Bending the Arc Toward Justice

Federal law has failed many poor and minority communities, who suffer disproportionately from pollution generated by others. But some states are filling the gap by providing new rights in their constitutions and also enacting comprehensive environmental justice legislation

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At one of the daily White House Coronavirus Task Force news briefings in early April, the surgeon general, Jerome Adams, discussed how black and brown communities have been disproportionately impacted by the COVID-19 pandemic. He described how residents of minority neighborhoods in Michigan, Illinois, and Louisiana; in large cities like Milwaukee and Detroit; and in the populous boroughs of the Bronx and Queens are more likely to get sick with the virus because they already are more likely to suffer from health conditions that can reduce their bodies' ability to handle additional illness. Moreover, because of past government policies and private-sector housing segregation, the residents have been forced for generations to live in communities that have limited access to quality health care. Worst of all, because of environmental racism, these citizens live in the midst of pollution-generating facilities such as landfills, incinerators, refineries, and chemical plants and, consequently, have been disproportionately exposed to environmental harms.

Last year, the National Institutes of Health released a study entitled "Race, Income, and Environmental Inequality in the United States, 1990-2014." The researchers concluded that black and brown families are more likely to live in environmentally hazardous neighborhoods than white families, even when they have equal or higher incomes. According to the authors, this overburdening with toxic concentrations of pollution explains some of the significant health disparities that exist between America's white population and its black and Hispanic minorities.

One might think that the law addresses these disparities, but over the last 30 years or so, since when the disparities were first widely recognized, environmental justice advocates have become disheartened as each avenue of redress ends up a dead end. First there were court decisions limiting the use of Title VI of the Civil Rights Act of 1964 as well as the Equal Protection Clause of the Fourteenth Amendment to combat the siting of pollution-generating facilities in black and brown communities that are already inundated with noxious neighbors. At one point, it appeared that federal environmental laws could provide effective routes to address these disparate impacts, especially when coupled with alternative dispute resolution, but that hasn't worked out either as courts have whittled away potential benefits for minority communities. In sum, what has been coined Legislative Environmentalism has failed miserably for black and brown neighborhoods.

Clearly, law at the national level is not implementing cherished American ideals of egalitarianism and equity. But the battle is not lost; there are still means of redress under our federal republic. Providing tools at the state constitutional and legislative levels helps affected communities fight against environmental injustice. We need our 50 laboratories of democracy to show successful solutions in countering environmental racism. Already, lode-star states are enacting environmental rights amendments to their constitutions, along with legislation that specifically addresses the health and the environment of disproportionately impacted communities.

But before we look at this leadership in protecting public health in the states, it helps to first ask how federal environmental laws fail many minority or low-income communities. The answer lies in the laws' process orientation, requirements to jump through procedural hoops. For example, the preparation of an environmental impact statement is a key part of the permitting process under the National Environmental Policy Act. NEPA provides that if an EIS is determined to be inadequate after the federal government's assessment of the potential environmental effects of the proposed project, the applicant can always revise the document to meet regulators' objections. The result in too many cases is that the siting of the pollution-generating facility may only be delayed and not stopped, which is the primary goal of affected communities.

A recent example of this problem is the *Friends of Buckingham v. State Air Pollution Control Board* case. In January, the Fourth Circuit Court of Appeals in Richmond sent a permit for an Atlantic Coast Pipeline's compressor station back to Virginia's state regulators over environmental justice concerns. The compressor station, which would burn gas 24 hours a day, 365 days a year, is one of three planned to support the transmission of natural gas through the 600-mile ACP, which is projected to stretch from West Virginia to South Carolina.

The plaintiffs, Friends of Buckingham and the Chesapeake Bay Foundation, challenged the compressor station permit issued by the State Air Pollution Control Board, arguing that the project would have a disproportionately adverse impact on the health of residents of the predominately African American Union Hill neighborhood in Virginia's Buckingham County. In fact, according to the appellate court, Union Hill consists of 84 percent nonwhite residents, some of whom are the descendants of its Civil War-era founders. The court recognized a study which revealed that the residents, including many elderly, already suffer chronic ailments including asthma, chronic obstructive pulmonary disease, chronic bronchitis and pneumonia, heart disease, and other conditions that would make the residents particularly susceptible to pollution from the compressor station.

The court of appeals vacated and sent the permit back to the board for reconsideration, citing, among other things, the panel's inadequate assessment of the health risks of the site to the community. "It is clear to us that the board's EJ review was insufficient, which undermines the board's statutory duties and renders the board's permit decision arbitrary and capricious, and unsupported by substantial evidence,"

the court concluded. "The board rejected the idea of disproportionate impact on the basis that air quality standards were met," the three-judge panel found, "but environmental justice is not merely a box to be checked, and the board's failure to consider the disproportionate impact on those closest to the compressor station resulted in a flawed analysis."

Moreover, the court of appeals cited the board's failure to obtain an independent assessment of the Union Hill site's suitability and stated, "The board's failure to expand on and correct this erroneous [Department of Environmental Quality] site suitability analysis — which remained unchanged from October 2018 to January 2019 — was arbitrary, capricious, and unsupported by substantial evidence in the record."

Nevertheless, Aaron Ruby, a spokesman for Dominion Energy, stated via email: "We will immediately begin working with the state to resolve the procedural issues identified by the court and are confident this can be completed in a timely manner. We expect the project will still deliver significant volumes to customers under our existing timeline, even as we work to resolve this permit."

Most states do not have environmental justice legislation. Still, achieving equal treatment can arguably be an agency duty under state law

As this episode shows, in many respects the greatest strength of environmental laws is that they are procedural, allowing opportunity for community intervention on process-related grounds; but at the same time the greatest weakness of environmental laws is that they are procedural, and EJ thus can become indeed merely a box to check en route to ultimate project approval.

The Old Dominion does not have environmental justice legislation, which would make environmental justice an integral, systemic part of how agencies permit and regulate activities in the commonwealth. Nonetheless, achieving environmental justice can arguably be an agency duty under state law. Indeed, the statute provides that the Air Pollution Control Board in approving permits "shall consider facts and circumstances relevant to the reasonableness of the activity involved and the regulations proposed to control it." There are four major grounds for review of permits under Virginia law. Number 1 references "the character and degree of injury to, or interference with, safety, health, or the reasonable use of property which is caused or threatened to be caused." Number 3 references "the suitability of the activity to the area in which it is located." The appellate court determined that the board violated this state law by failing to assess the compressor station's disproportionate health impacts on the predominately African American community, in violation of the first enumerated ground for concern, and failed to assess the suitability of the site in violation of the third.

If achieving environmental justice can be read into state permitting laws even absent explicit EJ language, avenues for communities to pursue are even stronger where state law explicitly grants environmental rights. In January, New York added Article 48 to its Environmental Conservation Law. Among other things, Article 48 declares that it is now state policy that "all people, regardless of race, color, religion, national origin or income, have a right to fair treatment and meaningful involvement in the development, implementation and enforcement of laws, regulations and policies that affect the quality of the environment."

Moreover, it is now state policy that "no group of people, including a racial, ethnic or socioeconomic group of people, should be disproportionately exposed to pollution or bear a disproportionate share of the negative environmental consequences resulting from industrial, municipal, or commercial operations, or the execution of federal, state, local, and tribal programs and policies."

Finally, it is now state policy that "no group of people, including a racial, ethnic or socioeconomic group, should suffer from inequitable allocation of public resources or financial assistance for environmental protection and stewardship, including environmental remediation, pollution prevention, open space acquisition and/or other protection and stewardship activities."

New York clearly has a robust environmental justice program. One could easily surmise that if Virginia had comprehensive environmental justice legislation similar to New York's, the concerns of the Union Hill residents would have been treated markedly different by the state board in the ACP compressor station matter and may not have required intervention by the federal court system to read EJ into the state's statutory language.

Unfortunately, due to adverse court decisions, Legislative Environmentalism at the national level does not provide any substantive rights such as the human right to a clean, safe, and healthy environment for anyone, much less disproportionately affected communities like Union Hill. Not even the U.S. Constitution provides that everyone has the right to be able to breathe fresh, clean air; have access to clean water and sanitation; or to live in a clean, safe, and healthy neighborhood. Nor is there a Supreme Court decision declaring that the right to a clean, safe, and healthy environment for all falls within a penumbral right — a right that could be derived from other rights explicitly protected in the Bill of Rights — as the Supreme Court has declared in *Griswold v. Connecticut* for the right to privacy or in *Obergefell v. Hodges* regarding the right for same-sex couples to marry.

Eventually, this may prove to be a problem for the residents in the *City of Flint v. Guertin* matter. In this well-reported incident, the residents of Flint, Michigan, filed a civil suit in federal district court against former state and local government officials who changed the city's drinking water source in 2014. They argued that the government officials acted with deliberate indifference and thus violated their constitutional right to bodily integrity by knowingly contaminating their drinking water with lead and harmful bacteria, and then repeatedly lied about evidence of the contamination, causing the residents to unknowingly and involuntarily ingest poisonous substances over a period of months.

In short, the Flint community contended that the Michigan Department of Environmental Quality failed to implement proper corrosion controls while drawing water from the contaminated Flint River, and then covered up its actions. The residents prevailed in the district court, and the Sixth Circuit Court of Appeals affirmed and held that the residents' constitutional right to bodily integrity was violated, largely relying on cases which involved physical "intrusions" or "invasions."

In January, the Supreme Court denied the petition for certiorari filed by the former state and local government officials who asked the Court to determine whether any alleged substantive due process right to bodily integrity should be extended to protect the public at large from exposure to environmental toxins resulting from governmental policy decisions. With that denial, the Court determined that the residents' civil suit against those former state and local government officials could proceed.

Unfortunately, there is no right to bodily integrity nor a right to environmental protection set forth in the U.S. Constitution

Unfortunately, there is no right to bodily integrity nor a right to environmental protection set forth in the U.S. Constitution. Nor do federal environmental laws grant any American the fundamental human right to lead healthy, productive lives or have access to breathable air, potable water, and land on which to grow nutritious foods. This failure of Legislative Environmentalism at the federal level is the reason why we must look to the states for substantive relief.

An Environmental Rights Amendment, or ERA, placed in the bill of rights section of a state constitution, creates a constitutional mandate that each person, regardless of race, color, national origin, or income, has an inalienable right to clean air, clean land, and clean water that is enforceable by state courts. These green amendments are manifestations of Constitutional Environmentalism, and provide a mechanism to imbed environmental justice for all as a substantive obligation of government, not merely as an aspirational goal as per NEPA and other federal laws. Where ERAs exist, they are the primary statement of environmental policy in a state.

Virginia, unfortunately, does not have such an amendment. Currently, Article 11, Section 1, of Virginia's Constitution provides: "To the end that the people have clean air, pure water, and the use and enjoyment for recreation of adequate public lands, waters, and other natural resources, it shall be the policy of the commonwealth to conserve, develop, and utilize its natural resources, its public lands, and its historical sites and buildings." The evocative language continues: "It shall be the commonwealth's policy to protect its atmosphere, lands, and waters from pollution, impairment, or destruction, for the benefit, enjoyment, and general welfare of the people." However, in spite of these seemingly lofty words, in Section 2, the General Assembly "may" undertake actions to protect "its atmosphere, lands, and waters from pollution, impairment or destruction." But there is no requirement for state action, as Section 2 is not a mandate and Section 1 is merely a statement of policy.

Likewise, Michigan, regrettably, does not have an ERA, although it too has evocative language in its constitution. Currently, Article IV, Section 52, provides: "The conservation and development of the natural resources of the state are hereby declared to be of paramount public concern in the interest of the health, safety and general welfare of the people. The legislature shall provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction." Section 52 is a statement of legislative power. It is not a mandatory duty. The constitutional mandate is satisfied by the enactment of general legislation such as the Michigan Environmental Protection Act. Moreover, it does not confer standing to any citizen to bring a claim for a violation of the state's constitution.

With an environmental rights amendment to their state constitution, residents of affected communities can have legal recourse before agencies and courts

Imagine, for a moment, if Virginia and Michigan had a simple and straightforward ERA like New York's impending self-executing provision, which states, "Each person shall have a right to clean air and water, and a healthful environment." The proposed ERA (Article I, Section 19) will be inserted in the state constitution's bill of rights section, together with the right to freedom of worship; the right to freedom of speech and press; as well as the right to equal protection of the laws. In New York, a constitutional amendment requires a simple majority vote of each chamber of the legislature in two successive legislative sessions with an election for state legislators in between. The proposed ERA will then be put before the voters via a November 2, 2021, referendum.

One could easily surmise that if Virginia and Michigan had such an ERA, the legitimate public health and environmental concerns of the Union Hill and Flint residents would have been treated markedly differently by the State Air Pollution Control Board in the ACP matter and the state and local government officials in the Flint drinking water matter.

It should be understood that Union Hill is not an anomaly. For example, Harlem and the South Bronx are very much like Union Hill in that those predominantly black and Hispanic communities have some of the highest asthma rates in New York City, according to a March 2019 National Academy of Sciences' study entitled, "Inequity in consumption of goods and services adds to racial-ethnic disparities in air pollution exposure." The study, which for the first time quantified the racial gap between who causes air pollution and who breathes it, concluded that black and Hispanic Americans bear a disproportionate burden from air pollution caused mainly by white Americans.

Air pollution is the major environmental human health risk in the United States. The Clean Air Act requires EPA to set national standards for particulate matter, ozone, nitrogen oxides, carbon monoxide, sulfur dioxide, and lead, which are considered harmful to human health and the environment. Particulates are especially harmful. Once inhaled, these fine particles can affect other organs, becoming responsible for more than 100,000 deaths each year from heart attacks, strokes, lung cancer, and other diseases. The researchers studied $PM_{2.5}$ pollution — particles two and a half microns across — finding it is disproportionately caused by the consumption of goods and service by the white majority, but was disproportionately inhaled by residents of black and Hispanic communities.

Although those environmental laws and their implementing regulations are well-intentioned and comprehensive, they all fail to include a fundamental pillar: a basic right to clean air, clean land, and clean water for all individuals and communities. There's a major difference, however, between the prospects of the residents of Harlem and the South Bronx in that they have a state environmental justice statute and will have an ERA in 2021, whereas, the residents of Union Hill and Flint do not have such tools, merely aspirational language.

The fact that people who live, learn, work, and play in America's most polluted environments are commonly people of color and the poor is not new information. For example, a January 2020 study entitled, "The Effects of Historical Housing Policies on Resident Exposure to Intra-Urban Heat: A Study of 108 U.S. Urban Areas," published in the journal *Climate*, concluded that deadly urban heatwaves disproportionately affect minority neighborhoods because of a legacy, beginning in the 1930s, of racist housing policies.

Although redlining was banned by the Fair Housing Act of 1968, the researchers found that those

neighborhoods are still predominantly home to minority and lower-income communities who are disproportionately exposed to a variety of environmental hazards such as lead, poor water and air quality, overdevelopment, and limited shade. Thus, historical housing policies in the United States are directly responsible for the disproportionate exposure to current heat events in urban areas. This is important because the world has experienced 18 of the 19 warmest years on record since 2001.

Further, in 2018 the *American Journal of Public Health* published a study by EPA's National Center for Public Health of the Office of Research and Development entitled, "Disparities in Distribution of Particulate Matter Emission Sources by Race and Poverty Status." With respect to African American youth, EPA's scientists stated: "Black children and children living below the poverty line experience even higher rates of asthma (13.4% and 11.1%, respectively). In addition, black children are 4 times more likely to be admitted to the hospital for asthma, and have a death rate 10 times that of non-Hispanic white children." This is damning information. The agency went on to say, "Previous research has shown that stationary sources of air pollution are found in higher concentrations near socially disadvantaged populations — specifically low-income communities and communities of color. Race and poverty are intertwined in America, with 34% of black children living in poverty compared to 19% of children overall. A deeper examination of disproportionate pollutant exposures across racial versus socioeconomic lines can better inform policies to address health disparities."

In sum, EPA's scientists supported, through their analysis, the fact that environmental racism continues to exist in this country, and that the health of certain populations, chiefly minority and low-income neighborhoods, is more adversely impacted as compared to the health of non-Hispanic white communities. EPA's scientists concluded that: "Disparities in pollution exposure from PM emissions were more pronounced for black populations (regardless of wealth) than those living in poverty. Thus, it is insufficient to consider only socioeconomic status when working to decrease burdens caused by PM. Emission disparities resulting from structural racism exist on a national level and at the state and county levels in most instances."

Similar to the Union Hill neighborhood, black and brown communities and low-income communities across this nation are doing all the right things in seeking to have federal, state, and local government regulators address health and environmental issues in the permitting process by engaging in community-empowerment organizing; working with lawyers skilled in community-empowerment advocacy; participating in the government's decisionmaking processes in order to have a seat at the table; and using the full panoply of environmental laws and their implementing regulations to address instances of environmental injustice.

If environmental justice is to be secured for all communities throughout this country, there must be a concerted effort to amend state constitutions to include the environmental rights of individual citizens. Additionally, states must enact comprehensive environmental justice legislation, and have vibrant environmental justice programs. Otherwise, millions of residents in environmentally overburdened communities like Union Hill, Flint, the South Bronx, and Harlem — and similar communities across the country — will continue to be exposed disproportionately to environmental risks unless they have more tools in the toolbox. Union Hill's win must not be a Pyrrhic victory.

States also need to pass vigorous, comprehensive environmental justice legislation to ensure equal treatment for all their residents in sharing burdens

It may not be surprising to note that the coronavirus crisis has exposed for all Americans to see the health and environmental disparities across this nation — dying from COVID-19 is more likely for those who experience pre-existing conditions like asthma caused by air pollution largely produced in richer communities. However, the coronavirus, racial inequality, unequal health care, climate change, and environmental racism must not be the burden of black and brown communities nor the shame of white communities. But states, which have primary responsibility for protecting the welfare of their citizens, can respond to these inequities by securing environmental rights via amendments to their constitutions together with vigorous legislation addressing the impact of pollution on public health, our communities, and the diverse neighborhoods that make up these United States. **TEF**