Justice40 and the Evolution of Environmental Justice

The exact start of the Environmental Justice (EJ) movement is often attributed to protests in Warren County, North Carolina, in the early 1980s. North Carolina allowed disposal of soil laced with polychlorinated biphenyl (PCBs), a highly toxic substance once widely used in products like coolant, near a predominantly Black community.

Although disposal of PCBs had been regulated, laws did not require public participation in the selection of dumping sites. Residents, concerned about PCB contamination in their water supply, protested and were soon joined by national organizations such as the NAACP,[1] which led to longer, larger and more coordinated demonstrations.[2]

Although the protests did not ultimately prevent the siting, they sparked a movement. Various groups scrutinized governmental decisions that targeted, or disproportionately impacted, minority communities for hazardous waste treatment, storage and disposal facilities. Those efforts prompted former President George Bush Sr. to establish an Environmental Equity Working Group and President Bill Clinton to direct federal agencies to make environmental justice part of decision-making processes.[3]

Federal agencies define EJ as "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. Fair treatment means that no population bears a disproportionate share of negative environmental consequences resulting from industrial, municipal and commercial operations or from the execution of federal, state and local laws; regulations and policies."[4] However,

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the term has evolved and become much broader by encompassing efforts to address climate change.

When President Joe Biden took office in 2021, he announced "Justice40," an initiative which promised vulnerable communities that have experienced decades of underinvestment and compounded pollution to see 40% of the "benefit" from federal climate change policy and clean energy investment, and infrastructure spending.[5] President Biden tasked key officials in his administration with developing "interim guidance" to identify the kinds of communities that would be targeted for funding and develop requirements for stakeholder consultation.[6] Despite the interim guidance issued last summer, federal agencies remain largely left to develop their own methodologies on how to satisfy the commitment.[7]

In response, the Council on Environmental Quality (CEQ) has been working on final guidance on how it will deliver Justice40, including rollout of the "Climate and Economic Justice Screening Tool."[8] The tool will help identify the communities qualifying for funding and other resources.[9] Although the White House has released a beta version, the final tool is not up and running even though federal agencies are allocating billions of dollars from federal infrastructure and COVID-19 relief legislation.[10]

EJ advocates have criticized the tool because it does not include

explicit race indicators they believe are necessary to avoid skewing benefits away from Black Americans. Administration officials are concerned about the legality of using race-based indicators, citing a case last year where white farmers successfully sued the U.S. Department of Agriculture for launching a program that sought to provide loan forgiveness for "socially disadvantaged" farmers and ranchers under the American Rescue Plan Act.[11] The program defined "socially disadvantaged groups" as those who have been "subjected to racial or ethnic prejudice because of their identity as members of a group[.]"[12] The court enjoined implementation because race was the sole basis of eligibility and thus, violated equal protection.[13] Nevertheless, EJ advocates argue the screening tool could use other proxies for race, such as "disadvantaged," "underserved," "vulnerable" or "marginalized."

Even further, some argue the tool fails to include other environmental indicators such as proximity to hazardous waste facilities or considerations of cumulative impacts. The tool has also been criticized for lacking indicators to include EJ issues in rural areas, like Indian reservations.[14] And crucial lingering questions remain about whether and how the initiative will achieve its objective given inherent difficulties in quantifying and accounting for "benefits."

Despite these uncertainties, some states such as Delaware have created an oversight committee to ensure racially underserved and poor communities are first in line when state agencies decide how to spend federal dollars.[15] Colorado requires "disproportionately impacted communities," defined, in part, as those census block groups where at least 40% of households are low-income, 40% of households identify as minority or 40% of households are burdened by housing costs, to be included in decisions that could negatively affect their health.[16] New Jersey authorized its environmental protection department to deny or condition certain permits based on how a facility may affect public health in EJ communities.[17] Washington state enacted a similar law, the Healthy Environment for All (HEAL),[18] and the Climate Commitment Act (CCA), which established a program to reduce carbon pollution and achieve greenhouse gas limits, particularly for communities that bear the greatest burdens from air pollution.[19]

Admittedly, not all states will adopt sweeping EJ or climate change bills. Presumably, a state like Wyoming will be less likely to embrace similar efforts. But that does not mean such states are immune from broader EJ and climate change efforts. For nearly a decade, Wyoming—the nation's leader in U.S. coal production—supported a proposed coal port project in Washington state. Washington denied critical project permits under the Clean Water Act, a decision that ultimately prevented Wyoming coal exports from reaching end-use foreign markets.[20] Hypothetically, if the coal port project had been proposed today, it would not be surprising if Washington's HEAL or CCA legislation compounded the bases for permit denials.

State and federal efforts to date also highlight deficiencies when it comes to tribal considerations. As the EJ movement continues to evolve, much more thought needs to be given to how it will intersect with federal Indian law and policy. The movement acknowledges the need for more public involvement from disproportionately impacted communities that are often largely comprised of racial minority groups. However, federally recognized tribes are not solely racial minority groups; they are separate sovereigns.[21] Accordingly, since 2000, federal agencies have been required to meaningfully consult with tribal officials on matters which have tribal implications, a recognition of the unique government-to-government relationship.[22] As sovereigns, tribes can administer environmental programs under the "treatment as a state" provisions of environmental laws such as the Clean Air Act and Clean Water Act, giving them greater autonomy to identify and address their own EJ priorities outside of the Justice40 framework.[23] Further, EJ and climate change interests do not always align. For example, some commentators note the Biden administration is "racing to find minerals for electric vehicles and clean tech … [b]ut many of those mines will be located next to lands of Indigenous people."[24]

The environmental justice conversation has come a long way since the early 1980s and it will continue to evolve. Going forward,

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it will be important to watch whether the Administration can deliver the benefits promised by Justice40, how the courts will resolve conflicts over EJ policies, and how tribal considerations will be addressed. What is clear, however, is that environmental justice is here to stay. **WL**

(Endnotes)

1 National Association for the Advancement of Colored People.
2 U.S. Dep't of Energy Office of Legacy Mgmt, *Envt'l Justice History*, www.energy.gov/lm/services/environmental-justice/environmental-justice-history.
3 *Id.* referencing Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 16, 1994).
4 *Id.*
5 *Tackling the Climate Crisis at home and Abroad*, 86 Fed. Reg. 7619 (Feb. 1, 2021).
6 Memorandum from Shalanda Young, Acting Director of the Office of Management and Budget, Brenda Mallory, Chair of the Council on Environmental Quality, Gina McCarthy, National Climate Advisor, on Interim Implementation Guidance for the Justice40 Initiative (July 20, 2021).
7 Jean Chemnick, "On anniversary of Biden's EJ order, is Justie40 delivering?," Climate Wire, January 27, 2022.
8 The Climate and Economic Justice Screening Tool, beta version, screeningtool.geoplatform.gov/en/#3/33.47/-97.5.
9 Press Release, White House, CEQ Publishes Draft Climate and Economic Justice Screening Tool (Feb. 18, 2022).
10 Jean Chemnick, "What voting rights mean for Biden and environmental justice," Climate Wire, January 14, 2022.
11 H.R. 1319, 117th Cong § 1005(a)(1) (2021).
12 *Id.* at Section 1005(b)(3) referencing 7 U.S.C. § 2279(a).
13 *Faust v. Vilsack*, 519 F. Supp. 3d 470 (D. Wisc., June 10, 2021).
14 Kelsey Brugger, "Biden environmental justice advisers air frustrations," Greenwire, January 18, 2022.
15 Miranda Wilson, "Delaware offers litmus test for Biden's EJ plan," Energy Wire, February 3 2022.
16 Colo. Sess. Law, H.B. 1266 (2021).
17 N. J. Sess. Law, S.B. 232 (2020).
18 Wash Sess. Law, S.B. 5141 (2021).
19 Wash. Sess. Law, SB 5126 (2021).
20 *Montana & Wyoming v. Washington*, No. 220152, *motion for leave to file a bill of complaint denied* (U.S. June 28, 2021).
21 *Morton v. Mancari*, 417 U.S. 535, 553-54 (1974) (upholding Indian employment hiring preference, because it is "granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities[.]").
22 *Consultation and Coordination with Indian Tribal Government*, 65 Fed. Red. 67249, (Rep. Raúl Grijalva (D-AZ) introduced the Requirements, Expectations, and Standard Procedures for Effective Consultation with Tribes (RESPECT) Act, H.R. 3587, 117th Congress, which would codify those consultation requirements).
23 *City of Albuquerque v. Browner*, 97 F. 3d 415 (10th Cir. 1996) (upholding the Pueblo of Isleta's water quality standards for the Rio Grande River developed pursuant to the treatment as a state provisions of the Clean Water Act; the City of Albuquerque was required to upgrade its sewage plant which affected the Pueblo's downstream water quality).
24 Jael Holzman and Scott Waldman, "How mining for clean energy could undermine Biden's EJ goals," Climate Wire (April 19, 2022).

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