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Environmental Justice Act of 2017: A Fighting Chance for Frontline Communities

By Jeremy Orr*

Introduction

Since the release of the United Church of Christ's landmark *Toxic Wastes and Race in the United States*¹ report in 1987 and the 1992 release of the U.S. Environmental Protection Agency's ("EPA") *Reducing Risk for All Communities*² report, our Federal Government has been well aware that the health of communities of color and the poor are disproportionately and adversely impacted by environmental decision-making. We have had Presidential actions on environmental justice in the form of Executive Orders.^{3, 4} We have seen agency-wide commitments to environmental justice plans by EPA Administrators.^{5, 6} Yet, while public awareness and concern about environmental justice has grown over the past thirty years, Congress has taken no substantive steps to remedy this harm. That was until the introduction of the Environmental Justice Act of 2017 ("EJA") by U.S. Senator Cory Booker in October 2017.⁷

There have certainly been various environmental justice bills introduced in both chambers of Congress over the past three decades, but none of them have ever made it out of committee and to the floor for a vote. The most notable of past environmental justice bills was the Environmental Justice Act of 1992, sponsored by civil rights activist and U.S. Representative John Lewis.⁸ It was the first federal bill directly aimed at eradicating racial inequalities in the application of environmental laws and policies. Consider this for context: I was five years old when Lewis's bill was introduced in Congress and now, 26 years later, I work as a

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1. UNITED CHURCH OF CHRIST, *TOXIC WASTES AND RACE IN THE U.S.*, ix (1987).
2. U.S. ENVTL PROTECTION AGENCY ENVTL EQUITY WORKGROUP, *REDUCING RISK FOR ALL COMMUNITIES 1* (1992).
3. Exec. Order No. 12898, 59 Fed. Reg. 7629 (Feb. 6, 1994).
4. EXECUTIVE OFF. OF THE PRESIDENT, MEMORANDUM OF UNDERSTANDING ON ENVTL JUSTICE AND EXECUTIVE ORDER 12898 (Aug. 4, 2011).
5. U.S. ENVTL PROTECTION AGENCY, PLAN EJ 2014 (September 2011).
6. U.S. ENVTL PROTECTION AGENCY, EJ 2020 ACTION AGENDA, ENVTL JUSTICE, (October 2016).
7. Env'tl. Justice Act of 2017, S. 1996, 115th Cong. (2017).
8. Env'tl. Justice Act of 1992, H.R. 5326, 102nd Cong. (1992).

civil rights and environmental attorney doing my best to represent communities that essentially have no legal recourse for “environmental injustice” and writing about the need for such a law that would allow our most vulnerable citizens to protect themselves from environmental harm. Booker’s 2017 rendition packs the punch needed to address this inherently unjust problem.

Significant Provisions of The Environmental Justice Act Of 2017 and Its Practical Application

A. Expanding the Definition of Environmental Justice

The Environmental Justice Act of 2017, a bill requiring “[f]ederal agencies to address environmental justice” and consider “cumulative impacts in certain permitting decisions, and for other purposes,”⁹ has a number of provisions that endow communities with the statutory tools necessary to secure environmental justice. For starters, the EJA expands the definition of environmental justice. The widely cited EPA definition of environmental justice is “the fair treatment and meaningful involvement of all people regardless of race, color, culture, national origin, income, and educational levels with respect to the development, implementation, and enforcement of protective environmental laws, regulations, and policies.”¹⁰ Whereas, the EJA states:

(4) The term “environmental justice” means the fair treatment and meaningful involvement of all individuals, regardless of race, color, national origin, educational level, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies to ensure that—

communities of color, indigenous communities, and low-income communities have access to public information and opportunities for meaningful public participation relating to human health and environmental planning, regulations, and enforcement;

no community of color, indigenous community, or low-income community shall be exposed to a disproportionate burden of the negative human health and environmental impacts of pollution or other environmental hazards; and

the 17 Principles of Environmental Justice written and adopted at the First National People of Color Environmental Leadership

9. Env'tl. Justice Act of 2017, *supra* note 7.

10. U.S. ENVTL. PROTECTION AGENCY, ENVTL. JUSTICE KEY TERMS, VOCABULARY CATALOG, (June 10, 2010), https://ofmpub.epa.gov/sor_internet/registry/termreg/searchandretrieve/glossariesandkeywordlists/search.do?details=&glossaryName=Env%20Justice%20Key%20Terms [https://perma.cc/2XD5-VFWL].

Summit held on October 24 through 27, 1991, in Washington, DC, are upheld.¹¹

Expanding this definition and passing it into law in its proposed form would be monumental. Many environmental justice practitioners, myself included, often question the level of clarity and inclusiveness of the EPA's current definition on two fronts: 1) it lacks any direct reference to environmental opportunities and benefits; and 2) the phrase "regardless of" does not inherently implicate the proactive protection of black and brown, indigenous, and poor communities. The EJA's assurance of "access to public information and opportunities for meaningful public participation" addresses the barriers to learning about and pursuing environmental benefits that these communities often miss out on.

B. The Codification of Environmental Justice Executive Order 12898

Of great significance, the EJA also codifies Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations ("EO 12898").¹² EO 12898 directed all federal agencies to focus their attention on the human and environmental health effects of agency actions on minorities and low-income communities and stated that "each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States...."¹³ EO 12898 required agencies to create environmental justice strategies that are to be adhered to agency wide. The strategies were meant to address adverse environmental effects and should at the very least:

- (1) promote enforcement of all health and environmental statutes in areas with minority populations and low-income populations;
- (2) ensure greater public participation;
- (3) improve research and data collection relating to the health of and environment of minority populations and low-income populations; and
- (4) identify differential patterns of consumption of natural resources among minority populations and low-income populations.¹⁴

Think about how meaningful it would be for every Federal agency and department to be legally responsible for creating an agency-wide environmental

11. Env'tl. Justice Act of 2017, *supra* note 7, at § 3.

12. *Id.* at § 5.

13. Exec. Order No. 12898, 59 Fed. Reg. 7629 (Feb. 6, 1994).

14. *Id.*

justice strategy that would prioritize the health and well-being of communities of color and poor communities. Just a few examples: the Department of Labor would have to address exposure of Latinx workers to chemical hazards at poultry plants in around the country; the Environmental Impact Assessment required of the Department of Transportation when expanding lanes on interstate highways would now need to account for the potential displacement of low-income individuals who have lived along the service drive for decades because that is the only place they could afford to reside; the Department of Justice could require consent agreements between industrial polluters and communities, which would be a remedy for black and brown communities who live in the shadows of oil refineries, trash incinerators, and coal plants.

Also, through the codification of EO 12898, the EJA would provide for oversight and approval of agency environmental justice strategies by creating the Interagency Working Group on Environmental Justice (“IWG”).¹⁵ Under the EJA, the IWG would be chaired by the Administrator of the EPA and would consist of the heads of the following departments, agencies, and White House offices: the Secretary of Agriculture; Secretary of Commerce; Secretary of Defense; Secretary of Energy; Secretary of Health and Human Services; Secretary of Homeland Security; Secretary of Housing and Urban Development; Secretary of the Interior; Secretary of Labor; Secretary of Transportation; Attorney General; Administrator; Director of the Office of Environmental Justice; Chairman of the Consumer Product Safety Commission; Chairperson of the Chemical Safety Board; Director of the Office of Management and Budget; Director of the Office of Science and Technology Policy; Chair of the Council on Environmental Quality; Assistant to the President for Domestic Policy; Director of the National Economic Council; Chairman of the Council of Economic Advisers; Such other Federal officials as the President may designate.¹⁶

The IWG would also provide guidance regarding the criteria that agencies must follow and serve as a clearinghouse for each agency as it develops its environmental justice strategy.¹⁷ Additionally, the IWG would assist in coordinating research efforts and data collection, examine existing data and studies on environmental justice, hold public meetings, and develop interagency model projects that demonstrate cooperation among agencies.¹⁸

The IWG is particularly intriguing because it forces federal agency leaders to be in relationship with one another and it creates a mechanism for accountability amongst the leaders and their agencies. If done properly, no agency would be able to get away with skirting their responsibility of accounting for the environmental impacts of their actions on vulnerable communities. Because each agencies’ environmental justice strategy would be vetted by all the other members of the IWG, it would be difficult for environmental injustices to occur without other

15. Env’tl. Justice Act of 2017, *supra* note 7, at § 4.

16. *Id.*

17. *Id.*

18. *Id.*

federal agency leaders recognizing it and prompting action to prevent or quickly remedy any issues.

C. The Codification of the National Environmental Justice Advisory Council

The EJA also calls for the codification of the National Environmental Justice Advisory Council (“NEJAC”).¹⁹ NEJAC is a federal advisory committee to the EPA that was established on September 30, 1993.²⁰ NEJAC “provides advice and recommendations about broad, cross-cutting issues related to environmental justice, drawing on all stakeholders involved in the environmental justice dialogue. In addition, NEJAC provides a valuable forum for discussions about integrating environmental justice with other EPA priorities and initiatives.”²¹ According to its Charter, NEJAC is comprised of approximately twenty-seven individual members and a Designated Federal Officer.²² The members come from various, nonfederal sectors including: academia; community groups; industry/business; nongovernment organizations/environmental organizations; state/local governments; and tribal governments/indigenous groups.²³

For over twenty years, NJEAC has provided advice and recommendations directly to sitting EPA Administrators. NEJAC’s recommendations are typically derived from its seven subgroups who serve as workgroups for specific environmental justice topic/issue areas: 1) Air and Water; 2) Enforcement; 3) Health and Research; 4) Indigenous Peoples; 5) International; 6) Puerto Rico; and 7) Waste and Facility Siting.²⁴ Managed by a Designated Federal Officer and chaired by a current NEJAC member, these subgroups meet independently of NEJAC’s full body; however, subgroups are not allowed to make recommendations directly to or independent of the EPA, as subgroup recommendations must be reported to and approved by the NEJAC full body.²⁵

Since its creation, NEJAC has provided the EPA with hundreds of recommendations in the form of nearly forty annual and semi-annual comprehensive reports that average fifty pages per report.²⁶ Many of these recommendations have been adopted by the EPA, including the 1996 creation of

19. Env’tl. Justice Act of 2017, *supra* note 7, at § 6.

20. U.S. ENVTL PROTECTION AGENCY, *National Environmental Justice Advisory Council*, (Dec. 15, 2015), <https://www.epa.gov/environmentaljustice/national-environmental-justice-advisory-council> [<https://perma.cc/DCX7-FJXU>].

21. *Id.*

22. U.S. ENVTL PROTECTION AGENCY, *National Environmental Justice Advisory Council Charter* (August 8, 2014), available at <https://19january2017snapshot.epa.gov/sites/production/files/2015-02/documents/nejac-charter.pdf> [<https://perma.cc/32BB-XBJN>].

23. *Id.*

24. *Id.* at 3.

25. *Id.*

26. U.S. ENVTL. PROTECTION AGENCY, *NEJAC Advice and Recommendations*, (Oct. 20, 2015), <https://www.epa.gov/environmental-justice/national-environmental-justice-advisory-council-recommendation-reports-0> [<https://perma.cc/G6CJ-636R>].

the popular Brownfields program in which the EPA partners with state and local governments to remediate former industrial or commercial sites that were polluted or contaminated with hazardous wastes; the sites are used for new business development purposes.²⁷

Many people are surprised to discover that NEJAC is still in existence today under the current administration and continues to serve the same purpose for which it was created. The most noteworthy fact about NEJAC is that it directly responds to the Principles of Environmental Justice that were crafted at the 1991 National People of Color Environmental Leadership Summit. The NEJAC embodies the seventh of those Principles, which holds that “environmental justice demands the right to participate as equal partners at every level of decision-making including needs assessment, planning, implementation, enforcement and evaluation.”²⁸ As a recently appointed member to NEJAC, I know firsthand the importance of this committee’s work and the meaningfulness of environmental justice community members having a voice and a seat at the table.

D. Cumulative Impact and Past Violations

The EJA seeks to address a battle that environmental justice communities have been fighting for years: the issue of cumulative impacts regarding permitting decisions. As it stands, neither the Clean Air Act or Clean Water Act requires regulatory bodies at any level of government to account for cumulative impacts when deciding permits that will allow for new or increased emissions or discharge of pollutants. One of the EJA’s primary purposes is to “require consideration of cumulative impacts in permitting decisions.”²⁹ This means that, when assessing a permit, the combined environmental pollution of the entire geographic area must be considered, regardless of whether the pollution is routine or accidental and from a single source or multiple sources.³⁰ In addition, the permitting process under the EJA would consider whether the applicant has a persistent history of permit violations.³¹ The permitting authority could either deny the permit altogether or require an additional redemption plan that would bring the applicant into compliance.³²

These changes to the Clean Air Act and Clean Water Act permitting would no doubt be chided by industrial polluters and celebrated by environmental justice frontline communities. For too long, permitting authorities at all levels of government have willfully allowed industrial polluters to poison our air and water

27. U.S. ENVTL PROTECTION AGENCY, *Environmental Justice, Urban Revitalization, and Brownfields: the Search for Authentic Signs of Hope* 9-10, (Dec. 1996), available at <https://www.epa.gov/sites/production/files/2015-02/documents/public-dialogue-brown-fields-1296.pdf> [<https://perma.cc/L4VU-XALQ>].

28. First National People of Color Summit, *Principles of Environmental Justice*, (Apr. 6, 1996), <https://www.ejnet.org/ej/principles.html> [<https://perma.cc/7X8Q-MUVK>].

29. Env’tl. Justice Act of 2017, *supra* note 7, at § 2.

30. *Id.* at § 8.

31. *Id.*

32. *Id.*

with no consequences. While entire counties were in non-attainment for ambient air quality standards, polluters up for permit renewal could simply say “it’s not us, it’s the other companies,” and subsequently receive their permit, only to contribute to the environmental and public health issues ailments of already overburdened communities. The EJA would remedy that. Likewise, through my work, I’ve seen polluters with countless past and current violations receive permits for renewals and expansions to discharge or emit more harmful pollutants in our water and air with zero consideration of their history of transgressions. For many environmental justice communities, with no explicit environmental justice laws on the books, they’ve been on the losing side of most of these battles. But the passage of the EJA could quickly change that.

E. Statutory and Common Law Claims for Damages and Injunctive Relief

The EJA also empowers a citizen to bring statutory and common law claims against the government when environmental laws are violated.³³ Among the various federal acts covered by this provision of the EJA, it explicitly allows claims for violations of the Safe Drinking Water Act, the Clean Air Act, the Solid Waste Disposal Act, and “any other Act administered by the Administrator.”³⁴

As a Detroit resident, I cannot help but think about the how my neighbors up the road in Flint could use this provision of the EJA to begin to make themselves whole, given the leaded drinking water crisis. The ability to take the EPA to court for its failure to enforce the Lead and Copper Rule of the Safe Drinking Water Act after thousands have been irreversibly harmed only seems fair and just. Yet, with no such mechanism in place to allow for this, how can we expect to hold governments accountable for such actions—or lack of action in Flint’s case. And to be clear, Flint is just one example of many environmental tragedies perpetrated by our government that has gone unpunished. These issues have been taking place throughout the country in poor communities of color for decades.

F. Reinstating the Use of the Civil Rights Act of 1964 in Environmental Justice Actions

The final section of the EJA revives the right of private citizens to bring claims under Civil Rights Act of 1964 (“CRA”) for disparate impacts of discriminatory practices.³⁵ This provision allows for a private citizen to bring a claims against the entities in violation of the Civil Rights Act and for those claims to be based on disparate impact or discriminatory effect.

Of all the provisions in the EJA, I believe this to be the most imperative in the fight for environmental justice. The CRA notably prohibits any form of discrimination based on race, color, or national origin by a private entity; however, Supreme Court precedent only allows for private citizens to bring a claim to court

33. *Id.* at § 9.

34. Env’tl. Justice Act of 2017, *supra* note 7, at § 9.

35. Env’tl. Justice Act of 2017, *supra* note 7, at § 10.

when the discrimination is intentional.³⁶ This means that a person or community cannot sue a private entity for damages or injunctive relief for disparate impact. Thus, only the federal government can bring a case on the behalf of the citizen or community when it comes to enforcing environmental regulations. By putting this power back into the hands of the people most impacted by discriminatory environmental practices and effects, the EJA arms these communities with the tools to hold private entities accountable. Simply knowing that they could now be sued by community residents for adverse health impacts will make industrial polluters think twice before violating environmental laws.

Conclusion

As a lawyer who practices in the realm of environmental justice, and as an African American living in inner-city Detroit, I find myself embroiled in the battle against environmental injustices in both my personal and professional lives every single day. I live just blocks from the country's largest trash incinerator. So not only do I go to work to advocate for fellow racial minorities and low-income individuals, I also go to work to advocate for my family, my friends, and myself. Experiencing the adverse impacts that environmental hazards have on the health and well-being of marginalized individuals and communities myself, it perplexes me that systemic racism and oppression of poor people are still very much alive in an area such as environmental decision-making. It perplexes me because this isn't a theoretical issue in which we need to change people's hearts, but rather all we need to do is change people's behavior to begin to end these environmental injustices. And we can do this through strong federal environmental justice laws such as the EJA.

While the Environmental Justice Act of 2017 is the most comprehensive bill to date, its passage in the current political climate faces an uphill battle to say the least. There has been no action on the bill since it was referred to the Committee on Environmental and Public Works upon its introduction in the Senate in October 2017. Nonetheless, I am optimistic in my belief that we are inching ever closer to the passage of such a bill in the coming years. As more states continue to enact environmental justice policies and strengthen their own standards for the enforcement of federal environmental acts to better protect their most vulnerable citizens, it is only a matter of time before the Congress will be forced to take action and create uniformed laws to address environmental justice. And when they do, it is my hope that the Senator Booker's bill serves as the baseline for what's to come. Current and future frontline communities deserve the fighting chance that the Environmental Justice Act of 2017 seeks to give them.

36. *Alexander v. Sandoval*, 532 US 275, 293 (2001).
