



A SHARED DESTINY

by Adam C. Arnold

“It really boils down to this: that all life is interrelated. We are all caught in an inescapable network of mutuality, tied into a single garment of destiny. Whatever affects one destiny, affects all indirectly.”

Rev. Dr. Martin Luther King Jr. (Dec. 24, 1967)¹

As much a movement as a legal concept, environmental justice is aimed at the burdens placed upon poor communities and communities of color, who often bear the more negative environmental consequences of modern society.² The decisions made about where to locate industry or dispose of waste inevitably affects one’s neighbors. What one does not want in one’s backyard could end up in one’s neighbor’s, especially if they wield less political, social, or economic power. Although it is one of the most diverse states in the country,³ environmental justice remains a challenge for New Jersey. With a new administration in Trenton that promises to be an environmental steward, there may be renewed focus on reducing environmental inequalities in the implementation of new and existing policy. As set forth below, the environmental justice movement

teaches that to successfully address these inequalities one must think more globally about the impacts of government decisions and act locally to support—or challenge—the decision-makers.

So, what exactly is environmental justice (or EJ, as it is often called)? The federal Environmental Protection Agency (EPA) offers this definition: “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.”⁴ The uncomfortable reality is that environmental externalities are often borne by the poorest communities, and that the people making up those communities tend, disproportionately, to be people of color.⁵ Acknowledging these disparities in New Jersey’s first statewide EJ policy created by Executive Order No. 96 in 2004, then-Governor Jim McGreevy declared that “New Jersey’s communities of color and low-income communities have historically been located in areas of the State having a higher density of known contaminated sites,” and that “the cumulative impact of multiple sources of exposure to environmental hazards in low-income and people of color communities...requires an interagency response.”⁶

Far from a new phenomenon in 2004, this inequality has been at the core of the EJ movement since its earliest days. Indeed, the movement is now commonly understood as springing from the civil rights movement.⁷ While there can be little doubt that the raised consciousness and spirit of social activism that fueled the broader civil rights movement also fueled EJ concerns, the EJ movement more accurately began as a series of discrete grassroots actions directed primarily at local environmental concerns.⁸ Together, these relatively isolated actions began to develop a collective trajectory: Facilities with the propensity to cause adverse environmental impacts seemed routinely to be sited in poor communities of color, which bore a disproportionate amount of the negative externalities of industrial land use decisions.⁹ In the late 1970s and early 1980s, this issue spurred protests against a PCB-containing landfill by activists in Warren County, North Carolina, attracting national attention and leading some to mark it as the genesis of the EJ movement.¹⁰

Two key reports followed and solidified the EJ movement. The first, issued by the U.S. General Accounting Office in 1983, focused on the Southeastern United States, and discovered that the majority of landfills were placed in poor and African-American communities.¹¹ The second, released in 1987, was a more exhaustive study of the locations of commercial hazardous waste facilities across the entire country, conducted by the United Church of Christ's Commission for Racial Justice.¹² The latter study concluded that race was the key factor in determining where hazardous waste facilities would be located nationwide.¹³ These two reports, along with a litany of other writings, protests, court battles, and an executive order by President Bill Clinton in 1994,¹⁴ galvanized a fight against discrete industrial facility siting decisions into a cohesive EJ movement.

Against this backdrop, and in the 1990s, the small, predominantly African-American city of Chester in Delaware County, Pennsylvania, became ground zero of the EJ movement.¹⁵ In Chester, the movement found a community with not only high rates of poverty, crime, and unemployment, but also with higher than average lead levels in children's blood, a higher than average risk of cancer, a mortality rate higher than the rest of the county, and the highest child-mortality rate in all of Pennsylvania.¹⁶ To EJ advocates, it was no coincidence that Chester also happened to be home to a disproportionate number of commercial hazardous waste facilities.¹⁷ Meanwhile, in the rest of Delaware County (which was apparently more than 91 percent Caucasian), only two such waste facility permits were granted, and their combined capacity was 1,400 tons per year.¹⁸ Taking aim at the flow of waste and industrial facilities into the city, local citizens formed a group to give voice to the environmental concerns of the community.¹⁹ Eventually, through the involvement of public interest lawyers, the group Chester Residents Concerned for Quality Living (CRCQL) began pursuing legal avenues to limit, or at least frustrate, attempts to locate additional industrial and waste facilities in Chester.²⁰

In 1996, CRCQL filed a lawsuit in federal court against the state environmental agency alleging its issuance of a permit to a petroleum-contaminated soil remediation plant was a violation of residents' civil rights under Section 601 of the Civil Rights Act, Title VI, as well as a violation of EPA regulations promulgated under Section 602 of Title VI.²¹ The latter claim proved essential. Under Section 601, there is an express private right of action for individuals, but succeeding on such a claim requires a showing of intentional discrimination.²² Since CRCQL (and indeed most plaintiffs alleging violations based on the discriminatory siting of waste facilities),

could not demonstrate that the high number of such facilities in Chester was the direct product of intentional discrimination, their only hope was for the court to infer a private right of action under Section 602.²³ In such an event, CRCQL would be able to succeed on a disparate impact analysis, based on a showing that the state's siting decisions disproportionately affected the African-American residents of Chester.²⁴ In 1997, the Third Circuit held that CRCQL could maintain an action under discriminatory effect regulations promulgated by the EPA pursuant to Section 602.²⁵

While the Third Circuit's decision obviously was a major victory for the residents and EJ advocates, it ultimately proved fleeting, as the underlying state permit expired after the ruling, leading the Supreme Court to declare the issue moot and vacate the Third Circuit's judgment before addressing its merits.²⁶ In the years that followed, the Supreme Court cast further doubt upon the precedential value of the Third Circuit's earlier decision in Chester when it issued its 2001 decision in *Alexander v. Sandoval*, foreclosing the possibility of inferring a private right of action under Title VI based on federal regulations that target disparate impact.²⁷

The impact of *Sandoval* reverberated in New Jersey, when a community of predominantly African-American and Hispanic residents in Camden challenged the environmental permits issued to a cement-grinding facility in a series of cases known as *South Camden Citizens in Action v. New Jersey Dep't of Env't Prot.*²⁸ The South Camden residents were initially successful in obtaining a preliminary injunction to prevent the siting of the facility under a disparate impact theory in April 2001, just five days before the Supreme Court issued its decision in *Sandoval*, foreclosing the relief for which they fought.²⁹ The Third Circuit ultimately found that, after *Sandoval*, no right to be free from disparate impact

discrimination can be found in either Section 601 or Section 602 of Title VI.³⁰

While the Chester and South Camden cases proved anticlimactic with respect to the residents' civil rights claims against the state, they brought forth a critical acknowledgement, that industrial facilities have been routinely sited in poor, largely minority communities.³¹ These examples suggest to EJ advocates that industry is attracted to Chester and Camden, and cities like them, because they represent a path of least resistance.³² Camden's fight, like Chester's, typifies what the EJ movement has, at its center, done most effectively. As these decisions demonstrate, by organizing and resisting the siting of such facilities in their cities, the people of Chester and Camden altered the land use calculus of some industrial sectors and inspired greater engagement in local decision-making.

Today, EJ is often viewed as a coherent, unified movement. There is a shared understanding of the movement's existence as a wide-ranging campaign directed at protecting minority and low-income populations from absorbing negative environmental outcomes by virtue of their relative social, economic, or political weakness.³³ This broad view of the movement, however, is most useful in the abstract, as a point of reference. In practice, the EJ movement is most effective when it is operating at the local level, directed toward unique local concerns.³⁴ And, while prevailing notions of EJ have expanded over the years, taking on a broader range of issues, the outcomes highlighting the injustices at the core of the movement remain fundamentally local—in land use and public service decisions that implicate local actors.³⁵

The local nature of EJ concerns is manifest in the ongoing water crisis in Flint, Michigan. The crisis in Flint is one grounded in governmental miscalculation, and, some would argue, indiffer-

ence.³⁶ In short, between 1967 and 2000, Flint's public water was supplied by the Detroit Water and Sewerage Department under the terms of a long-term contract.³⁷ Prior to 1967, Flint's water was supplied by a city-owned system established in 1883, which drew from the Flint River and treated the supply at a waste treatment plant.³⁸ This aged system served only as an emergency backup after 1967 and was run just a handful of times each year, solely for maintenance purposes.³⁹ After the initial contract expired in 2000, the arrangement with Detroit continued on a year-to-year basis, subject to what turned out to be consistent rate increases each year.⁴⁰ In early 2014, after failing to negotiate the terms of a renewal term with Detroit, the city began treating water from the Flint River, using the old system, and distributing it to residents.

Soon thereafter, residents began to complain about the smell, taste, and appearance of the water. Eventually, General Motors ceased using it in their plant entirely, noting its corrosive effect on its parts and machinery.⁴¹ What is now known is this: The water treatment was inadequate, leading to the distribution of corrosive water that, in addition to causing a number of independent health problems, eventually began leaching lead from the city's aging pipes; elevating blood-lead levels in residents, particularly children; and exposing them to a variety of health risks.⁴² Despite the rapidity with which these issues began revealing themselves, it was not until late 2015 that authorities began to acknowledge the problem.⁴³

The decisions, failures, and neglect, which led to the water crisis in Flint, implicate a multitude of governmental agencies and actors, and are exhaustively detailed in a report commissioned by Michigan's governor.⁴⁴ But the socioeconomic undercurrent was all too familiar to EJ advocates. Even before the water crisis, the economic and demographic con-

ditions of Flint had come to represent the type of industrial decline that has plagued working-class communities since the late 20th century.⁴⁵ As manufacturing jobs dwindled, so too did the population of Flint. By 2010, Flint's population was half of what it was in 1960, over 40 percent of its population was living below the federal poverty threshold,⁴⁶ the median value of its owner-occupied homes was one-fifth of the national average,⁴⁷ and the city was plagued by crime.⁴⁸

If the strength of the EJ movement is at its peak when directed locally, the tragedy in Flint presented a unique challenge, in the sense that the key decision makers operated externally, removed from the crisis and its victims.⁴⁹ As a governor-commissioned report on the crisis explains, it occurred "when state-appointed emergency managers replaced local representative decision-making in Flint, removing the checks and balances and public accountability that comes with public decision-making."⁵⁰ But while the challenge may have been unique, the lesson learned was less so. As the report goes on to proclaim, the crisis in Flint is "also a story [] of something that *did* work," noting that were it not for "the critical role played by engaged Flint citizens, by individuals both inside and outside of government who had the expertise and willingness to question and challenge government leadership, and by members of a free press," the crisis may never have been exposed and mitigation efforts may never have begun.⁵¹

In New Jersey, then-Governor McGreevy's 2004 executive order served as a call to action for all executive branch bodies to consider impacts upon vulnerable EJ communities in their decision-making processes and established a petition process for those communities to seek redress.⁵² However, advocates have argued that past administrations in Trenton have only paid lip service to EJ.⁵³ And so, the administration of recently elected Governor Phil Murphy has been called upon to

undertake a comprehensive EJ initiative.⁵⁴ In a report to the new governor, his Environmental and Energy Transition Advisory Committee recommended the appointment of a senior environmental justice advisor who would direct an open public process with a re-tooled Environmental Task Force.⁵⁵ The task force would conduct roundtables throughout the state to ensure meaningful stakeholder engagement on how best to evaluate cumulative environmental impacts, reduce health disparities, and improve the quality of life within EJ communities.⁵⁶

Beyond study and engagement, it was suggested that the governor direct the New Jersey Department of Environmental Protection (NJDEP) to update and resurrect its EJ screening tool to identify areas with severe pollution loading and cumulative impact so resources could be redirected to reduce pollution and health disparities within target communities.⁵⁷ With the crises in Flint likely on their minds, the transition team recommended that state agencies be directed to coordinate efforts to reduce the incidence of childhood lead poisoning, and that options be explored to leverage federal Children's Health Insurance Plan funding to protect low-income children from lead.⁵⁸

Of course, there is a question of how such an ambitious EJ agenda would be funded. On that score, the transition team suggested the governor tap into funds that could become available when the state rejoins the Regional Greenhouse Gas Initiative, the group of nine states in the Northeast working to address climate change impacts, primarily from power plant emissions.⁵⁹ It was also suggested that the state direct funds from an anticipated \$140 million emissions standards settlement with Volkswagen to a new EJ initiative.⁶⁰

Governor Murphy has now begun the work of refocusing the executive branch on EJ concerns. For instance, on April 20, 2018, the governor stated that "[g]ood

environmental policy is something that must lift all communities," when he signed Executive Order No. 23, which he said "will ensure state agencies are considering the cumulative impacts of their actions in overburdened communities on an ongoing basis."⁶¹ Like those before it, the new EJ executive order acknowledges the disproportionate impacts upon low-income communities and communities of color.⁶² The order charges the NJDEP with developing guidance for all executive branch agencies on how to consider EJ concerns in implementing their various responsibilities. Notably, neither the order nor the guidance developed pursuant to it will create a private right of action (*i.e.*, EJ communities still lack the legal mechanism to directly challenge disparate impacts in court). But there is renewed hope.⁶³ And as Dr. King noted, "we must accept finite disappointment but must never lose infinite hope."⁶⁴

With the power of both pulpit and purse, the new administration in Trenton may help guide and focus EJ efforts. But as can be gleaned from the experiences outlined in the cases regarding Chester, Camden, and Flint, local decision-making will continue to drive renewal within the communities that need it most. How this administration supports or discourages local actors will, in part, determine its success in improving the quality of life in EJ communities. Just as it was in the beginning, the fight for environmental justice is most often a local one. ☪

Adam C. Arnold is a senior associate in the environmental law department at Gibbons P.C. of Newark, where he litigates state and federal environmental claims of all types and counsels businesses across various industries with respect to environmental compliance and due diligence issues in corporate and real estate transactions.

Endnotes

1. Drew Dillinger, Dr. King's

Interconnected World, *The New York Times* (Dec. 22, 2017) available at <https://www.nytimes.com/2017/12/22/opinion/martin-luther-king-christmas.html> (last viewed May 11, 2018).

2. *Learn About Environmental Justice*, Environmental Protection Agency, available at <https://www.epa.gov/environmentaljustice/learn-about-environmental-justice>.
3. The 25 Most Diverse Towns in New Jersey, Ranked, NJ Advance Media (Feb. 8, 2018) available at http://www.nj.com/data/2018/02/the_25_most_diverse_towns_in_new_jersey.html.
4. *Environmental Justice*, Environmental Protection Agency, <https://www.epa.gov/environmentaljustice>. This message has remained static on the EPA's website since at least 2008.
5. Exec. Order No. 96 (2004), available at <http://nj.gov/infobank/circular/eom96.htm> (last viewed on May 9, 2018).
6. *Id.*
7. *See, e.g.*, Jonathan C. Augustine, Environmental Justice in the Deep South: A Golden Anniversary Reflection on Stimulus and Change, 47 *U.S.F.L. Rev.* 399, 433 n. 48 (2013) (listing a number of articles and commentators who have posited the environmental justice movement as a part of the broader civil rights movement).
8. *See e.g.* Sheila Foster, Justice from the Ground Up: Distributive Inequities, Grassroots Resistance, and the Transformative Politics of the Environmental Justice Movement, 86 *Cal. L. Rev.* 775, 788 (1998).
9. *Id.*
10. Augustine, *supra*, at 410.
11. U.S. General Accounting Office, Siting Hazardous Waste Landfills and Their Correlation with Racial

- Status of Surrounding Communities (1983), <http://archive.gao.gov/d48t13/121648.pdf>.
12. United Church of Christ, Commission for Racial Justice, A National Report on the Racial and Socio-Economic Characteristics of Communities with Hazardous Waste Sites (1987), available at <https://www.nrc.gov/docs/ML1310/ML13109A339.pdf> (last viewed on May 9, 2018).
 13. *Id.*
 14. In 1994, President Bill Clinton signed an executive order directing, among other things, 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.” Exec. Order No. 12898, 59 F.R. § 7629 (1994), available at <https://www.archives.gov/files/federal-register/executive-orders/pdf/12898.pdf>.
 15. See Foster, *supra*, at 779 and 782.
 16. *Id.*
 17. *Chester Residents Concerned for Quality Living v. Seif*, 132 F.3d 925, 927 n. 1, 928 (3d Cir. 1997), *vacated*, 524 U.S. 974, (1998).
 18. *Id.*
 19. *Chester Residents Concerned for Quality Living v. Seif*, 944 F. Supp. 413, 414-16 (E.D. Pa. 1996).
 20. *Id.*
 21. 132 F.3d at 927-28.
 22. *Id.* at 936-37.
 23. *Id.*
 24. *Id.* at 937.
 25. *Id.*
 26. 524 U.S. 974 (1998).
 27. 532 U.S. 275 (2001).
 28. *S. Camden Citizens in Action v. Dep’t of Env’tl. Prot.*, 274 F.3d 771 (3d Cir. 2001), *reh’g den.*, 33 Env’t Rep. (BNA) (3d Cir. Jan. 15, 2002); *S. Camden Citizens in Action v. Dep’t of Env’tl. Prot.*, 145 F. Supp. 2d 505 (D.N.J. 2001). *S. Camden Citizens in Action v. Dep’t of Env’tl. Prot.*, 145 F. Supp. 2d 446 (D.N.J. 2001).
 29. *S. Camden Citizens in Action*, 145 F. Supp.2d at 549.
 30. *S. Camden Citizens in Action*, 274 F.3d at 788-790.
 31. See *e.g.*, *id.* at 774-75.
 32. See Foster, *supra*, at 800.
 33. *Id.*
 34. *Id.* at 838-841.
 35. See, Augustine, *supra*, at n. 17.
 36. Jonathan Lubrano, Water, Lead, And Environmental Justice: Easing The Flint Water Crisis With A Public Water Contamination Liability Fund, 42 *Wm. & Mary Env’tl. L. & Pol’y Rev.* 331, 341-42 (2017).
 37. Flint Water Advisory Task Force, Final Report at 15 (March 21, 2016) (emphasis in original), available at <https://perma.cc/4REX-3HSV> (last viewed on May 9, 2018).
 38. *Id.*
 39. *Id.* at 15-16.
 40. *Id.*
 41. *Id.* at 17.
 42. *Id.* at 18.
 43. *Id.* at 18-19.
 44. *Id.*
 45. See *e.g.*, Demographic and Labor Market Profile: City of Flint, Michigan Department of Technology, Management, and Budget (April 2016) available at http://milmi.org/Portals/137/publications/Flint_City_Demographic_and_Labor_Mkt_Profile.pdf (last viewed on May 15, 2018).
 46. *Id.* at 13.
 47. *Id.* at 12.
 48. *Id.* at 16.
 49. Oliver Milman, *The Guardian*, Flint water crisis: Michigan officials ignored EPA warnings about toxicity (Feb. 3, 2016), available at: <https://www.theguardian.com/us-news/2016/feb/03/flint-water-crisis-congress-michigan-officials-ignored-epa-warnings-lead>.
 50. *Id.*
 51. *Id.*
 52. See note 5, *supra*, and accompanying text.
 53. Tom Johnson, Environmental Justice Should Be Core Principle of Murphy Administration, *NJ Spotlight* (Jan. 29, 2018), available at <http://www.njspotlight.com/stories/18/01/28/environmental-justice-should-be-at-core-of-murphy-administration> (last viewed on May 15, 2018).
 54. Report of the Environment and Energy Transition Advisory Committee (Jan. 1, 2018), available at: <http://nj.gov/governor/news/reports/docs/Environment%20and%20Energy%20Transition%20Report.pdf> (last viewed on May 9, 2018).
 55. *Id.*
 56. *Id.*
 57. *Id.*
 58. *Id.*
 59. *Id.*
 60. *Id.*
 61. Press Release, Governor Murphy Signs Executive Order to Address Environmental Justice Issues in New Jersey’s Urban Communities, available at http://www.state.nj.us/governor/news/news/562018/approved/20180420d_eo.shtml (last viewed on May 15, 2018).
 62. Executive Order No. 23 (April 20, 2018), available at <http://www.nj.gov/infobank/eo/056murphy/pdf/EO-23.pdf> (last viewed on May 9, 2018).
 63. *Id.*
 64. Rev. Dr. Martin Luther King Jr., Unfulfilled Hopes, Sermon Delivered at Dexter Avenue Baptist Church (April 5, 1959).