that all communities in SELC’s region have clean air, clean water, and a healthy environment in which to live, work, and raise their families.<sup>2</sup> SELC, as a public

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1. See, e.g., *The Biden Plan to Build Back Better by Advancing Racial Equity Across the American Economy*, JOEBIDEN.COM, <https://perma.cc/A4WF-D5UX>; *The Biden Plan to Secure Environmental Justice and Equitable Economic Opportunity*, JOEBIDEN.COM, <https://perma.cc/LN3F-7LZC>.

2. SELC has not, for most of its thirty-plus year history, been focused on environmental justice, but instead has focused on environmental protection for ecologically sensitive areas in

interest law firm, has used existing tools in new ways to protect threatened communities in the American Southeast. We share lessons SELC has learned through these cases, as well as ideas for more comprehensively addressing environmental justice at the state level. Before reviewing these examples of cases brought by SELC, we begin with an overview of the early Environmental Justice Movement in the region that SELC serves. We conclude with a description of the 2020 New Jersey Environmental Justice statute—one of the most significant pieces of environmental justice legislation enacted—and contrast that new legislative tool with administrative options that state environmental agencies have now to enforce disparate impact standards under Title VI of the Civil Rights Act of 1964.

## I. BACKGROUND: ENVIRONMENTAL INJUSTICE IN CONTEXT

SELC focuses on environmental and natural resource protection in six southeastern states: Virginia, North Carolina, South Carolina, Georgia, Alabama, and Tennessee.<sup>3</sup> Some of these states contain the most environmentally contaminated sites in the nation and a high proportion of low-income and African American residents.<sup>4</sup> Early grassroots actions spurred the development of the Environmental Justice Movement in this region.<sup>5</sup>

In 1982, a predominantly African American community's civil disobedience in opposition to a toxic PCB landfill in Warren County, North Carolina, brought national attention to the disproportionate siting of undesirable land

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the Southeast more generally. But increasingly over the last several years, environmental justice advocacy has grown in importance within the organization and we have been fortunate to partner with client organizations that are led by people of color or otherwise focused on addressing environmental injustices within their communities. *See Environmental Justice: A Clean Environment for All*, S. ENV'T L. CTR., <https://perma.cc/JY8R-WWZ4>. Chandra Taylor has pioneered this work at SELC for more than a decade, and her work with predominantly African American communities like West Baden, which has long been subject to pollution from an old Alcoa aluminum smelter, and Navassa, which is home to a creosote Superfund site, blazed a trail for SELC to more fully embrace environmental justice work. *See Chandra Taylor*, S. ENV'T L. CTR., <https://perma.cc/2DHC-KQSU>.

3. *Our States*, S. ENV'T L. CTR., <https://perma.cc/G8KY-N87C>.

4. *See* Andrea Simpson, *Who Hears Their Cry?: African American Women and the Fight for Environmental Justice in Memphis, Tennessee*, in *THE ENV'T JUST. READER* 82, 83 (Joni Adamson et al. eds., 2002) (“According to the EPA’s own reports, the South has more states with environmentally hazardous sites than any other region . . . Texas, Louisiana, Alabama, Florida, and North Carolina are excessively contaminated, and Tennessee, in particular, is one of the most environmentally toxic states in the nation. The South also continues to be the region where most African Americans reside.”).

5. *See* Tseming Yang, *The Form and Substance of Environmental Justice: The Challenge of Title VI of the Civil Rights Act of 1964 for Environmental Regulation*, 29 B.C. ENV'T AFFS. L. REV. 143, 149–51 (2002) (summarizing history of environmental justice activism and litigation); Julia B. Latham Worsham, *Disparate Impact Lawsuits Under Title VI, Section 602: Can a Legal Tool Build Environmental Justice?*, 27 B.C. ENV'T AFFS. L. REV. 631, 633–37 (2000).

uses in communities of color.<sup>6</sup> This community action, along with initial studies showing the impacts of toxic contaminants on communities of color, led to a General Accounting Office (“GAO”) report in 1983.<sup>7</sup> Congressional leaders requested that the GAO study the location of hazardous waste landfills in the Southeast and the racial and economic demographics of the surrounding communities, in what proved to be a groundbreaking analysis. In 1987, the United Church of Christ Study further highlighted the disproportionate burden low-income communities and communities of color bear in hosting unhealthy and undesirable facilities.<sup>8</sup>

These events resulted in EPA creating the Environmental Equity Workgroup in 1990 to focus on distributional issues raised by environmental policies and enforcement.<sup>9</sup> The First National People of Color Environmental Leadership Summit in 1991 marked the beginning of the Environmental Justice Movement’s expansion beyond contaminated sites to encompass public health, worker safety, land use, transportation, housing, resource allocation, and community empowerment.<sup>10</sup> EPA’s Environmental Equity Workgroup and the First National People of Color Environmental Leadership Summit played an instrumental role in pushing President Clinton to issue Executive Order 12,898 in 1994 to address demographic information associated with federal actions and improve public participation in terms of environmental justice. According to EPA’s current definition:

Environmental justice is the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies. This goal will be achieved when everyone enjoys:

The same degree of protection from environmental and health hazards, and

Equal access to the decision-making process to have a healthy environment in which to live, learn, and work.<sup>11</sup>

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6. See Mollie Soloway, *Measuring Environmental Justice: Analysis of Progress Under Presidents Bush, Obama, and Trump*, 51 ENV’T L. REP. 10,038, 10,040 (2021).

7. U.S. GEN. ACCT. OFF., GAO/RCED-83-168, SITING OF HAZARDOUS WASTE LANDFILLS AND THEIR CORRELATION WITH RACIAL AND ECONOMIC STATUS OF SURROUNDING COMMUNITIES (1983), <https://perma.cc/8SLR-55ZK>.

8. UNITED CHURCH OF CHRIST, TOXIC WASTES AND RACE IN THE UNITED STATES (1987), <https://perma.cc/227B-HUSW>.

9. See Jonathan C. Augustine, *Environmental Justice in the Deep South: A Golden Anniversary Reflecting on Stimulus and Change*, 47 U.S.F. L. REV. 399, 411 (2013).

10. *Principles of Environmental Justice*, 1991 PROC. FIRST NAT’L PEOPLE OF COLOR ENV’T. LEADERSHIP SUMMIT (United Church of Christ Comm’n for Racial Just., Washington, DC).

11. *Environmental Justice*, EPA, <https://perma.cc/8EDK-F397>.

This definition incorporates both procedural<sup>12</sup> and substantive<sup>13</sup> elements, which in practice should require both meaningful participation in the decision-making process and consideration of the risk of disparate impacts from permitting or other agency actions. In this Article, we focus on substantive elements of environmental justice—on laws and policies that promote environmentally just outcomes and strategies for enforcing those laws.

Nearly thirty years following EO 12,898, while these early developments and tools have continued to evolve, low-income communities and communities of color still bear a disproportionate environmental burden from the siting of polluting facilities.<sup>14</sup> These communities also suffer disproportionate health impacts, as well as socioeconomic inequities that undermine the ability of citizens to respond to unexpected pressures.<sup>15</sup> Dr. Robert Bullard gave the following testimony at a congressional hearing in October 2020:

People of color are overrepresented in populations who live within a one-mile radius (44%) and a three-mile radius (46%) of the nation's 1,388 Superfund sites. Studies now show some 60 percent of the nation's Superfund sites are threatened by flooding and climate change impacts. These threats were made real by Hurricane Harvey and the flooding of the San Jacinto Waste Pits and French Limited Superfund sites. The flooded French Limited Superfund site is in Barret Station, Texas, founded in 1889 by Harrison Barrett, a former slave.

Discriminatory policies and unequal power arrangements place African Americans and other people of color at elevated health risks

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12. Procedural justice is also sometimes referred to as “political justice,” and considers “the fairness of decision-making processes rather than the discrete distributional outcome of those processes.” Alice Kaswan, *Distributive Justice & the Environment*, 81 N.C. L. REV. 1031, 1045 (2003). Procedural requirements can provide the basis for a successful legal claim, if, for example, “an agency fails to abide by the participation requirements in reaching a decision.” See Jason Pinney, *The Federal Energy Regulatory Commission & Environmental Justice: Do the National Environmental Policy Act & the Clean Air Act Offer A Better Way?*, 30 B.C. ENV'T AFFS. L. REV. 353, 387 (2003) (citing *El Pueblo Para el Aire y Agua Limpio v. County of Kings*, 22 Env't L. Rep. (Env't L. Inst.) 20,357, 20,358 (Cal. Super. Ct. Dec. 30, 1991)).
  13. Substantive justice is also sometimes defined as “distributive” justice, which focuses “on whether communities bear more than their fair share” of exposure to undesirable land uses or industrial pollution. Kaswan, *supra* note 12, at 1043.
  14. See, e.g., Robert D. Bullard, *Environmental Justice in the 21st Century*, ENV'T JUST. RES. CTR. 15 (Nov. 15, 2008), <https://perma.cc/K6ZP-2CN9>; Paul Mohai & Robin Saha, *Which Came First, People or Pollution? Assessing the Disparate Siting and Post-siting Demographic Change Hypotheses of Environmental Injustice*, 10 ENV'T RSCH. LETTERS 115,008 (2015).
  15. See *Environmental Justice for All Act: Hearing on H.R. 5986 Before the H. Nat. Res. Comm.*, 116th Cong. (2020) (statement of Robert D. Bullard, professor at Texas Southern University).

from waste and industrial facilities, chemical plants and refineries, and increased vulnerability from natural and human-made disasters.<sup>16</sup>

The year 2020 has seen growth in grassroots and institutional concern about systemic racism and the environmental injustices associated with such systems. The “I can’t breathe” refrain that echoed the tragic last words of George Floyd and Eric Garner became a rallying cry not just for Black Lives Matter protests, but also for environmental justice advocates.<sup>17</sup> Mustafa Santiago Ali, Vice President for Environmental Justice, Climate, and Community Revitalization at the National Wildlife Federation and former senior advisor at EPA, testified before Congress, “[w]hen we say, ‘I can’t breathe’ we literally can’t breathe” in relation to cumulative air pollution and COVID-19 infections that have disproportionately burdened Black and Brown communities.<sup>18</sup> Environmental injustice is becoming a more broadly understood lens through which to view the disparate absence of basic public health infrastructure, such as the lack of waste water systems in the predominantly Black town of White Hall in Lowndes County, Alabama.<sup>19</sup> There has been a renewed push for legislation to address some of the impediments to remedying environmental injustices.<sup>20</sup> As mentioned, the Biden–Harris Administration is bringing new energy and emphasis to tackling environmental injustices.<sup>21</sup>

There is hope for meaningful change as the legal landscape continues to evolve, but this Article focuses on existing tools and how SELC has leveraged those tools in defense of threatened communities. Following examples of SELC’s work, we provide an overview of the New Jersey Environmental Justice Law enacted in 2020. This is one of the rare statutes dealing comprehensively with environmental injustices. Because there are no similar statutes in the Southeast, SELC has instead relied on race-neutral environmental provisions when representing communities of color that face environmental harms. The New Jersey statute offers a stark contrast. But even for states that do not enact

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16. *Id.* at 1–2.

17. Denise Chow, *Why ‘I Can’t Breathe’ Is Resonating With Environmental Justice Activists*, NBC NEWS (June 10, 2020), <https://perma.cc/6KV7-9CDC>.

18. *Pollution and Pandemics: COVID-19’s Disproportionate Impact On Environmental Justice Communities: Hearing Before the Subcomm. on Env’t and Climate Change of the Comm. on Energy and Com.*, 116th Cong. (2020).

19. Catherine Coleman Flowers has worked tirelessly to bring wastewater infrastructure in rural Alabama. *See, e.g.*, Danielle Purifoy, *In Lowndes County, Getting Free Means Getting Infrastructure*, SCALAWAG MAGAZINE (Feb. 13, 2017), <https://perma.cc/5P74-NMLB>; Alexis Okeowo, *The Heavy Toll of the Black Belt’s Wastewater Crisis*, THE NEW YORKER (Nov. 23, 2020), <https://perma.cc/T6T5-A3BP>.

20. *See, e.g.*, Environmental Justice for All Act, H.R. 5986, 116th Cong. (2020), <https://perma.cc/VJL3-VZMH>; Environmental Justice Act of 2019, S. 2236, 116th Cong. (2019), <https://perma.cc/3NQR-9GCR>.

21. *See, e.g.*, Exec. Order No. 14,008, 86 Fed. Reg. 7619 (Jan. 27, 2021).

comparable legislation, we argue that state environmental agencies can do more to enforce disparate impact standards under the authority of Title VI.

## II. FIGHTING FOR ENVIRONMENTAL JUSTICE WITHOUT LEGISLATIVELY ENACTED SUBSTANTIVE ENVIRONMENTAL JUSTICE PROTECTIONS

In what follows, we provide examples of SELC's advocacy on behalf of predominantly African American communities that either were threatened with new sources of industrial pollution or had long been exposed to such pollution in violation of existing environmental standards. Each of these communities has rich, unique histories and stories that we cannot fully tell here. Each also reveals particular ways in which residential racial segregation has developed in the South, with both urban and rural examples. Environmental injustice along racial lines necessarily follows from patterns of residential racial segregation. In the resilient Union Hill community in central Virginia, descendants of Freedmen continue to live on land that has been passed down through generations since the end of the Civil War. The Atlantic Coast Pipeline company ("ACP LLC"), for its part, purchased the approximately sixty-five acre tract for its compressor station in Union Hill from Variety Shade Landowners of Virginia, a remnant of the former plantation lands.<sup>22</sup> Near the Belews Creek coal-fired power plant in Stokes County, North Carolina, many local residents are descended from the predominantly African American enclave known as Little Egypt, which was displaced to make way for the power plant. Just down the road is Walnut Tree, a predominantly Black community that was built to provide opportunities for home ownership in the early 1970s and was excluded from the neighboring town of Walnut Cove for years. In places like Birmingham, Alabama, and surrounding towns, a combination of Jim Crow segregation, unjust zoning designations, and federal housing policy from the 1930s onward allowed polluting industrial facilities to cluster near predominantly Black neighborhoods and neighboring towns such as Tarrant.

In each of these examples, partnering with local organizations that were directly tied to the impacted community was key to our success. As a public interest law firm, SELC typically represents nonprofit membership organizations. To have standing, a necessary jurisdictional hurdle that must be cleared before a lawsuit can be brought, those client organizations must demonstrate that they have members who will suffer actual or threatened harm resulting from the challenged project or facility. But beyond legal requirements, SELC has learned that it is critical to listen to directly affected communities about the harms they face or have endured. Litigation can be an important vehicle for

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22. Michael Martz, *Dominion Purchases Land for Natural Gas Compressor Station Site in Buckingham*, RICHMOND TIMES DISPATCH (Aug. 26, 2015), <https://perma.cc/C25T-XEMU>; *Variety Shade History*, VARIETY SHADE LANDOWNERS OF VIRGINIA, <https://perma.cc/8WHS-W22M>.

telling the stories of those who are at risk and a critical organizing tool for those communities. Neighborhoods threatened with pollution have a crucial role to play in defining themselves as environmental justice communities, particularly when government agencies fail to acknowledge their demographic characteristics. This aspect of our work was particularly important in the Union Hill cases, where both the Federal Energy Regulatory Commission (“FERC”) and Virginia’s Department of Environmental Quality (“DEQ”) initially failed to recognize the character of Union Hill as a historic Freedmen community that was established in the decades immediately after the Civil War and remains predominantly African American today. The door-to-door community study organized by Friends of Buckingham became an important part of telling the story of who would be exposed to the pollution from the Atlantic Coast Pipeline’s (“ACP”) proposed Compressor Station. As we describe below, the risk of being erased or ignored is particularly acute for rural communities where census tract data covers large geographic areas.

First, we describe how SELC integrated environmental justice claims into its challenge to FERC’s permit for the ACP as an example of how EO 12,898 allowed FERC to consider disparate impacts on communities of color or low-income communities—even for federal actions that are not directly subject to the Order. Second, we show how SELC successfully raised an environmental justice claim following Virginia’s grant of an air pollution permit for a compressor station for the ACP in Union Hill. In this example, SELC successfully linked environmental justice considerations to existing state law that requires the Air Pollution Control Board (“Air Board”) to consider site suitability and health criteria before granting a permit. In both of these cases, SELC represented Friends of Buckingham, a grassroots organization devoted to protecting the natural resources and cultural heritage of Buckingham County.<sup>23</sup> We also contrast this experience with barriers we faced bringing a similar challenge against the North Carolina compressor station for the ACP. Relying on an older, unenforced state environmental equity policy, SELC elevated similar environmental justice concerns as were present in Virginia, but North Carolina’s standards were not judicially enforceable. Third, we describe SELC’s work with neighborhoods bordering the leaking coal-ash impoundment at the Belews Creek steam station and the neighboring community of Walnut Tree that was under threat for exploratory drilling for fossil gas fracking. Finally, we describe SELC’s successful modification of a consent decree with the Drummond ABC Coke plant just north of Birmingham, Alabama, that had long exceeded limits on emitting benzene into a predominantly Black community in Tarrant.

### *A. Union Hill*

By early 2019, Friends of Buckingham was running out of options in the struggle against the ACP and its proposed Virginia compressor station. Five

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23. FRIENDS OF BUCKINGHAM, <https://perma.cc/EJ9H-79L5>.

years earlier, people living in Union Hill had learned that the Dominion-led ACP<sup>24</sup> was slated to cut through their community. Dominion proposed placing the only Virginia-based compressor station for the approximately 600-mile-long pipeline in Union Hill. Neighbors began organizing to make their voices heard in the decision-making processes that would follow: before the County Board of Supervisors as it considered a zoning permit, before FERC as it prepared a Draft Environmental Impact Statement, and before the Commonwealth's Air Board and DEQ as they considered permitting the compressor station. In addition, organizers with Friends of Buckingham assembled a People's Tribunal on Human Rights and Environmental Justice to highlight the connections between their struggle against the ACP's proposed compressor station and broader injustices with fracked-gas infrastructure in the Commonwealth and beyond.<sup>25</sup>

Community members told these decision-makers their stories and the unique history of Union Hill, partnered with members of the neighboring Yogaville Ashram, and allied with other grassroots efforts against the ACP across the Commonwealth and the country. Union Hill is a threatened, historic Freedmen's community where over 80% of the residents are African American or biracial, including many who trace their ancestry to the formerly enslaved who founded the community after the Civil War.<sup>26</sup> Their story eventually became a rallying cry for opponents of the ACP, with the "#WeAreUnionHill" hashtag widely used on social media as emblematic of the long history of environmental injustice.<sup>27</sup> Their fight brought national figures such as Reverend Doctor William J. Barber II, co-chair of the Poor People's Campaign, and former Vice President Al Gore to Union Hill to speak out against the proposed compressor station.<sup>28</sup> Friends of Buckingham remained a grassroots organizing effort throughout this struggle, elevating the voices of those who would be most directly impacted by the pollution from the compressor station.<sup>29</sup>

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24. The Atlantic Coast Pipeline was a joint venture of Dominion Energy, Inc., Duke Energy Corporation, and Southern Company. The ACP had been approved by the Federal Energy Regulatory Commission to transport shale gas from West Virginia to Virginia and North Carolina. ACP Programmatic Agreement (Pet's J.A., Doc. 69-8, JA02599).

25. *The People's Tribunal on Human Rights and Environmental Justice: Impacts of Fracked Gas Infrastructure*, FRIENDS OF BUCKINGHAM (Sep. 28, 2017), <https://perma.cc/5GY4-UFRB>.

26. Brief for Petitioner at 8–11, *Friends of Buckingham v. State Air Pollution Control Bd.*, 947 F.3d 68 (4th Cir. 2020) (No. 19-1152); Brief for Georgetown University Law Center Civil Rights Clinic for Amici Curiae at 8–17, *Friends of Buckingham v. State Air Pollution Control Bd.*, 947 F.3d 68 (4th Cir. 2020) (No. 19-1152).

27. See Emily Hollingsworth, 'We are all Union Hill,' *FARMVILLE HERALD* (Feb. 21, 2019), <https://perma.cc/X9AU-7XD7>.

28. See Denise Lavoie, *Al Gore Meets With Residents Fighting Gas Pipeline Station*, ASSOCIATED PRESS (Feb. 19, 2019), <https://perma.cc/MX43-957A>.

29. In many ways, Friends of Buckingham embraced the Jemez Principles for Democratic Organizing. See *Jemez Principles for Democratic Organizing*, Meeting hosted by Southwest

### 1. FERC EJ Claims

ACP LLC applied for its certificate of public convenience and necessity (“CPCN”) from FERC in September 2015. Because the ACP was an interstate gas pipeline, the Natural Gas Act required Atlantic to obtain this permit before commencing construction. Permitting the ACP was a major federal action with the potential to significantly affect the quality of the human environment; thus, the National Environmental Policy Act (“NEPA”) required FERC to prepare an Environmental Impact Statement (“EIS”) before issuing the CPCN.<sup>30</sup> As part of the NEPA process and pursuant to EO 12,898, *Federal Action to Address Environmental Justice in Minority Populations and Low-Income Populations*, FERC considered whether impacts from the ACP would cause “disproportionately high and adverse” effects on communities of color or low-income households.<sup>31</sup> FERC issued its Draft EIS in February 2016.

At a substantive level, the D.C. Circuit has held that “[t]he principle of environmental justice encourages agencies to consider whether the projects they sanction will have a ‘disproportionately high and adverse’ impact on low-income and predominantly minority communities.”<sup>32</sup> The D.C. Circuit’s use of “encourages” is particularly relevant in the context of FERC. Section 6-604 of EO 12,898 states that “[i]ndependent agencies are *requested* to comply with the provisions of this order.”<sup>33</sup> FERC has stated that, as an independent regulatory commission, it is not required to abide by EO 12,898:

The order does not apply to independent agencies, such as the Commission, and the President’s memorandum that accompanies it states that it is intended to improve the internal management of the Executive Branch, and does not create any legally enforceable rights. Therefore, the EIS is not deficient for failing to include a specific discussion of this issue.<sup>34</sup>

Once FERC exercises its discretion to perform an environmental justice review in an EIS, however, it is subject to judicial review under the Administrative Procedure Act (“APA”).<sup>35</sup>

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Network for Environmental and Economic Justice (SNEEJ) (Dec. 1996), <https://perma.cc/J6AY-F5SA>.

30. FED. ENERGY REGUL. COMM’N, FERC EIS 0267D, DRAFT ENVIRONMENTAL IMPACT STATEMENT: ROVER PIPELINE PROJECT PANHANDLE & TRUNKLINE BACKHAUL PROJECT, at ES-1 (2016).

31. *Id.* at 4-201.

32. *Sierra Club v. Fed. Energy Regul. Comm’n*, 867 F.3d 1357, 1368 (D.C. Cir. 2017).

33. Exec. Order No. 12,898, § 6-604, 59 Fed. Reg. 7632 (Feb. 11, 1994); *see also* Pinney, *supra* note 12, at 373.

34. *City of Tacoma, Washington*, 86 FERC ¶ 61311 (1999).

35. “Because FERC voluntarily performed an environmental-justice review, we need not decide whether Executive Order 12,898 is binding on FERC.” *Sierra Club v. Fed. Energy Regul.*

As noted above, for major FERC actions that could significantly affect the quality of the human environment, the Commission must prepare an EIS pursuant to NEPA.<sup>36</sup> EPA has prepared guidance for including environmental justice considerations in the NEPA process.<sup>37</sup> FERC's published guidance manual for preparing environmental reports for projects under the Natural Gas Act also offers recommended steps for environmental justice review, including the consideration of demographic information and alternatives for above-ground infrastructure such as compressor stations in environmental justice communities.<sup>38</sup> Thus, regardless of whether EO 12,898 itself *requires* FERC to complete such reviews, it is difficult to comply with NEPA's dictates and ignore environmental justice.

Though SELC had been involved in reviewing other required environmental permits for the ACP regarding ecologically sensitive areas in the George Washington and Monongahela National Forests, threats to endangered species, and other related issues, the FERC Draft EIS was the first opportunity SELC had to confront environmental justice issues relating to the ACP. SELC submitted extensive comments on the Draft EIS to FERC on behalf of a number of nonprofit conservation groups in Virginia and North Carolina, including Friends of Buckingham.<sup>39</sup>

SELC's direct representation of Friends of Buckingham came after they unsuccessfully challenged ACP LLC's zoning application for the compressor station. Despite the zoning ordinance's prohibition on such industrial facilities in the Union Hill A-1 agricultural district, the Buckingham County Board of Supervisors granted a special use permit ("SUP") for the compressor station in January 2017, and unfortunately, a legal claim challenging the unlawful SUP was ultimately dismissed on procedural grounds.<sup>40</sup>

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Comm'n, 867 F.3d 1357, 1368 n.5 (D.C. Cir. 2017) (citing *Communities Against Runway Expansion, Inc. v. F.A.A.*, 355 F.3d 678, 689 (D.C. Cir. 2004) ("The FAA exercised its discretion to include the environmental justice analysis in its NEPA evaluation, and that analysis therefore is properly subject to 'arbitrary and capricious' review under the APA.")).

36. 42 U.S.C. § 4332(2)(C)(i).

37. EPA, FINAL GUIDANCE FOR INCORPORATING ENVIRONMENTAL JUSTICE CONCERNS IN EPA'S NEPA COMPLIANCE ANALYSES (1998), <https://perma.cc/F4EH-NZXT>; FEDERAL INTERAGENCY WORKING GROUP ON ENVIRONMENTAL JUSTICE, PROMISING PRACTICES FOR EJ METHODOLOGIES IN NEPA REVIEWS (2016), <https://perma.cc/4BFG-WRRB>.

38. Vol. I, FERC, GUIDANCE MANUAL FOR ENVIRONMENTAL REPORT PREPARATION FOR APPLICATIONS FILED UNDER THE NATURAL GAS ACT, Vol. I at 4-77-80 & 4-145-47 (2017), <https://perma.cc/2MNP-SWVV>.

39. Shenandoah Valley et al., Comments on the Draft Environmental Impact Statement for the Proposed Atlantic Coast Pipeline and Supply Header Project (Apr. 6, 2017) (FERC eLibrary No. 20170406-5347).

40. Letter from Buckingham County Board of Superiors to Mr. Scott Summers c/o of Atlantic Coast Pipeline, Jan. 11, 2017 (Pet'rs' J.A., Doc. 69-1, JA00324, Friends of Buckingham v. State Air Pollution Control Board, 947 F.3d 68 (4th Cir. 2020) (No.19-1152)).

As noted above, an important aspect of environmental justice work is listening to directly affected community members and amplifying their stories. In preparation for submitting comments to FERC, SELC met with representatives of Friends of Buckingham in Union Hill and spoke with other community members on the telephone in the spring of 2017. Dr. Lakshmi Fjord, an anthropologist who has a longstanding connection to Yogaville (which is about five miles as the crow flies from Union Hill), provided information about an ongoing detailed community study that she had spearheaded with Friends of Buckingham. Dr. Fjord provided a tour of the area, including a look at the proposed site for the Virginia compressor station and its proximity to homes where Friends of Buckingham members live.

Pastor Paul Wilson of Union Hill Baptist Church hosted a small meeting with members of the church and community who are active with Friends of Buckingham. Union Hill Baptist is a predominantly Black congregation organized in 1868 and one of two churches that share a common history in the Union Hill community, the other being Union Grove. Chad Oba, co-founder and president of Friends of Buckingham, assisted in the door-to-door study and voiced personal concerns about pollution from the Compressor Station, both for personal reasons (regarding her husband's respiratory health) and for the health and well-being of her neighboring Union Hill community members. John and Ruby Laury, deacons of Union Hill Baptist who, in their retirement, raise cattle on a small farm less than a mile from the proposed compressor station, relayed their concerns about the local permitting process and the anticipated pollution and noise from the facility. John's cousin Berkeley Laury, a lifelong Union Hill resident whose house is just about a half of a mile down the road from the Virginia Compressor Station site, expressed similar concerns and was later featured in one of SELC's "In the Path of the Pipeline" videos.<sup>41</sup> Like many community members, Berkeley Laury expressed concerns about the air pollution, noise, and blow downs. SELC also met with Charles White, a local historian who has chronicled the free community of Union Hill that developed in the decades following emancipation at the close of the Civil War.<sup>42</sup>

Marie Gillespie, an elderly African American resident who lives close to the proposed compressor station said, "Dominion has not listened to us or our community. They just want to get it built." Ella Rose, whose home neighbors the proposed site, reported that she moved to the community in 2010 to retire: "I moved here to enjoy the freedom and atmosphere. I love nature, love looking at the animals that cross through here—the deer, the wild turkey. I moved here to enjoy the rest of my life, but the compressor station is going to scare away

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41. SELC, *In the Path of the Pipeline: Berkely Laury*, YOUTUBE (Nov. 8, 2017), <https://perma.cc/ZNA9-ZCMY>.

42. CHARLES WHITE, *THE HIDDEN AND FORGOTTEN: CONTRIBUTIONS OF BUCKINGHAM BLACKS TO AMERICAN HISTORY* (2nd ed. 2017).

the animals, ruin my quality of life. Would you want to live next to a noisy, polluting industrial facility right next your house?”<sup>43</sup> Over the course of SELC’s representation of Friends of Buckingham, SELC lifted up these stories to show what was at stake in the permitting decisions for the ACP’s Virginia Compressor Station.

FERC’s three-volume Draft EIS filled hundreds of pages and considered numerous environmental issues relating to the proposed ACP. Volume One alone consisted of 742 pages, considering issues relating to the crossing of national forests, potential impacts to threatened and endangered species, stream crossings, and more. FERC’s environmental justice review took up only three pages.<sup>44</sup>

Legal challenges to insufficient environmental justice reviews in the NEPA process have not fared well, even in recent challenges to FERC’s process.<sup>45</sup> Nevertheless, in comments to FERC, SELC included a detailed critique of the methodology used by FERC in the Draft EIS to determine the existence of “minority” populations and FERC’s conclusions that the Virginia Compressor Station would not have any disproportionately high and adverse environmental impacts on any racial group.<sup>46</sup>

The first step of FERC’s review failed to identify communities of color that would be directly affected by the ACP as a whole and the compressor stations in particular.<sup>47</sup> The census data FERC relied on did not provide an accurate picture of who would have been most directly affected by the construction and continuous operation of the Virginia Compressor Station and failed to comply with the EPA guidance that FERC itself said that it was following.<sup>48</sup> A comprehensive, door-to-door participatory study of the Union Hill community

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43. Shenandoah Valley et al., *supra* note 39, at 281.

44. *Id.* at 257–58 (“In the scant three pages of the draft EIS devoted to environmental justice and demographic and economic data, the Commission did not take a hard look at how pipeline construction and operation—particularly the operation of the compressor stations—will degrade the “healthful environment” for environmental justice communities in close proximity to the Atlantic Coast Pipeline route and the pipeline’s related industrial infrastructure. Federally mandated environmental justice review is not satisfied by mechanically checking off the box on rote, procedural steps.”).

45. *See, e.g.,* *Sierra Club v. Fed. Energy Regul. Comm’n*, 867 F.3d 1357, 1371 (D.C. Cir. 2017) (holding that FERC’s Final EIS considered the substance of the environmental justice concerns raised by petitioner, providing the public and agency with the information they needed to make an informed decision).

46. Shenandoah Valley et al., *supra* note 39, Statement at 259–64, 281–93.

47. *See* Shenandoah Valley et al., *supra* note 39, at 257–305; *see also* Dr. Ryan Emanuel, *Flawed Environmental Justice Analysis*, 357 *SCIENCE* 260 (2017) (noting that FERC’s flawed environmental justice analysis for the ACP failed to pick up on the disproportionate impact on indigenous people in North Carolina, who make up only 1.2% of the population but make up 13.2% of those who live within 1.6 kilometers of the pipeline route), <https://perma.cc/2ZA5-MLL4>.

48. *See* Shenandoah Valley et al., *supra* note 39, at 257–305/

(“the Household Study”), those who live closest to the proposed gas-fired compressor station, demonstrated that the community is over 80% people of color, and many community members could trace their ancestry to the Freedmen who established Union Hill following the Civil War.<sup>49</sup> The Household Study also revealed critical information about preexisting health conditions in Union Hill.<sup>50</sup> Out of the sixty-seven households that provided health information, thirty-five reported suffering from preexisting medical conditions, chiefly autoimmune, respiratory, and heart conditions.<sup>51</sup> Many elderly residents reported suffering from chronic respiratory ailments such as asthma, chronic obstructive pulmonary disease, bronchitis, allergies, and other heart and lung ailments.<sup>52</sup> And many of these residents reported heart disease and other conditions that would make them particularly susceptible to air pollution from the Compressor Station. In later comments to the Virginia Air Board, scholars familiar with participatory research validated the methods and results of the Household Study.<sup>53</sup> Detailed mapping analysis and drone footage of households surrounding the Compressor Station site further supported the Household Study’s results, including its conclusion that the Union Hill community is more densely populated than Buckingham County generally.<sup>54</sup>

The Union Hill Household Study is a model for communities of color threatened with new sources of industrial pollution that are otherwise at risk of being ignored or overlooked by permitting agencies. An initial step of any environmental justice evaluation must include a demographic analysis. But census tools like EPA’s EJ Screen<sup>55</sup> are ill-suited for rural areas where census tracts encompass very large geographic areas and are poor proxies for localized populations. Census-based tools also suffer from the systemic undercount of the Black population in the decennial census.<sup>56</sup> Though in more densely populated areas, EJ Screen can provide a more accurate snapshot of a given geographic

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49. Lakshmi Fjord, Union Hill Community Household Study Site and Methods Report 15, FRIENDS OF BUCKINGHAM, <https://perma.cc/7KBA-RW7D>.

50. *Id.*

51. Lakshmi Fjord, Buckingham Compressor Station Air Permit Comment 12 (Jan. 4, 2019) (Pet’rs’ J.A., Doc. 69-8, JA02733).

52. *Id.*

53. *See, e.g.*, Letter from James Igoe, Prof. of Anthropology, Univ. of Va. (Pet’rs’ J.A., Doc. 69-8 JA02699–02700); MARY FINLEY-BROOK, ENVIRONMENTAL INJUSTICES IN BUCKINGHAM COMPRESSOR STATION SITING AND PERMITTING 6 (2019) (Pet’rs’ J.A., Doc. 69-8 JA02807).

54. *See* STEPHEN METTS, AN ENVIRONMENTAL JUSTICE AND PROXIMITY REVIEW UTILIZING INDEPENDENT SPATIAL ANALYSES FOR THE PROPOSED DOMINION ENERGY BUCKINGHAM COMPRESSOR STATION, VIRGINIA (2019) (Pet’rs’ J.A., Doc. 69-8 JA02821–38); Burkett Comments (Pet’rs’ J.A., Doc. 69-8, JA02703–07).

55. *EJSCREEN*, EPA, <https://perma.cc/VUD9-LY77>.

56. *See, e.g.*, Charmaine Runes, *Following a Long History, the 2020 Census Risks Undercounting the Black Population*, URBAN INSTITUTE (Feb. 26, 2019), <https://perma.cc/7BLL-UZFE>.

area's racial demographics than in rural areas, even in these circumstances it is hard to find a substitute for a rigorous door-to-door study that documents the demographics and health information of those who live closest to the facility in question.

FERC itself recognized that the presence of an African American community next to the Buckingham compressor station would be significant. FERC determined that "African American populations have a greater prevalence of asthma" and other respiratory health issues.<sup>57</sup> FERC "outlined all the risks to African Americans from the Compressor Station, e.g., increased risk of asthma and lung cancer, and even noted that African Americans were an 'especially sensitive' community for these conditions."<sup>58</sup> But because it relied on incomplete census data that was drawn from much larger geographic areas (even as it otherwise confirmed that compressor station pollution would be limited to the immediate area around the station<sup>59</sup>), FERC wrongly decided that the African American population near the station did not exceed the threshold for environmental justice populations. Based on that conclusion, FERC did not consider there to be any enhanced risk to the people of Union Hill.<sup>60</sup>

The project developers canceled the ACP in July 2020, before our challenge to the CPCN, including FERC's EIS, had been heard in the federal court of appeals.<sup>61</sup> Nevertheless, SELC had briefed and was prepared to argue environmental justice claims as part of its overall case.<sup>62</sup> Given the well-documented ways in which FERC's process deviated from the EPA guidance that the Commission said that it was following, SELC had a strong argument for remand on the arbitrary and capricious standard of review.

Ultimately, however, the NEPA process is meant to "provide full and fair discussion of significant environmental impacts" to "inform decision makers and the public of reasonable alternatives that would avoid or minimize adverse impacts or enhance the quality of the human environment."<sup>63</sup> NEPA and its state-law analogues are "procedural in nature and do not have substantive standards regarding the siting and concomitant concentration of environmentally

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57. FED. ENERGY REGUL. COMM'N, ATLANTIC COAST PIPELINE AND SUPPLY HEADER PROJECT, FINAL ENVIRONMENTAL IMPACT STATEMENT VOLUME I (July 2017) [hereinafter FERC Final EIS], <https://perma.cc/2RYW-K7UZ>.

58. *Friends of Buckingham v. State Air Pollution Control Bd.*, 947 F.3d 68, 88 (4th Cir. 2020) (quoting FERC Final EIS, *supra* note 57).

59. FERC Final EIS, *supra* note 57.

60. *Id.*

61. *Dominion Energy and Duke Energy Cancel the Atlantic Coast Pipeline*, ATL. COAST PIPELINE, <https://perma.cc/455E-U5YF>.

62. See Joint Opening Brief of Conservation Petitioners and Landowner Petitioners at 31–35, *Atlantic Coast Pipeline v. Fed. Energy Regul. Comm'n*, No. 18-1224 (D.C. Cir. Apr. 5, 2019); Conservation Pet'rs' Reply Br. (Doc. #1796657), 15–17 (July 10, 2019).

63. 40 C.F.R. § 1502.1 (2020).

hazardous facilities.”<sup>64</sup> As a result, any judicial victory under NEPA would at most require additional analyses or the consideration of alternatives, which can only indirectly lead to substantive relief. Environmental justice claims under NEPA, a race-neutral environmental law, are inherently process-oriented and are not a substitute for claims for substantive protections for communities of color that are threatened with new sources of industrial pollution or who have experienced disproportionate, cumulative pollution from existing sources.<sup>65</sup>

2. *PSD Permit Fight – Using an Existing Site Suitability and Health Statute to Require Environmental Justice Review of the Buckingham Compressor Station*

The ACP’s Buckingham compressor station also required a prevention of significant deterioration (“PSD”) permit from Virginia regulators. Compressor stations are essential for the operation of a pipeline. They pressurize gas, allowing it to move through the pipeline.<sup>66</sup> To drive its compressors, the proposed Compressor Station’s four turbines, with a combined 58,162 horsepower, would have burned gas 24 hours a day, 365 days a year.<sup>67</sup> The Compressor Station turbines would have been a significant new source of industrial pollution in Union Hill, generating nitrogen oxide, particulate matter, and air toxics like formaldehyde and hexane.<sup>68</sup>

As noted above, volunteers with Friends of Buckingham educated neighbors about the threat of the proposed new source of pollution. Soon after ACP LLC submitted its application for an air pollution permit,<sup>69</sup> community members mailed letters to the Virginia DEQ informing the agency that many people with preexisting respiratory ailments live near the planned facility. As early as October 2015, neighboring residents in Union Hill, such as Marie Gillespie and Cora Perkins, voiced their concerns about potential health risks from the compressor station in their community.<sup>70</sup>

These letters were an early indication that a Virginia law requiring the consideration of site suitability factors would be particularly relevant to this permitting decision. Virginia law mandates that the Air Board “shall consider facts and circumstances relevant to the reasonableness of the activity involved,” including “[t]he character and degree of injury to, or interference with safety,

64. Julia B. Latham Worsham, *supra* note 5, at 639.

65. See, e.g., Section III, *infra*, regarding New Jersey’s Senate Bill 232.

66. September 2015 Atlantic Application 1–3 (Pet’rs’ J.A., Doc 69-1, JA00042-54).

67. May 2018 Permit Application App. A at 11 (Pet’rs’ J.A., Doc 69-3, JA01018).

68. January 2019 DEQ Permit Approval at 11, 6 (Pet’rs’ J.A., Doc 69-8, JA02991, JA02986).

69. The Virginia DEQ received a PSD application for the proposed Buckingham Compressor Station, a “minor” source under Virginia’s governing law, on September 17, 2015, Pet’rs’ J.A., Doc 69-1, JA00035 (Updated application submitted May 25, 2018 – JA00947).

70. General Correspondence to DEQ, Oct. 13, 2015 (Pet’rs’ J.A., Doc. 69-1, JA00165-246).

health, or the reasonable use of property which is caused or threatened to be caused” and “[t]he suitability of the activity to the area in which it is located.”<sup>71</sup> Virginia incorporated these standards into its state implementation plan (“SIP”) under the Clean Air Act (“CAA”),<sup>72</sup> making them federally enforceable. In some ways comparable to NEPA requirements, which mandate permitting agencies consider the effects of a new federal action on the human environment, this Virginia law is on its face race-neutral. But unlike NEPA, the requirement to weigh these site-specific factors can lead to permissible reasons for rejecting the permit application, not just an analysis of the facility’s potential effects.

In its first comments to the DEQ and the Air Board, SELC argued that the terms of this Virginia law required the Board to weigh environmental justice considerations before making its decision.<sup>73</sup> In other words, the Board could not accurately consider the character and degree of injury threatened by the Compressor Station to the community’s health and safety or the suitability of the Compressor Station to Union Hill without considering the demographics and health risks faced by the predominantly African American community. Nor could the Air Board properly consider the suitability of the Compressor Station for the area in which it would be located without considering the unique history and character of Union Hill. In later briefing to the Fourth Circuit Court of Appeals, SELC began its statement of the case with the history of Union Hill. SELC juxtaposed how the formerly enslaved ancestor of Richard Walker (one of our standing declarants) had passed along land purchased from the old Variety Shade Plantation in 1885 with how ACP LLC purchased neighboring property from the descendants of the owners of that same plantation.<sup>74</sup>

Over the nearly three years following ACP LLC’s initial application for an air permit in September 2015, the company updated its permit application three times and responded to several rounds of questions from the DEQ.<sup>75</sup>

71. VA. CODE ANN. § 10.1-1307(E)(1), (3); 9 VA. ADMIN. CODE § 5-170-170(1), (3).

72. 42 U.S.C. § 7410.

73. *See* Transcript of Sept. 11, 2018 Public Hearing (Administrative Record document AR6850).

74. Petitioners’ Final Opening Brief, Doc. 79-1, *Friends of Buckingham v. State Air Pollution Control Bd.*, No. 19-1152, 8–9 (4th Cir. Aug. 16, 2019).

75. Updated Application from Dominion re: Buckingham Compressor Station Minor Permit Equipment Change, May 25, 2016 (Pet’rs’ J.A., Doc. 69-1, JA00249-93); Atlantic Coast Pipeline Updated Application, May 25, 2018 (Pet’rs’ J.A., Doc. 69-2, JA00947-01117); DEQ Request for Information Letter, Sept. 5, 2017 (Pet’rs’ J.A., Doc. 69-2, JA00820-22); DEQ Application Approval and Request for Information Letter, Nov. 1, 2017 (Pet’rs’ J.A., Doc. 69-2, JA00863-65); DEQ Request for Information Letter, Mar. 5, 2018 (Pet’rs’ J.A., Doc. 69-2, JA00902-04); DEQ Request for Information Letter, Mar. 22, 2018 (Pet’rs’ J.A., Doc. 69-2, JA00907-09); DEQ Request for Information Letter, June 25, 2018 (Pet’rs’ J.A., Doc. 69-3, JA01166-67).

None of the agency's questions related to the health and site-suitability criteria set forth in Virginia law governing this kind of permit or to the unique characteristics of the Union Hill community.<sup>76</sup> Instead, the DEQ completed a one-page site evaluation form.<sup>77</sup> A DEQ environmental inspector deemed the site "Sparsely Populated" and checked only "Forest" as a land use of the area around the proposed site, leaving the "Residential" option blank.<sup>78</sup> The DEQ listed the approximate distance to the nearest "school" and "hospital/nursing home," but it left blank the space on the form for "other buildings"—ignoring that there are at least twenty homes within 2,000 feet of the proposed site boundary.<sup>79</sup> The DEQ repeated this incomplete picture in the "Site Suitability" section of the permit analysis it issued along with a draft permit in July 2018 (and which later accompanied the final permit issued by the Air Board).<sup>80</sup>

Information related to the demographics of Union Hill or any risk of disproportionate health impacts was absent from the DEQ's review of ACP LLC's permit application.<sup>81</sup> But the DEQ did not explain why it considered concerns relating to "environmental justice" to be separate from the section 10.1-1307(E) factors.<sup>82</sup> Instead, in response to SELC's comments that the section 10.1-1307(E) factors require consideration of environmental justice issues, the DEQ wrote that SELC had "mixed the concept of environmental justice . . . with the requirement to determine site suitability."<sup>83</sup>

In addition to the site-suitability factors, the Commonwealth Energy Policy also makes environmental justice issues relevant to the pipeline and compressor station siting issues. The law states that it is the policy of the Commonwealth to "[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."<sup>84</sup> In written comments to the Air Board, SELC noted this requirement is consistent with the recommendation of the Governor's Advisory Committee on Environmental Justice that the DEQ suspend the permitting decision for the Compressor Station

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76. See Va. Code § 10.1-1307(E). See DEQ Request for Information Letter, Sept. 5, 2017 (Pet'rs' J.A., Doc. 69-2, JA00820-22); DEQ Application Approval and Request for Information Letter, Nov. 1, 2017 (Pet'rs' J.A., Doc. 69-2, JA00863-65); DEQ Request for Information Letter, Mar. 5, 2018 (Pet'rs' J.A., Doc. 69-2, JA00902-04); DEQ Request for Information Letter, Mar. 22, 2018 (Pet'rs' J.A., Doc. 69-2, JA00907-09); DEQ Request for Information Letter, June 25, 2018 (Pet'rs' J.A., Doc. 69-3, JA01166-67).

77. Permit Application Site Evaluation, (Pet'rs' J.A., Doc. 69-2, JA00861).

78. *Id.*

79. *Id.*; see Dec. 7, 2018 S. Env't L. Ctr. Comments Attach. B, map showing Union Hill residences (Pet'rs' J.A., Doc. 69-7, JA02396).

80. DEQ Draft Permit Analysis at 13 (Pet'rs' J.A., Doc. 69-6, JA01794).

81. See Response to Public Comments at 31 (Pet'rs' J.A., Doc. 69-6, JA02176).

82. See *id.*

83. *Id.*

84. Commonwealth Energy Policy, VA. CODE ANN. § 67-102(A)(8) (2020).

pending a more comprehensive assessment of the disproportionate health risks on those living in Union Hill.<sup>85</sup> In response to comments on this issue, the DEQ said in a footnote that the permit process for the Compressor Station was not “inconsistent with the Commonwealth Energy Policy.”<sup>86</sup> With regard to the risk of disproportionate harm, the DEQ’s position was a classic Catch-22: on one hand, if a facility will comply with national ambient air quality standards (“NAAQS”), there cannot be a risk of disproportionate harm; on the other hand, if a facility does not comply with NAAQS, it cannot receive an air permit and the question of disproportionate harm is moot.<sup>87</sup> Regardless, because the Commonwealth Energy Policy does not give rise to a right of action or provide enforceable standards to ensure that new, polluting energy infrastructure does not cause disproportionate harm to “disadvantaged or minority communities,”<sup>88</sup> it did not play a large role in our advocacy to the DEQ. By the time the Fourth Circuit considered this case, the Respondent Air Board acknowledged that environmental justice is a component of the energy policy in Virginia, and, thus, this acknowledgement was part of the Commonwealth’s concession that the Air Board had a duty to weigh environmental justice considerations.<sup>89</sup>

At the Air Board’s first meeting to consider the Draft Permit, the DEQ did not think that the Air Board needed to consider environmental justice as part of its site suitability determination. Instead, the DEQ argued that local site suitability decisions are the sole provenance of county zoning officials.<sup>90</sup> With regard to concerns that pollution from the compressor station would disproportionately harm a predominantly Black community, the DEQ said that there could be no disproportionate impact from a proposed facility where its expected emissions would not exceed NAAQS.<sup>91</sup> The DEQ’s position was nearly identical to the one taken by FERC in its cursory environmental justice review: “Health impacts from compressor station emissions would be moderate because . . . air emissions would not exceed regulatory permittable [sic] levels. As a

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85. SELC, Comments to DEQ & Air Board, 311–13 (Sept. 21, 2018) (Pet’rs’ J.A., Doc. 69-6, JA02065-114); *see also* Environmental Justice Review of Virginia’s Gas Infrastructure, Memo to Governor Northam (Aug. 16, 2018). A number of other commenters also raised the Commonwealth Energy Policy.

86. Response to Public Comments at 29 n.12 (Pet’rs’ J.A., Doc. 69-6, JA02174).

87. Virginia Air Pollution Control Board, Board Meeting Transcript (Nov. 9, 2018) (Pet’rs’ J.A., Doc. 69-7, JA02286) (referring to NAAQS and Significant Ambient Air Concentration requirements as “health-based” standards, DEQ staff said “Our view is that if there — if all the health-based standards are being complied with, then there really is no disproportionate impact, because everyone is being subjected to the same air pollution but well below health-based standards”).

88. Commonwealth Energy Policy, VA. CODE ANN. § 67-102(D) (2020).

89. *Friends of Buckingham v. State Air Pollution Control Bd.*, 947 F.3d 68, 87 (4th Cir. 2020).

90. November 9, 2018 Hearing Transcript 52:14–17 (Pet’rs’ J.A., Doc. 69-7, JA02253-4).

91. *Id.* at 85:14–18; Air Pollution Control Board November 9, 2018 Meeting Transcript at 85 (Pet’rs’ J.A., Doc. 69-7, JA02286-8).

result, no disproportionately high and adverse impacts on environmental justice populations as a result of air quality impacts . . . would be expected as a result of ACP.”<sup>92</sup> In both instances, SELC argued that the government’s position effectively reads environmental justice or site suitability criteria out of the process. If a facility’s pollution would violate NAAQS, then it could not receive a permit, rendering any disproportionate risk analysis moot. But according to the DEQ and FERC’s analysis, it is only when pollution limits would violate NAAQS that a disproportionate risk analysis would be required.

The Air Board deferred ruling on the draft permit at its November 2018 meeting and requested additional information about the demographics of the Union Hill community.<sup>93</sup> At its December 2018 meeting, the Air Board again deferred action and opened an additional, truncated public comment period on demographics and site suitability factors.<sup>94</sup> During this second comment period, the Board received considerable information about Union Hill’s status as an environmental justice community and the risk of disproportionate harm.<sup>95</sup> These comments stood in stark contrast to the demographic picture of the area painted by ACP LLC and the DEQ, both of which relied on census-based tools that use demographic information from larger geographic areas extending well beyond the proposed Compressor Station site and Union Hill.<sup>96</sup> Using these census-based tools—again mirroring FERC’s methodology—Atlantic concluded “that no environmental justice community is in the vicinity of the Station.”<sup>97</sup> FERC similarly relied on racial demographics of the large census tracts surrounding the Compressor Station site—tracts that encompass more than three-fourths of the entire county—and gave no consideration to the particular makeup of the Union Hill community.<sup>98</sup>

Ultimately, the Air Board’s failure to make findings on the conflicting information on the demographics of Union Hill played an important role in the Fourth Circuit’s decision to reverse the Air Board’s permit.<sup>99</sup> But the Air

92. FERC Final EIS, *supra* note 57, at 4-514.

93. November 9, 2018 Hearing Transcript, *supra* note 90, at 142:16–23, 143:23–144:13, 148:18–149:2.

94. VIRGINIA AIR POLLUTION CONTROL BOARD, MINUTES (Dec. 19, 2018), <https://perma.cc/Q62J-EXZ7>.

95. See generally Email Comments Received December 21, 2018 through January 4, 2019 re: Buckingham Compressor Station (Pet’rs’ J.A., Doc. 69-8, JA02625-32, JA02634-42, JA02645-46, JA02648-2685, JA02687-720, JA02722-848, JA02869-75, JA02877-88).

96. ESRI Report (Pet’rs’ J.A., Doc. 69-8, JA02853-68); November 9, 2018 Hearing Transcript, *supra* note 90, at 60:12–61:23; December 19, 2018 DEQ Presentation 26–33 (Pet’rs’ J.A., Doc. 69-7, JA02443-2452).

97. January 2019 Atlantic Comments at 1 (Pet’rs’ J.A., Doc. 69-8, JA02849).

98. FERC Final EIS *supra* note 57, at 4-513.

99. *Friends of Buckingham v. State Air Pollution Control Bd.*, 947 F.3d 68, 86 (4th Cir. 2020) (“ . . . the Board thrice erred in performing its statutory duty under sections 10.1-1307(E)(1) and (E)(3): (1) it failed to make any findings regarding the character of the local population

Board's decision to agree with SELC's position—in response to comments and public pressure from community members and their allies—that environmental justice considerations are a crucial part of the site suitability and health criteria set forth in section 10.1-1307(E) was likewise important in having the claim considered by the court. Showing the court Union Hill's unique history was also important in bringing the suitability of the compressor station to the historic community where it was to be located.

*B. Belews Creek – from Facing Fracking Fears to Fighting Coal Ash*

Turning to the second community that we highlight in this Article, SELC had the chance to begin working with Walnut Tree community members in the summer of 2015. Walnut Tree started as an affordable housing development just outside of the town of Walnut Cove in Stokes County, North Carolina, in the early 1970s. The predominantly Black community had expected to be annexed by Walnut Cove, but that expectation was thwarted for over forty years.

Community members reached out to the local Stokes County Branch of the NAACP following Walnut Cove's authorization for the state to drill a core sample in the unincorporated Walnut Tree community. North Carolina was then actively pursuing the possibility of luring fracking operations to the state, and there was the possibility that shale deposits underneath Walnut Tree could prove to contain methane. Fracking—or hydraulic fracturing—involves horizontal drilling into shale rock, followed by high pressure injections of fracking fluid, a mixture of water, sand, and chemicals used to fracture the shale rock and release hydrocarbons to the surface.<sup>100</sup> Given the risk of fracking operations leading to water contamination, air pollution, and seismic activity, Walnut Tree community members were alarmed to find out that Walnut Cove had authorized an exploratory core sample to be drilled in their backyard without prior notice to Walnut Tree. Initial analysis of the 1,750-foot-deep core sample showed signs of the presence of methane, increasing concern from members of Walnut Tree and other opponents of fracking in Stokes County.<sup>101</sup>

The State Conference of the NAACP introduced SELC to members of the Stokes County Branch of the NAACP. SELC learned more about the long history of Walnut Tree's exclusion from Walnut Cove's town services, even as they paid Walnut Cove inflated rates for water service and were subject to the town's land use laws. Walnut Tree's problems getting clean water stretched

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at Union Hill, in the face of conflicting evidence; (2) it failed to individually consider the potential degree of injury to the local population independent of NAAQS and state emission standards; and (3) DEQ's final permit analysis, ostensibly adopted by the Board, relied on evidence in the record that was incomplete or discounted by subsequent evidence").

100. *The Process of Unconventional Natural Gas Production*, EPA, <https://perma.cc/6YCQ-GHZ6>.

101. See Bertrand M. Gutierrez, *Geologist: Samples Show Signs of Shale Gas in Walnut Cove*, WINSTON-SALEM JOURNAL (Jul. 18, 2015), <https://perma.cc/83MV-SQKV>.

back decades. After inspections discovered intolerably high levels of manganese and iron in Walnut Tree's well water, Walnut Cove extended water service to the community and closed the well. But years later, Walnut Cove switched the community back to its well water, leading to complaints about the water's taste and color for years.<sup>102</sup>

SELC also learned more about Walnut Tree's long exposure to effects from the neighboring Belews Creek steam station, a coal-fired power plant operated by Duke Energy since 1974.<sup>103</sup> The construction of the coal-fired power plant displaced the predominantly African American community of Little Egypt, but many community members remained in the area around the fence line of the plant and its coal-ash impoundment, one of the largest in the state.<sup>104</sup> Before the CAA mandated pollution controls, residents of Walnut Tree recalled having to sweep soot and ash that had fallen from the power plant's smoke stacks off their cars in the morning.

The North Carolina Advisory Committee to the U.S. Civil Rights Commission held a hearing in Stokes County concerning Duke Energy's coal ash pollution and its effects on surrounding communities.<sup>105</sup> Tracey Edwards, who grew up near the coal-fired power plant and coal ash impoundment, testified that she, her friends, and her family had experienced a rash of health problems. "When the Duke Energy plant began its operations in the early 1970s, coal ash would fall off—fall on our land, rooftops of our homes, and our vehicles, and cover them worse than the pollen in the springtime around here," Ms. Edwards testified. But community members continued to eat straight from local gardens and drink well water.<sup>106</sup> Summarizing comments brought by community members and SELC to the Advisory Committee, SELC noted:

This community presents a classic case of environmental injustice . . . . Duke Energy's unlined coal ash pond at Belews has been leaking toxic pollutants into groundwater every day for decades. Even Duke has admitted that the pollution has migrated off site. The area near the plant is predominantly low-income and of color. Just a few miles west, another predominantly black community is having on-going problems with their well water in Walnut Tree and is being considered as a prime location for the risky practice of hydraulic fracturing,

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102. Bertrand M. Gutiérrez, *Cloudy Water Comes at a Premium in Stokes Town*, WINSTON-SALEM JOURNAL (Feb. 15, 2016), <https://perma.cc/Q52E-H8CW>.

103. *Belews Creek Steam Station*, DUKE ENERGY, <https://perma.cc/G867-87QZ>.

104. Neill Caldwell, *Speakers Wary of Coal Ash Closure Plan*, THE STOKES NEWS (Feb. 19, 2020), <https://perma.cc/4Z7G-D9W2> ("[T]he creation of the power station 50 years ago eradicated an African American community known as Little Egypt.")

105. *Listen to North Carolinians Testify on Harms from Coal Ash*, S. ENV'T L. CTR. (Apr. 7, 2016), <https://perma.cc/4ZXG-GQMN> (recordings of N.C. Advisory Committee to U.S. Commission on Civil Rights, Town Hall Meeting in Walnut Cove).

106. *Id.* (testimony of Tracey Edwards, Community Advocate, at 1:04).

which would certainly put their groundwater supply in great jeopardy.<sup>107</sup>

Because SELC had ongoing concerns about improper handling of coal ash waste at the Belews Creek facility, its relationship with Walnut Tree and the Stokes County NAACP led to partnering on coal ash work. In December 2017, SELC brought a citizens' suit on behalf of the State Conference of the NAACP, Stokes County Branch of the NAACP, and Appalachian Voices against Duke Energy for allowing unlawful leaks of toxic metals and other pollutants into the waters of the United States in violation of the Clean Water Act.<sup>108</sup> Because the Clean Water Act does not provide a vehicle for litigating environmental justice claims, SELC did not bring any specific claims of disproportionate impact. Instead, SELC highlighted the demographic data that it had compiled since 2015 showing the disproportionate harm to predominantly African American communities from groundwater pollution and reinforced that narrative in the standing declarations of local NAACP members from the area.

Ultimately, this citizen suit was resolved as part of a comprehensive settlement with Duke Energy that will lead to the excavation and removal of coal ash pollution from all of the company's coal ash lagoons in North Carolina.<sup>109</sup>

### *C. Securing Protection for a Birmingham Metropolitan Area Community from Benzene Pollution*

After working for years to address air pollution harming Tarrant, a predominantly African American town that borders North Birmingham, SELC recently reached a settlement that will provide permanent air quality protections for the town. Tarrant was incorporated in 1918, a few years after the ABC Coke Plant started operating with "industry as its center and reason for being."<sup>110</sup> Although whether this town was redlined is unknown,<sup>111</sup> Tarrant

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107. *SELC, Partners to Weigh-In on Overlap of Coal Ash, Environmental Justice, and Fracking Issues in NC*, S. ENV'T L. CTR. (Apr. 6, 2016), <https://perma.cc/KS7V-RKBD>.

108. Complaint, *Appalachian Voices v. Duke Energy Carolinas, LLC*, No. 1:17-CV-1097 (M.D.N.C. Dec. 5, 2017).

109. See *North Carolina Settlement Results in Largest Coal Ash Cleanup in America*, S. ENV'T L. CTR. (Dec. 31, 2019), <https://perma.cc/FK8D-RA4C>; Settlement Agreement between Duke Energy Carolinas, LLC, et al. and the North Carolina Department of Environmental Quality et al., (Dec. 31, 2019), <https://perma.cc/2GHS-7XH4>.

110. CITY OF TARRANT (Feb. 14, 2021), <https://perma.cc/YZ2C-F74T>.

111. "Redlining" has its origins in policies established by the Home Owners' Loan Corporation ("HOLC"), a New Deal initiative to help stem the tide of Depression-era foreclosures. To assess the risk of whether homes would likely retain their value, HOLC created color-coded maps, with areas colored in red considered to be the riskiest. Neighborhoods were routinely colored red—and thus, ineligible for government backed mortgages—if African Americans lived in them, even if it was a middle-class neighborhood. Banks adopted similar practices in

was directly adjacent to the redlined districts for African Americans in segregated Birmingham.<sup>112</sup>

The ABC Coke Plant has been in operation for over a century and is the largest merchant producer of foundry coke, a refined coal used in metallurgy, in the country.<sup>113</sup> As SELC summarized in its letter objecting to the consent decree:

The plant consists of 132 coke ovens and operates twenty-four hours per day, 365 days per year. The burned-off impurities contain numerous poisons that can pollute the surrounding communities' air, water, and soil. The plant is located within one mile of a predominately African American neighborhood, less than a mile from Tarrant Elementary School.<sup>114</sup>

Drummond has violated environmental laws many times at the ABC Coke Plant, further endangering neighboring residents.

In a 2016 Site Inspection Report, EPA documented “[m]ultiple violations and corrective actions . . . brought against ABC Coke over its operating history,” including consent decrees, settlement agreements, and/or notices of violation in 1975, 1980, 1988, 1989, 1999, 2004, and 2005, arising from Clean Air Act violations. Additionally, both ADEM [The Alabama Department of Environmental Management] and the EPA have cited this facility multiple times for violations of

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the decades that followed. See RICHARD ROTHSTEIN, *THE COLOR OF LAW*, 63–64, 108–09 (2017).

112. Jared Downing, *Old Birmingham Map Outlined 'Negro Concentrations,' Then Shunned Them*, ALA. NEWS (June 30, 2015), <https://perma.cc/XB3G-QP48>.
113. EPA, SITE INSPECTION REPORT, SOUTH TARRANT NEIGHBORHOOD SITE, TARRANT, JEFFERSON COUNTY, AL, EPA ID NO. ALN0004043036, at 3 (2016) [hereinafter EPA REGION 4 SITE INSPECTION REPORT], <https://perma.cc/32GD-QXFH>; see also *Alabama By-Products Company, Coke Plant, Highway 79 (Pinson Valley Parkway), Tarrant City, Jefferson County, AL*, Libr. of Cong., <https://perma.cc/4JHS-M6EL>.
114. Letter from SELC to the Dep't of Justice (July 17, 2019) (objecting to proposed consent decree in the matter of *United States v. Drummond Co.*, D.J. Ref. No. 90–5–2–1–10717) (citing Complaint ¶ 57, *United States v. Drummond Co.*, No. 2:19-cv-240-AKK (N.D. Ala. Feb. 8, 2019), ECF Doc. 1); see also *Coke Oven Emissions*, EPA, <https://perma.cc/NL7T-NF9D> (cataloging the health risks created by exposure to coke oven emissions, particularly occupational exposure); Travis R. Porter et al., *Spatiotemporal Association Between Birth Outcomes and Coke Production and Steel Making Facilities in Alabama, USA: A Cross-sectional Study*, 13 ENV'T HEALTH 85, 86 (2014) (concluding that emissions from these facilities showed a significant association with low birth rate and preterm birth); Jefferson Cnty. Dep't of Health (“JCDH”), PUBLIC COMMENTS ON ABC COKE DRAFT TITLE V RENEWAL PERMIT & JCDH RESPONSES 24 (2019) [hereinafter 2019 JCDF RESPONSE TO COMMENTS], <https://perma.cc/8UQL-VMDF> (public comment of Gabriel Mendez-Francis, noting the geographic proximity of the ABC Coke Plant to Tarrant Elementary School and her home).

the Clean Water Act. For example, in 2004, ADEM cited violations at the ABC Coke Plant for exceeding the daily limits on the release of benzo(a)pyrene, a cancer-causing pollutant, 37 times. EPA indicates that since 2007, Drummond has exceeded its Clean Water Act permit effluent limits at the ABC Coke Plant for cyanide (2007), B(a)P (2008, 2010, 2014, 2017), iron (2017), oil and grease (2017), and manganese (2018).<sup>115</sup>

For over a dozen years, Drummond's ABC Coke Plant in Tarrant has leaked dangerous levels of benzene, a known carcinogen, all while misrepresenting the total amount that it was exposing to the public by a magnitude of almost 28,000.<sup>116</sup> By failing to correctly report the benzene that the facility emitted, Drummond skirted more stringent reporting requirements under governing federal regulations, which could potentially require the plant to remove benzene from its waste streams completely.<sup>117</sup>

Nearby residents suffer from cancer, asthma, and lung disease at elevated rates.<sup>118</sup> And for years, the Jefferson County Department of Health ("JCDH") falsely informed the public that the ABC Coke plant was in compliance with its air pollution permit.<sup>119</sup> In Spring 2019, the JCDH reviewed a Title V CAA operating permit for the ABC Coke Plant. The seventy-two public comments from the community expressed concerns with pollution from Coke Plant, particularly regarding cumulative pollution from neighboring industrial facilities:

Many community members asked JCDH not to renew the permit because of the cancer, asthma, and/or chronic obstructive pulmonary disease of their family members or neighbors who live near the plant. For example, Debra Holston, a cancer survivor from Colledgeville, stated: "Fifty-five houses in the Pipeshop Quarters. Every house, every family, in the Pipeshop Quarters, including mine, cancer. It didn't skip one . . . I've lost too many people to what ABC Coke is putting out." Kathy Mason from North Birmingham and Tarrant stated: "[M]y grandkids know that my door closed, I'm sick . . . I had asked the doctor, Why I got lung disease? Why I got to keep having

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115. Letter from SELC to Dep't of Justice, *supra* note 114 (first citing EPA REGION 4 SITE INSPECTION REPORT, *supra* note 113; and then citing Steven Mufson, *The Betrayal: How a Lawyer, a Lobbyist, and a Legislator Waged War on an Alabama Superfund Cleanup*, WASH. POST (Apr. 25, 2019), <https://perma.cc/R8F4-M625>).

116. *Id.* at 5 (citing *Drummond Company Clean Air Act Settlement Information Sheet*, EPA, <https://perma.cc/Q7HP-ASJK>).

117. *Id.* (first citing 40 C.F.R. §§ 61.342(d), (e) (2019); and then citing 40 C.F.R. § 61.342(c)(1)(i) (2019)).

118. Letter from SELC to Dep't of Justice, *supra* note 114, at 4 (citing 2019 JCDH RESPONSE TO COMMENTS, *supra* note 114).

119. *Id.* at 6 (citing JCDH, QUESTIONS & COMMENTS FROM PUBLIC INFORMATION MEETING FOR ABC COKE 21 (Mar. 2014)).

asthma? I never smoked.” Jimmy Smith, who also has cancer, from North Birmingham commented: “Four lovely daughters raised up living in or living with arsenic, lead, and 15 other more deadly chemicals let out by ABC, US Pipe, other contaminators. Out of these four daughters . . . the eldest daughter dead with cancer. The number three daughter, taking cancer treatments every two weeks.”<sup>120</sup>

Drummond’s previous attempts to escape liability for cleanup at this plant resulted in felony convictions and the resignation of high-level EPA and Alabama officials on corruption charges.<sup>121</sup> To keep a neighboring Superfund site from expanding into Tarrant and to keep the ABC Coke facility off the National Priority List (which could allegedly expose Drummond to upwards of \$100 million in clean-up costs), a Drummond executive criminally conspired with Drummond’s attorney at the firm Balch & Bingham to illegally bribe a sitting legislator to persuade residents not to test their soil for contamination from ABC Coke. But in 2019, EPA and local officials nevertheless proposed a settlement that would have failed to protect the community from this ongoing benzene pollution and failed to require accurate accounting for benzene pollution from the facility.

After SELC petitioned the court to allow our client Gasp, a Birmingham-based environmental health organization, to participate in this settlement, a federal judge allowed SELC to be part of settlement negotiations.<sup>122</sup> Gasp has been actively involved with community members in Tarrant and neighboring communities to address air quality and environmental justice. Gasp has also commented on and challenged the Drummond plant’s permit over the past several years.

The initial proposed consent decree would have imposed \$775,000 in civil penalties against ABC Coke, but importantly, none of those funds would have been directed to the community where people have been exposed to benzene pollution from the facility.<sup>123</sup>

SELC’s intervention on behalf of Gasp was critical in securing an improved consent decree with stricter requirements for Drummond, including extending a program that will detect and repair benzene leaks for the life of the ABC Coke plant. The improved consent decree also forces the local board of health to maintain a public database with information about all permitted industrial sources in the county. And the civil penalty, originally slated to go to the local officials that have neglected the community for years, will now be

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120. *Id.* (citing 2019 JCDH RESPONSE TO COMMENTS, *supra* note 114).

121. Mufson, *supra* note 115; Letter from SELC to Dep’t of Justice, *supra* note 114, at 3 (citing 2019 JCDH RESPONSE TO COMMENTS, *supra* note 114).

122. Mem. Op. and Order, United States v. Drummond Co., Inc., No. 2:19-cv-00240-AKK (N.D. Ala. Aug. 31, 2020), ECF Doc. 17.

123. Letter from SELC to Dep’t of Justice, *supra* note 114, at 14.

placed in a fund to benefit the affected communities in Tarrant and North Birmingham.<sup>124</sup>

### III. BETTER TOOLS – NEW JERSEY ENVIRONMENTAL JUSTICE LAW AND THE POSSIBILITY OF STATE ENFORCEMENT OF TITLE VI DISPARATE IMPACT STANDARDS

While positive outcomes are possible under existing race-neutral environmental laws, as we have illustrated above, specific environmental justice legislation or enforceable regulations would yield enhanced results for communities. Below we provide an overview of the recently enacted New Jersey Senate Bill 232 as an example of state-level environmental justice legislation that provides new tools for advocates working to bring equitable enforcement of environmental laws. Following that overview, we discuss the pathway provided by Title VI and its implementing regulations for state environmental agencies to protect communities of color from disparate harm. Finally, we conclude with an example of how the absence of a statute like New Jersey’s and enforceable state-level regulations can inhibit efforts to advocate on behalf of a community facing new sources of pollution.

#### *A. New Jersey’s Senate Bill 232 – A Recent Example of Comprehensive Environmental Justice Legislation*

On September 18, 2020, New Jersey Governor Phil Murphy signed historic legislation designed to protect communities that have historically suffered a disproportionate burden from the concentration of polluting facilities in their neighborhoods. Senate Bill 232,<sup>125</sup> codified in Public Law, Chapter 92,<sup>126</sup> requires the New Jersey Department of Environmental Protection (“DEP”) to evaluate the environmental and public health impacts of certain facilities on overburdened communities when approving certain types of permit applications. The DEP is directed to deny requested permits for new facilities and authorized to impose conditions on permits for existing facilities if the permit would cause or contribute to adverse cumulative environmental and public health stressors in an overburdened community that are greater than those experienced by other communities.<sup>127</sup>

While signing the law, Governor Murphy said:

Today we are sending a clear message that we will [no] longer allow Black and Brown communities in our state to be dumping grounds,

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124. *United States v. Drummond Co., Inc.*, No. 2:19-cv-00240-AKK (N.D. Ala. Jan. 25, 2021).

125. S. 232, 219th Leg. (N.J. 2020), <https://perma.cc/W9GJ-HUHE>.

126. New Jersey Environmental Justice Law, P.L. 2020, Ch. 92, <https://perma.cc/6YHF-8KR3>.

127. *Id.* at § 4(c), (d).

where access to clean air and clean water are overlooked . . . This action is a historic step to ensure that true community input and collaboration will factor into decisions that have a cumulative impact for years to come. I'm incredibly proud that New Jersey is now home to the strongest environmental justice law in the nation.<sup>128</sup>

DEP Commissioner Catherine McCabe echoed Governor Murphy's statements, declaring:

Today, New Jersey is leading the way in addressing a critical gap in our nation's environmental protection laws . . . The signing of New Jersey's environmental justice bill improves protections for some of our most vulnerable New Jerseyans and empowers the DEP to evaluate a facility's specific impact on its neighboring communities. This is not just a landmark advancement for environmental protection in New Jersey, but a roadmap for environmental justice nationally.<sup>129</sup>

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128. Press Release, State of N.J. Governor Phil Murphy, Governor Murphy Signs Historic Environmental Justice Legislation (Sept. 18, 2020), <https://perma.cc/6F38-LM2C>. Governor Murphy began laying the groundwork for the 2020 legislation shortly after he was inaugurated in 2018. On April 20, 2018, he signed Executive Order No. 23, which directed the New Jersey Department of Environmental Protection (NJDEP), in consultation with the Department of Law and Public Safety, to develop guidance for all executive branch departments and agencies on environmental justice considerations in policymaking. N.J. Exec. Order No. 23 (Apr. 20, 2020), <https://perma.cc/A5GR-H73M>. In December 2018, DEP and Attorney General Gurbir S. Grewal launched a statewide environmental justice initiative, which included the creation of an Environmental Justice Section within the Attorney General's Office and the filing of eight lawsuits focused on addressing pollution and environmental hazards in low income and minority communities across the state. Press Release, State of N.J. Office of the Attorney General, Attorney General, DEP File Lawsuits Across New Jersey Targeting Polluters in Lower-Income and Minority Communities (Dec. 13, 2018) <https://perma.cc/SV75-YJ4R>. Another 18 cases were filed over the next year and a half. Six were filed in October 2019, targeting a wide range of environmental misconduct from releases of toxic chemicals to stockpiling contaminated waste material on site. Press Release, State of N.J. Office of the Attorney General, Attorney General, DEP File Six New "Environmental Justice" Lawsuits Targeting Polluters in New Jersey's Lower-Income and Minority Communities (Oct. 25, 2019) <https://perma.cc/59QY-RVRG>. Another 12 cases, similarly broad in environmental harm addressed, were filed in August 2020. Press Release, State of N.J. Office of the Attorney General, Attorney General, DEP File 12 New "Environmental Justice" Lawsuits Targeting Polluters in New Jersey's Lower-Income and Minority Communities (Aug. 27, 2020), <https://perma.cc/Y57H-S5LD>. The 2020 statute took the Environmental Justice Initiative to a new level.

129. Press Release, State of N.J. Gov. Phil Murphy, Governor Murphy Signs Historic Environmental Justice Legislation, *supra* note 128.

1. *Key Provisions of the New Jersey Law*

The statute begins with findings that set the stage for the mandates that follow and offer an explanation of the environmental and public health effects driving the legislation. Key among the findings are recognitions that all New Jersey citizens have a right to live, work, and recreate in a clean and healthy environment, and that there is a long history of poor communities and communities of color having a disproportionate number of polluting facilities that have resulted in adverse health impacts on community members, particularly children. This pattern of siting continues today, and through the Environmental Justice statute, New Jersey is committing to take affirmative steps to address the situation.<sup>130</sup>

The findings section further provides that no community should bear a disproportionate burden for the state's economic growth, communities must have a meaningful opportunity to participate in the decision-making for approvals that would further burden their members, and importantly, that it is in the public interest for a state to limit the placement or expansion of polluting facilities in overburdened communities.<sup>131</sup>

With that backdrop, the statute defines the specific permits subject to the law, delineates what constitutes an overburdened community, and outlines the obligations of permit applicants to conduct the environmental justice analysis and hold a public hearing.<sup>132</sup> DEP permitting decisions must take the environmental justice analysis into account. The statute covers permits for major industrial facilities which cause air quality, water, and waste impacts, along with the associated health concerns.<sup>133</sup> When applicants plan new facilities or expansions

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130. N.J. STAT. § 13:1D-157-61 (2020). (“The Legislature finds and declares that all New Jersey residents, regardless of income, race, ethnicity, color, or national origin, have a right to live, work, and recreate in a clean and healthy environment; that, historically, New Jersey’s low-income communities and communities of color have been subject to a disproportionately high number of environmental and public health stressors, including pollution from numerous industrial, commercial, and governmental facilities located in those communities; that, as a result, residents in the State’s overburdened communities have suffered from increased adverse health effects including, but not limited to, asthma, cancer, elevated blood lead levels, cardiovascular disease, and developmental disorders; that children are especially vulnerable to the adverse health effects caused by exposure to pollution, and that such health effects may severely limit a child’s potential for future success; that the adverse effects caused by pollution impede the growth, stability, and long-term well-being of individuals and families living in overburdened communities; that the legacy of siting sources of pollution in overburdened communities continues to pose a threat to the health, well-being, and economic success of the State’s most vulnerable residents; and that it is past time for the State to correct this historical injustice.”)

131. *Id.* § 13:1D-157.

132. *Id.* § 13:1D-160.

133. *Id.* § 13:1D-158. The covered facilities include major sources of air pollution (i.e., gas fired power plants and cogeneration facilities); resource recovery facilities or incinerators; sludge

of facilities requiring covered permits, the requirements of the Act are triggered if the activities occur in overburdened communities.<sup>134</sup> Overburdened communities are defined as any community where 35% of the households qualify as low-income according to the U.S. Census, 40% of households are minority, or 40% of households have limited English proficiency.<sup>135</sup> There are approximately 310 municipalities with populations totaling approximately 4,489,000 that have overburdened communities within their borders in New Jersey.<sup>136</sup>

Beginning immediately with the adoption of regulations that are currently under development, applicants must include an environmental justice analysis with their permit applications.<sup>137</sup> The analysis must assess environmental and public health stressors associated with the new or expanded facility covered by the permit, as well as the environmental and public health stressors already borne by the community.<sup>138</sup> The analysis must be submitted to the DEP and the municipality where the overburdened community is located at least sixty days before the required public hearing is held in the community.<sup>139</sup> The DEP will post the analysis on its website.<sup>140</sup> Notice of the public hearing must also occur sixty days before it is held, and the applicant is required to host the hearing and explain the environmental and public health stressors associated with the permit and how they can be addressed.<sup>141</sup> The applicant is required to provide a transcript of the public hearing to the DEP.<sup>142</sup>

One of the statute's most touted features is that it allows the DEP to deny a permit for a new facility if the environmental justice analysis shows that the environmental and public health stressors, when considered along with existing conditions in the area, would cause or contribute to a disproportionate impact on the overburdened community relative to other communities in the state.<sup>143</sup> However, the DEP may override this result where it determines that a new facility will serve a compelling public interest in the community in which it would be located.<sup>144</sup> The DEP instead may grant a permit that imposes condi-

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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. *Id.*

134. *Id.* § 13:1D-160.

135. *Id.* § 13:1D-158.

136. Press Release, State of N.J. Gov. Phil Murphy, Governor Murphy Signs Historic Environmental Justice Legislation, *supra* note 128.

137. *See* N.J. STAT. § 13:1D-160.

138. *Id.* § 13:1D-160(a)(1).

139. *Id.* § 13:1D-160(a)(2).

140. *Id.*

141. *Id.*

142. *Id.* § 13:1D-160(a)(3).

143. *Id.* § 13:1D-160(c).

144. *Id.*

tions on the construction and operation of the facility to protect public health.<sup>145</sup> The statute does not define “compelling public interest,” nor does the statute state what “conditions” will be placed on a facility in these circumstances to protect public health.<sup>146</sup> Accordingly, the scope and impact of this exception will not be known until these specifics are worked out in the rulemaking process.

Finally, for permits associated with existing facilities, the DEP may only impose conditions on the permit to address public health concerns; it may not deny the permit.<sup>147</sup>

The 2020 New Jersey statute and New Jersey’s enforcement initiative are emblematic of the growing Environmental Justice Movement and its focus on securing protections that prevent the addition of more polluting sources within overburdened communities while also deploying mechanisms to require companies to clean up existing polluting sources. The statute creates both substantive and procedural mechanisms for addressing this historic problem. It is exciting to see New Jersey adopt this fulsome approach, even as important details are still under development in the regulatory process. Most communities and advocates are fighting to protect and improve their environments and public health without the benefit of these sharpened tools. The examples previously discussed highlight some of the tools SELC has used in its environmental justice advocacy and the approaches it has taken to protect communities under less specific laws.

*B. Without New Legislation, State Enforcement Agencies Could Enforce Title VI Disparate Impact Standards*

For states in SELC’s region that lack a New Jersey-style law with substantive environmental justice protections, state agencies that receive federal funding and are charged with enforcing environmental laws nevertheless have an obligation to consider whether their decisions create potential disparate impacts under Title VI of the Civil Rights Act of 1964.<sup>148</sup> EPA’s implementing regulations under Title VI prohibit recipients of federal funds from using “criteria or methods of administering its program or activity which have the effect of subjecting individuals to discrimination because of their race” or other protected status.<sup>149</sup> To comply with their Title VI obligations, state environmental agencies have the authority to consider the potential for disparate impact under existing environmental laws, and once they do so, those state actions should be subject to judicial review under administrative law principles. Thus, even in the

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145. *Id.*

146. *See generally id.*

147. *Id.* § 13:1D-160(d).

148. Civil Rights Act of 1964, 42 U.S.C. §§ 2000d–2000d-7.

149. 40 C.F.R. § 7.35 (2020).

absence of a legislative enactment like New Jersey's Senate Bill 232, enforcement agencies could chart a path for greater environmental justice enforcement at an administrative level.

Administrative agencies are generally granted discretion in how they enforce the law, but pursuant to the cooperative federalism framework under which states enforce federal environmental laws, state agencies are required to ensure that they comply with applicable federal law, including EPA's Title VI disparate impact regulations. Taking the CAA as an example, section 110(a)(2)(E) of the CAA requires a state to provide assurances that its implementation plan will not operate in violation of any federal law.<sup>150</sup> A "state is therefore required under the CAA to provide necessary assurances that its [SIP] will not operate in violation of these disparate-impact regulations."<sup>151</sup> One way for a state environmental agency to make the necessary assurance that its regulations would comply with the disparate impact regulations would be to create requirements that its regulators consider substantive environmental justice considerations before issuing permits.<sup>152</sup>

Though the Supreme Court has limited enforcement options pursuant to Title VI by ruling that there is no private right of action following a state agency's failure to consider disparate racial impact from its decision,<sup>153</sup> agencies are still obligated to follow the law. At a minimum, the existing Title VI disparate impact regulations provide authority to exercise that discretion to consider disparate impacts in permitting decisions. This would be an important step for state environmental agencies even in the absence of a New Jersey-style Senate Bill 232 on the books.

### C. *How These Tools Could Make a Difference: the Northampton Compressor Station*

In contrast with the Buckingham Compressor Station struggle, there was a less sustained response to the proposed North Carolina compressor station for the ACP, which was slated for Northampton County near the Virginia bor-

150. 42 U.S.C. § 7410(a)(2)(E).

151. Brian Crossman, *Resurrecting Environmental Justice: Enforcement of EPA's Disparate-Impact Regulations Through Clean Air Act Citizen Suits*, 32 B.C. ENV'T. AFFS. L. REV. 599, 623–24 (2005).

152. Michael Regan, as Secretary of the NCDEQ, publicly supported the need to strengthen North Carolina laws and regulations to protect environmental justice concerns: "We must strengthen our state laws and regulations to be more inclusive of communities of color and tribal concerns before a location is chosen and well before a permit application is submitted. This process highlights the allegations of systemic racism that zoning and business-friendly regulations perpetuate against communities of color. An air permit should not be the first time that a community becomes aware of a proposed facility." Memorandum from Sharon Martin, Deputy Sec'y for Pub. Aff. to Interested Parties (Aug. 3, 2020).

153. *Alexander v. Sandoval*, 532 U.S. 275, 288–93 (2001).

der.<sup>154</sup> The difference was in part due to the fact that the area immediately surrounding the Northampton site was not as densely populated as Union Hill.<sup>155</sup> Nevertheless, many concerned citizens in Northampton County, particularly in the predominately African American neighboring Garysburg, spoke out against permitting the compressor station.

Under North Carolina's implementation of the CAA, however, there were two fundamental barriers to bringing legal challenges after the state granted the permit. There was no comparable site-suitability law or regulation as part of North Carolina's approved SIP under the CAA. In addition, this kind of PSD permit does not require a Best Available Control Technology evaluation as is required under Virginia law. And because the North Carolina General Assembly has not enacted legislation comparable to New Jersey's Senate Bill 232 and the North Carolina Department of Environmental Quality ("NCDEQ") has not instituted a policy or regulations for considering disparate impact under Title VI, SELC could not identify a viable legal path to raise environmental justice concerns in court.

Nevertheless, on behalf of the North Carolina Environmental Justice Network, the local chapter and State Conference of the NAACP, the neighboring Haliwa-Saponi Indian Tribe, and other community and environmental groups, SELC raised substantive environmental justice concerns about the facility to the NCDEQ. SELC requested that the agency withdraw the draft permit, complete a thorough environmental justice and health assessment of the community that would be subject to the air pollution from this facility, engage in tribal consultation with the Haliwa-Saponi, and seek additional information from ACP LLC.

In 2000, the NCDEQ (then known as the Department of Environment and Natural Resources, or "DENR") issued an Environmental Equity Policy.<sup>156</sup> The Equity Policy itself did not provide any substantive environmental justice protections, but it was instead an effort to provide a process for identifying potential environmental justice communities that could be impacted by agency action and engaging those communities in the decision-making process.<sup>157</sup> The NCDEQ cited its obligation to consider whether its permitting decisions might have a "disparate impact on communities protected by Title VI of the Civil Rights Act of 1964" when it adopted this policy.<sup>158</sup> SELC found little

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154. *Compressor Stations*, ATLANTIC COAST PIPELINE, <https://perma.cc/S9NU-7G3Z>.

155. FED. ENERGY REGUL. COMM'N, FERC EIS 0267D, FINAL ENVIRONMENTAL IMPACT STATEMENT: ATLANTIC COAST PIPELINE AND SUPPLY HEADER APP'X U (2017), U-6 tbl. U-1 [hereinafter App'x U], <https://perma.cc/3C3P-TJVD>.

156. NORTH CAROLINA DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES, ENVIRONMENTAL EQUITY INITIATIVE POLICY (Oct. 19, 2000).

157. *See generally id.*

158. *Id.* at 2.

evidence, however, that the agency had taken steps to implement the Equity Policy in the years leading up to the Northampton permit.

In comments to the NCDEQ regarding the draft permit for the Northampton compressor station, SELC asked the agency to consider available demographic data and conduct additional outreach and risk assessments.<sup>159</sup> Demographic data from the census showed the facility would most directly affect a predominantly African American community with many members living in poverty. The compressor station would have been located in census block group 6, a subset of census tract 9203, in Northampton County.<sup>160</sup> Within that census block group, 79.2% of the population is African American.<sup>161</sup> Within census tract 9203, 32.3% of the population lives at or below the federal poverty line,<sup>162</sup> nearly double the state average.<sup>163</sup>

SELC argued that the NCDEQ should also have used that demographic information to determine whether there are “special health risks based on the nature of the population” and assess “the cumulative effects” of permitted facilities. As SELC pointed out in comments to the NCDEQ,<sup>164</sup> the Northampton Compressor Station would be located in an area where people are already struggling with health challenges that are exacerbated by air pollution. The local health department reports that a high percentage of Northampton County citizens suffer from chronic diseases and that hospitalizations for asthma are higher than the state average.<sup>165</sup> Twenty-two percent of surveyed residents reported having been diagnosed with asthma and 64% reported high blood pressure. The three leading causes of death in Northampton County are cancer, heart diseases, and chronic lower respiratory disease, all conditions that are aggravated by air pollution.<sup>166</sup>

The Environmental Equity Policy recognized the potential for disproportionate environmental burdens to be imposed on low-income communities and communities of color. Given the evidence that the compressor station’s emissions would add to the cumulative effects of other nearby polluting facilities, SELC urged the NCDEQ to gather more information about the effects of the

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159. SELC Comments on Draft Air Permit No. 10466ROO for the Northampton Compressor Station (Facility ID#6600169) of the Atlantic Coast Pipeline (Nov. 20, 2017), <https://perma.cc/57GW-VKFE>.

160. U.S. CENSUS BUREAU, AMERICAN COMMUNITY SURVEY 5-YEAR ESTIMATES, 2010-2014, at B02001, <https://perma.cc/RL4Q-9TQU>; see also App’x U, *supra* note 155, at U-6 tbl. U-1.

161. *Id.* (analysis for block group 6 is on file with authors).

162. *Id.*

163. *QuickFacts: North Carolina*, U.S. CENSUS BUREAU (2019), <https://perma.cc/GMR6-KY2T>.

164. SELC Comments, *supra* note 159.

165. NORTHAMPTON COUNTY HEALTH DEPARTMENT, NORTHAMPTON COUNTY COMMUNITY HEALTH ASSESSMENT 7 (2014).

166. *Id.* at 17–18.

anticipated pollution and the characteristics of the affected community before it issued a permit.

Had the NCDEQ taken steps to institutionalize internal policies or procedures for considering the risk of pollution creating disparate harm to communities of color, indigenous communities, or low-income households under Title VI, the NCDEQ would have been obligated to undertake a more comprehensive review. And if it failed to do so, SELC would have had grounds for challenging the NCDEQ's action. But lacking those tools, SELC was left without viable legal options for further challenge. By the same token, the existence of protections offered by New Jersey's Senate Bill 232 would have allowed the predominantly African American residents who live closest to the proposed Northampton Compressor Station an avenue to raise concerns about disproportionate impact, particularly given the cluster of existing polluting facilities in the area.<sup>167</sup>

#### CONCLUSION

Though neither the Clean Water Act citizen suit challenging Duke Energy's Belews Creek coal ash impoundment nor the challenge to the ABC Drummond consent decree brought explicit discrimination or disparate impact claims (like SELC was able to raise in the *Friends of Buckingham* case and in the challenge to the FERC certificate), the promise of enforcing longstanding environmental laws for communities of color and other vulnerable populations is itself an important goal of environmental justice. Uma Outka has rightfully observed that "[a]dvocates can serve the important function of ensuring that the laws are enforced equitably without necessarily asserting discrimination."<sup>168</sup>

Indeed, the failure to aggressively enforce environmental laws when environmental justice communities face the brunt of pollution erodes environmental protections more broadly and is itself part of the broader pattern of environmental injustice.

To the extent that we fail to consider environmental justice a moral responsibility, and fail to make a conscious effort toward equitable distribution of environmental harms, we perpetuate ineffective pollution control and tolerate ongoing environmental degradation. The fact that environmental injustice is not always visible to the public at large has led to complacency over the level of pollution our laws allow.<sup>169</sup>

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167. N.J. STAT. § 13:1D-160(4)(c).

168. Uma Outka, *Environmental Injustice & the Problem of the Law*, 57 ME. L. REV. 209, 231–32 (2005).

169. *Id.* at 232.

Failing to consider how communities of color have borne a disproportionate risk from environmental pollution has made it easier for such pollution to proliferate.

In light of the barriers to prevailing on claims of discrimination, Professor Outka summarized practitioner Luke Cole's "litigation hierarchy," which "ranks the various theories for bringing environmental justice claims."<sup>170</sup> Mr. Cole proposed using "environmental laws, especially those which focus on procedure, applied in a traditional manner" and "[e]nvironmental laws, particularly those which mandate public participation" as the first and second most likely routes for successful litigation. In contrast, civil rights lawsuits and constitutional claims have the least likely avenue to success.<sup>171</sup>

When bringing a citizen suit under the Clean Water Act or intervening to block an ineffectual consent decree that fails to stop a long-term polluter, litigants can nevertheless highlight the discriminatory impacts of water or air pollution and tell the stories of historic injustice that have led to those disparate pollution burdens. As Jedediah Purdy has argued, what we commonly think of as "race-neutral" environmental laws, like the CAA, were at least in part intended to address the distributional unfairness of pollution that was understood at the time to be too often concentrated in low-wealth neighborhoods or communities of color.<sup>172</sup> But the drafters of those bedrock environmental statutes did not foresee the growth of economic inequality, retrenchment of civil rights enforcement, and a rejection of disparate-impact claims by the Supreme Court that would emerge in the 1970s, making it increasingly difficult to find legal redress for the distributional unfairness of environmental injustice under those laws.<sup>173</sup>

Until more states or EPA (under its authority to promulgate regulations under Title VI of the Civil Rights Act of 1964) enact substantive and enforceable environmental justice protections, communities of color and low-income

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170. *Id.* Luke Cole, who passed away in 2009, was an experienced environmental justice litigator who was a staff attorney for the California Rural Legal Assistance Foundation, General Counsel for the Center on Race, Poverty, and the Environment, and the author of articles in the field of environmental justice.

171. *Id.* at 232–33.

172. See Jedediah Purdy, *The Long Environmental Justice Movement*, 44 *ECOLOGY L.Q.* 809, 825–29 (2018) (noting that when enacted, chief sponsors of the CAA believed that the NAAQS would be set at a level to protect even the most vulnerable populations and saw the new requirements in the context of the Great Society and Civil Rights legislation of the 1960s, which led many to think that preexisting conditions of racial and economic "inequality [would] give way to a combination of egalitarian macroeconomic tendencies and inclusive and redistributive policies").

173. *Id.* at 829; see also *id.* at 835 (recognizing that, whatever the intent of the Congress that enacted the core anti-pollution statutes of the 1970s, those laws were nevertheless "designed without attention to the prospect of their benefits and regulated harms being channeled along lines of economic inequality and persistent racial disadvantage").

communities that are overburdened with disproportionate sources of pollution or threatened with new sources of pollution will often continue to have few choices for seeking redress. Because of the wide deference courts often afford permitting agencies, bringing an action to challenge a newly permitted polluting facility can itself be daunting. Communities will likely find themselves at the mercy of corporations that too often choose to put polluting facilities where they anticipate the least political resistance<sup>174</sup> or without the resources or legal tools to enforce substantive environmental justice protections. In the absence of more robust environmental justice statutes or enforceable state-level regulations, too often the situation will look like what SELC faced with the Northampton Compressor Station, rather than the Buckingham compressor in Union Hill.

Public interest environmental law advocates have an important role to play in elevating stories of communities that face disproportionate burdens from pollution. It is important to listen to communities of color and low-wealth neighborhoods that face unfair risks of exposure to harmful pollution, learn the deeper histories that shaped those communities, and find ways to help make those stories heard. Lawyers should remind courts, environmental agencies, and other decision-makers that these patterns of environmental injustice persist decades after landmark civil rights legislation was enacted in the 1960s. When a community is organized to fight against the risk of disproportionate pollution, a potential lawsuit may not be the most important part of that struggle.<sup>175</sup> Regardless of what additional tactics are undertaken in such struggles, lawyers can work with client groups to elevate their voices, a key part of building the political will needed to enact stronger laws, regulations, or policies that can better help redress environmental injustices.

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174. The “pattern of disproportionately siting locally undesirable land uses, or ‘LULUs,’ in poor and minority neighborhoods is common throughout industrial America.” See Kaswan, *supra* note 12, at 1034 (footnote omitted).

175. Purdy, *supra* note 172, at 823 (observing that environmental justice claims have likely made a difference in a number of siting and funding disputes that have not been resolved in court; because “the struggles in the environmental justice movement are primarily political and economic struggles, not legal ones,’ even suits with poor prospects of technically prevailing could be worth bringing for purposes of mobilizing communities, attracting publicity, and framing structural disparities in environmental benefits and burdens as civil-rights issues” (citing Luke W. Cole, *Environmental Justice Litigation: Another Stone in David’s Sling*, 21 *FORDHAM URB. L.J.*, 523, 541–44 (1994))).

