

The Evolving Landscape of Environmental Justice in 2020 and Beyond

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A concept that previously garnered attention with activists and select government agencies, environmental justice (EJ) is now regularly discussed in corporate boardrooms and among C-suite executives.^[1] This is for good reason—EJ has risen to prominence in recent years and months, buoyed by current social justice efforts, the recognition of health disparities underscored by the COVID-19 pandemic, and a presidential campaign in which EJ has taken center stage.

The U.S. Environmental Protection Agency (EPA) defines 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.” In the United States, EJ is arguably seeing the most significant progress since its outgrowth from the 1960s Civil Rights Movement. In addition to increased EJ advocacy in 2020, newly proposed federal legislation seeks to reframe the way in which the law addresses and incorporates EJ into existing systems for environmental protection. At the state level, new legislation and guidance set the tone for significant reform, with states like New Jersey and Connecticut passing historic measures to build EJ requirements into permitting and remediation procedures—potentially serving as models for other jurisdictions to follow.

These converging trends signal what will likely be a notable shift in the status quo, with potential for exponential amplification by the presidential and congressional election outcomes. The Democratic Party presidential nominee, former Vice President Joseph R. Biden, Jr., has released dedicated climate and EJ policy proposals, promising sweeping changes to federal EJ policy and prioritization should he and his running mate, Senator Kamala Harris (D-CA), win the White House. In addition, congressional election results could shift party dynamics such that the recent increase in EJ-related bills could have a strong chance of becoming law. Regardless of election outcomes, the Biden campaign’s forceful prioritization of EJ has spurred those on both sides of the aisle to take a stand. As such, the federal discussion on advancing EJ is likely to continue—albeit in different ways—even under a second Trump term.

A Closer Look at Federal EJ Activity

Although the most significant EJ activity has occurred at the state level, federal-level changes may be on the horizon, with much at stake in the 2020 presidential and congressional elections. Indeed, during the last presidential debate of this election cycle, the moderator asked a question about EJ and Biden responded by acknowledging the importance of protecting fenceline communities. Should he take office, all indicators suggest that EJ will be a government-wide priority. Not only has Biden released the most comprehensive EJ platform of any presidential candidate, but his selection of Senator Harris, a longstanding EJ advocate, as his running mate signals his commitment to follow-through on his campaign promises. In his July 2020 [Plan to Secure Environmental Justice and Equitable Economic Opportunity](#), Biden advocates for such far-reaching initiatives as: establishing an Environmental and Climate Justice Division of the U.S. Department of Justice; instructing the Attorney General to implement Senator Cory Booker's [Environmental Justice Act of 2019](#) through executive action; and overhauling EPA's program responsible for enforcing Title VI of the Civil Rights Act (Title VI).

A second term of the Trump Administration may also usher in a new wave of EJ prioritization. EPA Administrator Andrew Wheeler in a [recent public address](#) declared that "community-driven environmentalism" will be a focus of a second Trump term and is "the best opportunity in at least a generation to solve the environmental justice issues we face today." He retorted that community-driven environmentalism "will do more for environmental justice than all the rhetoric in political campaigns."

Beyond the White House, shifts in Congress's composition may have similarly significant impacts on EJ policy given a recent spike in EJ-specific legislative proposals. After co-sponsoring the Green New Deal, Senator Harris introduced two EJ bills in August 2020: the [EJ for All Act](#) (S.4401; H.R.5986) and the [Climate Equity Act](#) (S.4513; H.R.8019). The former is a sweeping overhaul of federal EJ policy, calling for expanding National Environmental Policy Act requirements for community engagement; amending the Clean Water Act and Clean Air Act to require consideration of cumulative impacts in permitting decisions; and expanding the private cause of action under Title VI by explicitly prohibiting discrimination based on disparate impacts. The latter requires Congress to consider the impacts of legislation, regulation, or investments on EJ communities in its decision-making, in addition to creating a Climate and Environmental Equity Office within the Congressional Budget Office. After introducing the Environmental Justice Act in 2019, Senator Booker released the [Environmental Justice Legacy Pollution Cleanup Act](#) (S.4617; H.R.8271) in September 2020, which increases funding for cleanup of legacy pollution and amends the Clean Air Act to prohibit issuance of new major source air pollution permits in overburdened communities. Additional recent EJ-related bills include the [Clean Economy Jobs and Innovation Act](#) (H.R.4447), which the House passed in September and features a section on EJ that incorporates the Environmental Justice for All Act's key provisions, and the [Public Health Air Quality Act of 2020](#) (S.4369; H.R.7822), which would require facility-specific fenceline monitoring of air pollution in certain communities. These bills foreshadow EJ legislation that may be passed by the next Congress.

Increasing State EJ Activity

In recent years, several states have enacted or proposed legislation that strengthens existing civil rights laws and establishes new EJ-specific laws. As a result, the vast majority of states now address EJ in some fashion—via legislation, agency policy and guidance, or advisory groups—with fewer than five failing to mention the concept at all. While there has been recent EJ activity in states from coast to coast, the extent to which a particular state addresses EJ varies widely. Some states, like California, have robust EJ schemes, while others make only passing reference to the concept.

Overall, since 2017, the Trump Administration's deregulatory environmental agenda has inspired greater state activity, including concerted efforts to promote EJ on behalf of their most vulnerable residents.

Notably, New Jersey's [landmark EJ law](#), signed into law in September, promises to have wide-reaching effects. Under the legislation, applicants seeking new or renewed permits for specific categories of facilities sited in "overburdened communities" must submit an "Environmental Justice Impact Statement" that evaluates the potential cumulative environmental and public health stressors associated with the permitted activity. New Jersey Department of Environmental Protection (NJDEP), in accordance with the law, has published a list of "overburdened communities," defined as any census block group with significant low-income, minority or non-English speaking populations (approx. 310 municipalities). The legislation empowers NJDEP to impose conditions on or deny a permit in its entirety, based on the agency's review of the applicant's Environmental Justice Impact Statement. The law also introduces significant public engagement and public notification mandates on applicants. These requirements apply to permits for a wide range of facilities, including but not limited to: anything defined as a "major source" of air pollution under the Clean Air Act; resource recovery facilities or incinerators; sludge processing facilities, combustors, or incinerators; sewage treatment plants with a capacity exceeding 50 million gallons per day; and certain kinds of landfills. The new legislation goes further than any other state EJ law and may serve as a model for other similarly inclined jurisdictions in the future.

Beyond the Garden State, other states have developed a host of strategies in recent years to further their EJ objectives, including establishing EJ oversight and advisory committees, identifying EJ communities statewide, and expanding public engagement requirements. Recent examples include:

- Since 2013, the California Environmental Protection Agency has had an [Environmental Justice Compliance and Enforcement Working Group](#)—now known as the [Environmental Justice Task Force](#)—to ensure that EJ is incorporated into state compliance and enforcement programs.
- Maryland passed [legislation](#) in 2018 that created a commission tasked with studying and making recommendations to the state legislature on EJ issues in Maryland's second most-populous county.
- In 2019, New York created a [permanent EJ advisory group](#) responsible for overseeing state agencies' implementation of EJ principles.
- In 2020, Virginia established the [Virginia Council on Environmental Justice](#) designed to advise the governor on how to best to protect vulnerable communities from disproportionate impacts of pollution.
- In October 2020, Connecticut [passed a bill \(HB7008\)](#) amending the state's 2008 EJ legislation to increase opportunities for community stakeholders to get involved and improve transparency and accountability. Under the new law, towns with more than five "affecting facilities"[2] are required to make an agreement with the owner or developer of additional sites where the owner agrees to fund ways to lessen environmental impact of the development. In addition, site owners are required to meet expanded community engagement requirements to advertise permit hearings. The bill goes into effect on November 1, 2020.
- In 2017, the Pennsylvania Department of Environmental Protection (PADEP) began updating

and revising its [2004 Environmental Justice Public Participation Policy](#). In October 2020, the PADEP [issued a notice](#) stating that it would withdraw the draft revised policy and continue working on it to “develop a Policy that will focus on integrating EJ into other [PADEP] practices and policies to provide tangible benefits to communities.” It did not provide a timeline for the revision process.

EJ Litigation

With few laws directly addressing EJ, activists have found little success attempting to vindicate EJ communities’ rights in the courts.[3] After the Fourth Circuit’s recent opinion in the *Friends of Buckingham* case, however, that tide may be changing.[4] In that case, the Virginia State Air Pollution Control Board (Air Board) granted a permit to construct a compressor station that would have been part of the now-abandoned Atlantic Coast Pipeline in Union Hill, a predominantly African American community established during the Civil War.

Plaintiffs’ challenged the Air Board’s decision arguing that it failed to perform its duties under Va. Code (Ann. § 10.1–1307(E)) to consider the potential for disproportionate health impacts from the compressor station and made an incomplete and misinformed site suitability determination. The Fourth Circuit agreed, concluding that the Air Board (1) failed to make findings regarding Union Hill’s demographics, (2) failed to consider the potential air pollution impacts regardless of compliance with applicable air emissions standards, and (3) relied on an incomplete factual record in assessing site suitability. As such, it vacated the issuance of the permit and remanded the matter back to the Air Board.

The *Friends of Buckingham* case is particularly significant because, although the proposed compressor station would have met applicable air quality standards, the Fourth Circuit determined that compliance with environmental thresholds alone was insufficient to account for EJ concerns. In fully embracing the importance of EJ, the Fourth Circuit explained that “[t]he Board’s reliance on air quality standards led it to dismiss EJ concerns. . . . 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.”[5]

While *Friends of Buckingham* is persuasive precedent, EJ litigants generally do not prevail in traditional litigation and often turn to administrative remedies, primarily Title VI of the Civil Rights Act, as well as creatively using other civil rights laws. For example, in Illinois, a coalition of environmental groups filed a complaint with the U.S. Department of Housing and Urban Development in August alleging that the City of Chicago violated the Fair Housing Act and the Housing and Community Development Act of 1974. The alleged violations stemmed, in part, from the city’s decision to approve the relocation of a recycling facility with high toxic air pollution from a wealthy neighborhood to an EJ community.[6] Undoubtedly, EJ activists will continue to find creative ways to assert EJ claims.

Practical Takeaways

The breathless pace with which EJ developments continue to emerge leaves many stakeholders—including the regulated community— anxiously wondering how they should mitigate risk, reform their practices, and proactively incorporate EJ best practices. This is particularly true given that despite its renewed momentum, EJ remains difficult to define. Notably distinct from other environment, health, and safety compliance areas, EJ lacks a dedicated, overarching federal statute

mandating specific actions and remedies. That may not be the case for long. As these changes continue to emerge, industry actors, in particular, will do well to follow the current state of play in the EJ space—paying particular attention to state activity and creative litigation by EJ advocates—to understand how such developments can affect continuity of operations and compliance in the coming months. Cases like *Friends of Buckingham* are reminders that it is integral for industry stakeholders to assess the EJ implications in areas in which they operate, understand the impacts of their operations on vulnerable communities, and—ultimately—show themselves to be good neighbors.

[1] For example, Duke Energy Corp.'s CEO [recently discussed](#) the company's development of EJ principles "to be sensitive to how a project might affect residents closest to a facility and be more proactive on stakeholder engagement."

[2] "Affecting facilities" include certain electric generating facilities, certain sewage plants, waste incinerators, certain processing or recycling facilities, medical waste, landfills, and any major source of air pollution.

[3] See e.g., *Town of Weymouth v. Mass. Dep't of Env'tl. Prot.* (1st Cir. 2020) (rejected plaintiffs' claim that the Massachusetts Department of Environmental Protection failed to comply with the Massachusetts Environmental Justice Policy in review of air permit for compressor station).

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

[5] *Id.* at 91-92.

[6] <https://aboutblaw.com/SzR>

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