

**ENVIRONMENTAL JUSTICE:
LEGAL THEORY AND PRACTICE
3RD EDITION**

by

Barry E. Hill

ENVIRONMENTAL LAW INSTITUTE

Washington, D.C.

TEACHERS WHO ADOPT THIS COURSEBOOK
MAY OBTAIN ACCESS TO THE TEACHERS' MANUAL BY
CONTACTING ORDERS@ELI.ORG OR 1-800-433-5120.

Copyright © 2009, 2012, 2014
Environmental Law Institute
2000 L Street NW, Washington, DC 20036

All rights reserved. No part of this work may be reproduced
or transmitted in any form by any means, electronic or
mechanical, including photocopying and recording, or by
any information storage or retrieval system, without permission
in writing from the copyright holder.

Published February 2009. Second Edition published May 2012.
Third edition published November 2014.

ISBN 978-1-58576-170-8

Let America Be America Again

*Let America be America again.
Let it be the dream it used to be.
Let it be the pioneer on the plain
Seeking a home where he himself is free.*

(America never was America to me.)

*Let America be the dream the dreamers dreamed—
Let it be that great strong land of love
Where never kings connive nor tyrants scheme
That any man be crushed by one above.*

(It never was America to me.)

*O, let my land be a land where Liberty
Is crowned with no false patriotic wreath,
But opportunity is real, and life is free,
Equality is in the air we breathe.*

*(There's never been equality for me,
Nor freedom in this "homeland of the free.")*

*We, the people, must redeem
The land, the mines, the plants, the rivers.
The mountains and the endless plain—
All, all the stretch of these great green states—
And make America again.¹*

—Langston Hughes
African American poet and author

1. THE COLLECTED POEMS OF LANGSTON HUGHES 189 (Arnold Rampersad & David Roessel eds., Vintage Books 1994).

This textbook/handbook is dedicated to my parents, James Henry and Cecelia Naomi Hill, who instilled in their seven children the importance of obtaining a quality education, and to my mentor, D.C. Court of Appeals Judge Inez Smith Reid, who inspired me to expand my horizons as a student, lawyer, and teacher.

Barry E. Hill

Table of Contents

Table of Cases	ix
Biography	xi
Acknowledgments	xiii
Introduction — Environmental Justice: Legal Theory and Practice	1
<i>Environmental Justice, Sustainable Development, and the Human Right to a Clean and Healthy Environment</i>	1
<i>Interrelationship Between Environmental Justice and Sustainable Development</i>	2
<i>Environmental Justice Movement</i>	6
Chapter 1 — Defining the Problem	13
1.1 <i>Overview: Who Bears the Burden?</i>	13
1.2 <i>Social, Health, Environmental, and Economic “Facts”</i>	15
1.2.1 Siting Decisions	15
1.2.2 Equal Enforcement of Environmental Laws	41
1.2.3 Health Impacts	48
1.2.4 Toxic Torts.....	68
1.3 <i>Zoning and Land Use Laws</i>	80
1.3.1 The Relationship of Zoning and Land Use Decisions to Environmental Injustice.....	81
Chapter 2 — Growth of the Environmental Justice Movement: Organizing the Grassroots	99
2.1 <i>Overview</i>	99
2.2 <i>The Grassroots Environmental Justice Movement</i>	99
2.2.1 Grassroots Activism.....	100
2.3 <i>Organizing the Grassroots</i>	115
2.3.1 First National People of Color Environmental Leadership Summit	115
2.4 <i>Tactics</i>	116
2.4.1 Louisiana—A Hotbed of Community Activism.....	117
2.4.2 Negotiation.....	133
2.4.3 Collaborative Problem-Solving	138
Chapter 3 — Addressing the Problem: The Legislative Branches	157
3.1 <i>Overview</i>	157
3.2 <i>Federal Legislation</i>	158
3.2.1 In the Absence of Specific Environmental Justice Legislation.....	158
3.3 <i>State Legislation</i>	186

3.3.1	A Potpourri of Legislative Initiatives	186
Chapter 4	— Addressing the Problem: The Executive Branches	217
4.1	<i>Overview</i>	217
4.2	<i>Federal Government</i>	217
4.2.1	Early EPA Experience	217
4.2.2	Presidential Action: The Environmental Justice Executive Order.....	220
4.2.3	U.S. EPA’s “Toolkit for Assessing Potential Allegations of Environmental Injustice”	236
4.2.4	The Office of Enforcement and Compliance Assurance’s “Environmental Justice Smart Enforcement Assessment Tool”	242
4.2.5	U.S. EPA’s “Environmental Justice Geographic Assessment Tool”.....	244
4.2.6	U.S. EPA Administrator Johnson’s Memorandum, “Reaffirming the U.S. Environmental Protection Agency’s Commitment to Environmental Justice,” and the Chief Financial Officer’s Supplemental Guidance	245
4.2.7	U.S. EPA Administrator Jackson’s Memorandum, “Our Top Priorities,” and the FY 2011-2015 Strategic Plan Regarding Environmental Justice and Children’s Health	249
4.2.8	U.S. EPA Administrator McCarthy’s Memorandum, “EPA’s Themes— Meeting the Challenge Ahead”	263
4.2.9	U.S. EPA’s EAB Decisions	268
4.3	<i>States</i>	276
4.3.1	New Mexico’s Environmental Justice Executive Order.....	276
4.3.2	New Jersey’s Environmental Justice Executive Orders.....	278
4.3.3	Maryland’s Environmental Justice Executive Order	281
4.3.4	Michigan’s Environmental Justice Executive Directive	283
4.3.5	Oregon’s Environmental Justice Executive Order.....	285
4.4	<i>Sustainable Development</i>	286
4.4.1	ABA Resolution on Sustainable Development and Report to the House of Delegates.....	287
4.4.2	U.S. EPA Office of Sustainable Communities.....	294
4.4.3	Bethel New Life, Inc.	297
4.4.4	Wilson Study, “How Planning and Zoning Contribute to Inequitable Development, Neighborhood Health, and Environmental Injustice”	303
4.4.5	Ransom Article, “Pursuing Health Equity: Zoning Codes and Public Health”	304
Chapter 5	— Addressing the Problem: The Judicial Branches	309
5.1	<i>Overview</i>	309
5.2	<i>The Anti-Discriminatory Law Approach</i>	312
5.2.1	Formulation of the Equal Protection Doctrine—Proving Intent.....	312

5.2.2 Utilizing the Equal Protection Doctrine in Environmental Justice Litigation	327
5.3 <i>The Title VI Approach</i>	367
5.3.1 Siting of Highways	368
5.3.2 Urban Renewal	374
5.3.3 Challenges to State Agency Decisionmaking	385
5.3.4 DOT's Federal Transit Administration Withholds Stimulus Funds Under §602	428
5.3.5 Implied Private Right-of-Action Under §602	436
5.3.6 Implied Private Right-of-Action Under §1983	463
5.3.7 Intentional Discrimination Under §601	467
5.4 <i>The Environmental Law, With a Twist Approach</i>	472
5.4.1 Siting.....	473
5.4.2 Scope of Inquiry and Standard of Review.....	500
Chapter 6 — Addressing the Problem: The Private Bar and Corporate America	535
6.1 <i>Overview</i>	535
6.2 <i>Private Bar</i>	535
6.2.1 American Bar Association	535
6.2.2 State Bar Associations	555
6.3 <i>Corporate America</i>	570
6.3.1 Mixed Signals	570
6.3.2 Collaborative Problem-Solving: The Experiences of Two Companies.....	586
6.3.3 Lexmark International's Environmental and Social Justice Policy	605
Chapter 7 — Human Right to a Clean and Healthy Environment	607
7.1 <i>Overview</i>	607
7.2 <i>Rights-Based Approach to Enforce the Human Right to a Clean and Healthy Environment</i>	608
7.2.1 Rights-Based Approach at the International Level and in the United States	608
Index	653

Table of Cases

Administrative Complaint Involving the Oakland Airport Connector Project and the Bay Area Rapid Transit District.....	428
Administrative Complaint Involving Shintech Inc. and the Louisiana Department of Environmental Quality.....	387
Alexander v. Sandoval.....	458
Ball et al. v. Union Carbide Corp.....	364
Bean v. Southwestern Waste Management Corp.....	328
Board of Commissioners v. Great Lakes Transfer, LLC.....	518
Communities Against Runway Expansion, Inc. v. Federal Aviation Administration.....	523
Darensburg 192 v. Metropolitan Transportation Commission.....	331
Eagle Environmental II, L.P. v. Commonwealth of Pennsylvania.....	506
East-Bibb Twiggs Neighborhood Ass’n v. Macon-Bibb County Planning & Zoning Commission.....	336
El Pueblo Para el Aire y Agua Limpio v. County of Kings (Plaintiff’s Brief).....	473
El Pueblo Para el Aire y Agua Limpio v. County of Kings (Opinion).....	478
Elizondo et al. v. Royal Metal Finishing, Inc.....	353
Hartford Park Tenants Ass’n v. Rhode Island Dep’t of Environmental Management.....	482
Hartford Park Tenants Ass’n v. Rhode Island Dep’t of Environmental Management (Settlement Agreement).....	488
Hinds County v. Mississippi Commission on Environmental Quality.....	515
Houston et al. v. City of Cocoa et al. (Complaint).....	374
Houston et al. v. City of Cocoa et al. (Consent Decree).....	381
Houston et al. v. City of Cocoa et al. (Order).....	383
In re American Marine Rail, Ltd. Liability Co.....	501
In re Chemical Waste Management of Indiana, Inc.....	269
In re Envotech, Ltd. Partnership.....	270
In re Knauf Fiber Glass, GmbH.....	274
In re South Bronx Unite! et al. v. New York City Industrial Development Agency et al.....	93
In the Matter of Amendment to the Madison County Solid Waste Management Plan (Re Addition of North County Line Municipal Solid Waste Landfill).....	511
In the Matter of the Application of Rhino Environmental Services (Colonias Development Council v. Rhino Envntl. Servs., Inc.).....	490
In the Matter of Louisiana Energy Services L.P. (ASLB 1997).....	123
In the Matter of Louisiana Energy Services, L.P. (NRC 1998).....	125
Johnson et al. v. Orleans Parish School Board et al.....	73
Latin Americans for Social and Economic Development v. Federal Highway Administration.....	370
Miller et al. v. City of Dallas.....	344
Mossville Environmental Action Now v. United States, Inter-Am. C.H.R. (petition).....	622
Mossville Environmental Action Now v. United States, Inter-Am. C.H.R. (response).....	628
Mossville Environmental Action Now v. United States, Inter-Am. C.H.R. (ruling).....	631
Neighbors for a Toxic Free Community et al. v. Vulcan Materials Co.....	133
Nonnon et al. v. City of New York (Complaint).....	69
Padres Hacia Una Vida Mejor et al. v U.S. Environmental Protection Agency et al.....	412
Phillips v. The City of New York (Stipulation of Settlement).....	72
Robinson Township, Washington County, PA et al. v. Commonwealth of Pennsylvania et al.....	638
Rosemere Neighborhood Association v. U.S. Environmental Protection Agency (9th Cir.).....	402
Rosemere Neighborhood Association v. U.S. Environmental Protection Agency (W.D. Wash.).....	406

Rosemere Neighborhood Association v. U.S. Environmental Protection Agency (Settlement Agreement)	407
R.I.S.E., Inc. v. Kay et al.	340
Senville v. Peters	525
South Camden Citizens in Action v. NJDEP (D.N.J. 2001)	441
South Camden Citizens in Action v. NJDEP (3d Cir. 2001)	464
South Camden Citizens in Action v. NJDEP (D.N.J. 2006).....	468
Souther v. The Commonwealth	313
Taliaferro et al. v. Darby Township Zoning Board et al.	95
United States of America and State of Louisiana v. City of Baton Rouge and Parish of East Baton Rouge (Complaint in Intervention)	526
United States of America and State of Louisiana v. City of Baton Rouge and Parish of East Baton Rouge (Memorandum in Support of Motion to Intervene)	530
United States of America and State of Louisiana v. City of Baton Rouge and Parish of East Baton Rouge (Ruling on Motion to Intervene)	531
Village of Arlington Heights v. Metropolitan Housing Development Corp.....	323
Washington Park Lead Committee, Inc. v. U.S. Environmental Protection Agency et al. (Decision).....	355
Washington Park Lead Committee, Inc. v. U.S. Environmental Protection Agency et al. (Consent Decree).....	361
Yick Wo v. Hopkins	319

Biography



Barry E. Hill is an Adjunct Professor of Law at Vermont Law School, where he has taught an environmental justice and sustainable development course for 20 years. Mr. Hill is Senior Counsel for Environmental Governance, Office of International and Tribal Affairs, U.S. Environmental Protection Agency (EPA). Previously, Mr. Hill was Director of EPA's Office of Environmental Justice from 1998-2007. Prior to that, he was the U.S. Department of the Interior's Associate Solicitor, Division of Conservation and Wildlife, and the Director, Office of Hearings and Appeals. Prior positions include: Of Counsel to the law firm of Dickstein Shapiro, LLP, where he practiced environmental law; Project Manager of the Superfund Business Unit of ICF International, an international consulting firm; Special

Counsel to the Attorney General of the District of Columbia; Legal Counsel to the Inspector General of the U.S. EPA; Law Secretary to the Deputy Administrative Judge of New York City (Criminal Division); and an Assistant District Attorney in Brooklyn, New York.

Mr. Hill has been a Visiting Scholar at the Environmental Law Institute from 2010-2012. Mr. Hill has lectured in the Middle East, Africa, South and Central America, and the Caribbean on the following topics: establishing an environmental law and policy framework for national governments; environmental justice and sustainable development; capacity-building training in environmental law for judges, prosecutors, government regulators, citizens, and the bar; citizen involvement in the environmental enforcement process; and the impact of global warming on indigenous populations. In 2011, Mr. Hill delivered the Distinguished Lecture for the Trinidad & Tobago Environmental Commission, and the Supreme Court of Trinidad & Tobago.

In 2011, Mr. Hill was presented the "Distinguished Alumni Award" by Brooklyn College of the City University of New York for his "commitment to environmental justice and sustainable development, and pioneering leadership in the field of environmental law and policy in the U.S. and abroad."

In 2001, Mr. Hill was presented the "Award for Distinguished Achievement in Environmental Law and Policy" by the American Bar Association for his work—teaching, research, and leadership—in the areas of environmental justice and sustainable development, and environmental law and policy.

Since 1999, Mr. Hill has been a Fellow of the American Bar Association's American Bar Foundation in recognition of his professional accomplishments, distinguished service, and commitment to the study of law and legal research.

Mr. Hill received his B.A. degree in Political Science from Brooklyn College; M.A. degree in Political Science from Howard University; and a J.D. degree from the Cornell University Law School. In 2012, Mr. Hill received an honorary Doctor of Laws degree from the Thomas Jefferson School of Law, since he "steadfastly fought environmental injustice by taking action to decrease environmental risks and to raise awareness of these issues, and by providing communities with the appropriate tools needed to address serious environmental problems."

Acknowledgments

I owe a tremendous debt of gratitude to the Environmental Justice Movement activists, advocates, and scholars who have inspired my keen interest and work in this area.

I am deeply indebted to the various authors and publishers who have granted me permission to reproduce excerpts of their work in this textbook/handbook.

Special recognition must be given to my colleagues on the American Bar Association's (ABA's) Standing Committee on Environmental Law—particularly, Dinah Bear, Hope Babcock, David Baker, Tommy Wells, and Elissa Lichtenstein. We made history. Through our efforts, in 1993, the ABA became the first mainstream organization in the United States to recognize and seek to address the issue of environmental justice. The resolution on environmental justice that was unanimously adopted by the House of Delegates became official policy of the ABA. Since then, the ABA has embarked on a myriad of progressive initiatives such as identifying lawyers, law school clinics, and legal services organizations nationwide who agreed to provide pro bono legal services to community-based organizations; and conducting 50-state surveys to identify what states are doing with respect to addressing the issue through legislation, regulations, and policies, as well as supplemental environmental projects that address the environmental and public health concerns of communities.

I am indebted to the talented team of attorneys and other professionals that comprised the District of Columbia Bar Association's Coalition on Environmental Justice—notably, Fran Dubrowski and Leslie Turner. Through our efforts, in 1995, the D.C. Bar became the first state bar association in the country to pass an environmental justice resolution and to embark on a number of groundbreaking initiatives to seek to address the issue of environmental justice in the nation's capital.

I gratefully acknowledge the help and encouragement of the team at the Environmental Law Institute—specifically, Scott Schang, Rachel Jean-Baptiste, and Bill Straub—for their efforts, support, and advice in publishing this textbook/handbook.

My sincere appreciation is extended to my sister, Sherry Yvonne Hill, whose expert typing skills and patience contributed immensely to the successful completion of this book.

Finally, I am grateful to my beloved family and dear friends who helped me more than they could ever imagine as I spent countless hours researching and writing in the lonely confines of my study. When I would emerge periodically, they were always there. Thank you all.

Be Well; Be Balanced; and Be Happy!!!

Barry E. Hill