

# ENVIRONMENTAL JUSTICE FOR ALL

People of color are often disproportionately impacted by environmental hazards. Trial lawyers can play a crucial role in righting this devastating imbalance.

By || **DANIELLE W. MASON**

In this country, more than half of the people who live close to hazardous waste sites are people of color, and they are more likely to die of environmental causes.<sup>1</sup> Communities of color are 75% more likely to live near commercial facilities that emit nuisance noises and odors and near air-polluting traffic.<sup>2</sup> And people of color are exposed to more air pollution across regions and income levels throughout the United States.<sup>3</sup>

Environmental racism is the disproportionate impact of environmental hazards on people of color.<sup>4</sup> Black children suffer disproportionately more from respiratory disease and infection than white children.<sup>5</sup> A recent study revealed that racial and ethnic minorities are at higher risk of premature death due to air pollution alone.<sup>6</sup>

For example, in Louisiana—which has an area known as “Cancer Alley” due to a row of polluting chemical plants—a study correlated higher cancer risk for its Black or impoverished residents because of high air toxicity.<sup>7</sup> The plants have been cited as one of the leading causes of disproportionate health impacts in the state.<sup>8</sup>

And we are all familiar with the struggles that the Black residents of Flint, Mich., continue to face as a result of drinking and bathing in water contaminated with lead at levels several thousand times higher than the federal standard allows.<sup>9</sup> And more recently, a water shortage crisis in Jackson, Miss., with a population that is more than 80% Black, left residents without access to safe drinking water.<sup>10</sup>

These communities also are more at risk for devastating impacts from events such as climate change and a global pandemic. A study of 108 urban areas that were formerly “redlined” neighborhoods (the discriminatory practice of denying services, such as mortgage loans, in certain neighborhoods based on their racial makeup) recorded temperatures in some cases up to 13 degrees hotter than non-redlined neighborhoods.<sup>11</sup> And a study released in April 2021 showed that even a small increase in particulate matter emitted from power plants corresponded to increases in COVID-19 mortality.<sup>12</sup>

Unfortunately, these outcomes are no accident or mere coincidence. The ugly truth is that institutional rules (such as redlining, zoning, and colorblind adaptation planning<sup>13</sup>); regulations; and corporate decisions often deliberately target low-income, minority communities for the siting of polluting factories and hazardous waste disposal because these communities have very little ability or power to fight against them. Building on the environmental justice movement that began in the 1960s, trial lawyers can deploy their legal and advocacy skills to fight this injustice.

## The History of the Environmental Justice Movement

The first mobilization of Black Americans against environmental injustice was the Memphis Sanitation Strike in Memphis, Tenn., in 1968.<sup>14</sup> The strike sought to achieve fair pay and better working conditions for Black sanitation workers who were exposed to pollution and toxic substances.

In 1979, a Black community in Houston fought to keep the Whispering Pines Sanitary Landfill from being placed within 1,500 feet of a local public school.<sup>15</sup> The resulting class action, *Bean v. Southwestern Waste Management Corp.*, “was the first of its kind in the

United States [claiming] environmental discrimination in waste facility siting under civil rights laws.”<sup>16</sup>

While the lawsuit was unsuccessful, the effort spurred further cases and activism across the country—most notably, the nonviolent sit-in protest in Warren County, N.C., in 1982 when more than 500 environmentalists and civil rights activists were arrested while

One issue is the absence of minority representation on local zoning boards or state environmental agencies with decision-making power.

protesting against a polychlorinated biphenyl landfill in the area.<sup>17</sup> This event is widely recognized as the catalyst for the environmental justice movement and led to the first studies establishing the disparate impact of environmental danger and harm on people of color.<sup>18</sup>

The Warren County protests further led to a U.S. General Accounting Office study of eight Southeastern states that found three out of four hazardous waste landfills examined were located in communities where Black people made up at least 26% of the population and whose family incomes were below the poverty level.<sup>19</sup> And a 1987 study by the United Church of Christ Commission on Racial Justice found that more than 15 million Black people, 8 million Hispanic

people, and half of all Asian/Pacific Islanders and Native Americans “resided in communities with at least one abandoned or uncontrolled toxic waste site.”<sup>20</sup>

These pioneering studies demonstrated the significant role that race played in where hazardous waste sites are placed and helped galvanize the environmental justice movement.<sup>21</sup> A flurry of action by environmental and civil rights groups followed.<sup>22</sup> However, government and legal obstacles stifled meaningful change.

For example, in 1994, President Bill Clinton issued Executive Order No. 12,898, which directed federal agencies such as the EPA to help these disenfranchised communities.<sup>23</sup> But a review by the U.S. Commission on Civil Rights in 2016 concluded that little progress had been made.<sup>24</sup> In its report, the commission noted that the EPA had a history of being unable to meet regulatory deadlines as well as delays in responding to Title VI complaints and that its Office of Civil Rights had never made a formal finding of discrimination or denied or withdrawn financial assistance from offending polluters.<sup>25</sup>

Despite the delays in meaningful action in the past, new government support from President Joe Biden suggests that things may be about to change. On Sept. 24, 2022, the EPA launched a new national office dedicated to advancing environmental justice and civil rights.<sup>26</sup> The office plans to dedicate more than 200 EPA staff across 10 regions who will engage with communities on environmental justice concerns, offer grants and technical assistance, and incorporate policies and programs to ensure that anyone receiving EPA funding complies with applicable civil rights laws.<sup>27</sup>

## Addressing Systemic Failures

Obtaining environmental justice for these impacted communities is about

more than just acknowledging the problems that exist and persist. It must necessarily include a redistribution of decision-making power back to the people most systematically affected. Self-education and awareness are good starting points,<sup>28</sup> but elevating the voices of these communities and holding local representatives accountable are also important tools.

**Lack of representation of those impacted.** One reason for the lack of improvement stems from the absence of minority representation on local zoning boards or state environmental agencies that often make the decisions to allow the placement of landfills or polluting factories in minority neighborhoods.<sup>29</sup> A 2014 survey conducted by a professor at the University of Michigan School for Environment and Sustainability confirmed that Black communities are often left out of the movement while more than 80% of people involved in environmental nonprofits designed to help are white.<sup>30</sup> Residents of impacted areas are often unable to participate in the administrative hearings to raise opposition due to lack of resources, limited free time, or no connections to political networks.<sup>31</sup>

As a result, the movement is largely conducted by nonminority allies instead of those who have lived with their families in and around these toxic and polluted areas for generations.

**Legal obstacles.** Alleging race discrimination under federal law has been a primary avenue for legal challenges, but it has been difficult to succeed on such claims against corporate or state polluters due to the U.S. Supreme Court precedent established in the 2001 case *Alexander v. Sandoval*.<sup>32</sup> That case involved §601 of Title VI of the Civil Rights Act of 1964, which prohibits “discrimination under any program or activity receiving Federal financial assistance,” and §602, which empowers federal agencies to promulgate regulations to enforce §601.



The *Sandoval* Court held that the act does not provide a private right of action under §602 for claims that a regulation or other agency action results in a discriminatory disparate impact (unintentional discrimination that occurs when actions are ostensibly neutral but in practice harm others disproportionately).<sup>33</sup> Instead, claims can be brought only for instances of intentional discrimination in violation of §601.<sup>34</sup> But it is unlikely one would ever find a “smoking gun” document in discovery that would suggest the placement of a toxic waste site or polluting factory was driven exclusively by the race or income of the inhabitants of the area.<sup>35</sup>

Moreover, these companies and state agencies are usually well equipped with “race neutral” reasons for their decisions. Companies also tend to have well-funded and organized lobbying efforts that demonstrate an economic boon to the community while concealing

or de-emphasizing the negative effects to the people surrounding it.

*Sandoval* ultimately shut down Title VI lawsuits involving environmental justice and disparate impact.<sup>36</sup> Without political clout or capital, and without a strong legal avenue to raise challenges, the problems caused by environmental racism continue to fester, leaving residents of these areas sick, frustrated, and further impoverished due to depressed and diminished property values.

## What Options Are Left

Despite the many obstacles to successful environmental justice claims, trial lawyers have some avenues to pursue.

**Tort law causes of action.** Common law tort claims such as public and private nuisance, trespass, and strict liability can be used to redress environmental harms. These claims are challenging to prove and have seen varying levels of success in court, but they can be a way to fill in

For more resources and to connect with other AAJ members handling these cases, join the Environmental Racism Litigation Group. With a focus on specialized practices and specific products, AAJ Litigation Groups allow trial lawyers to quickly share ideas, experiences, and resources in a secure environment. Go to [justice.org/litigationgroups](https://www.justice.org/litigationgroups).

gaps in environmental laws.<sup>37</sup> Remedies can include damages and equitable relief such as injunctions or requirements to clean up or abate pollution.<sup>38</sup>

**Citizen suits.** Federal environmental statutes such as the Clean Air Act; Clean Water Act; and Comprehensive Environmental Response, Compensation, and Liability Act provide for citizen suits—allowing private individuals or advocacy organizations to sue government agencies and polluters for failure to comply with environmental laws. Citizen suits have been a crucial way to hold polluters accountable when government agencies fail to or do not have the resources to adequately enforce their laws.<sup>39</sup>

**§602 administrative complaints.** Title VI provides a mechanism for the public to report discrimination by entities that receive EPA financial assistance through an administrative complaint process.<sup>40</sup> The agency can withdraw or threaten to withdraw funding unless the entity complies with Title VI nondiscrimination mandates.<sup>41</sup> However, this process typically has been bogged down by bureaucratic red tape and delays.<sup>42</sup>

Although environmental justice advocates have persevered and used the legal tools at their disposal, these existing mechanisms are not sufficient to fully address environmental racism—especially before a community suffers decades-long effects.

## Congressional Action Is Needed


An important measure that could fundamentally reshape the environmental justice movement—and give trial lawyers the tools they need to continue the fight—is the Environmental Justice for All Act.<sup>43</sup> As introduced in 2021, the act would make sweeping changes to federal law aimed at reducing disparities in environmental health along economic and racial lines. Its measures include

- establishing environmental justice requirements, advisory bodies, and programs
- prohibiting disparate environmental impacts on the basis of race, color, or national origin
- allowing affected communities to sue over disparate impacts
- directing federal agencies to follow certain requirements concerning environmental justice, such as preparing community impact reports
- creating an advisory body and positions, including the White House Environmental Justice Interagency Council, which would be required to issue an environmental justice strategy
- mandating requirements and programs related to chemicals and toxic ingredients in certain products.

Passage of this bill in Congress would effectively undo the *Sandoval* precedent and would add a private right of action to §602 of the Civil Rights Act based on intentional discrimination or disparate impact, permitting people to file lawsuits instead of going through futile administrative processes. It also would strengthen the National Environmental Policy Act by requiring federal agencies to provide early and meaningful community involvement opportunities for proposed projects that may negatively impact the surrounding area, giving a much-needed “seat at the table” to those who historically have had none.

In the meantime, other federal legislation recently passed included some environmental justice-related measures.<sup>44</sup> The Infrastructure Investment and Jobs Act included several infrastructure improvements that will impact communities, such as access to safe drinking water, cleaning up Superfund sites and other legacy contamination in minority

communities, and reducing vehicle emissions.<sup>45</sup> And the Inflation Reduction Act provided for grant funding “to support community-led projects in disadvantaged communities and address disproportionate environmental and public health harms related to pollution and climate change.”<sup>46</sup>

The health and wealth disparity of people of color continues to widen as affected communities cannot afford or do not have access to proper medical treatment or preventative care, nor can they sell their properties and move to a safer location. New and innovative litigation strategies are both warranted and needed to solve these systemic problems and truly achieve liberty and justice for all. 

---

**Danielle W. Mason** is a founder of *Bullock Ward Mason* and can be reached at [danielle@bwmlaw.com](mailto:danielle@bwmlaw.com).

## NOTES

1. Aneesh Patnaik et al., *Racial Disparities and Climate Change*, Princeton Student Climate Initiative, Aug. 15, 2020, <https://psci.princeton.edu/tips/2020/8/15/racial-disparities-and-climate-change>.
2. Nathalie Baptiste, *Study: Black People Are 75 Percent More Likely to Live Near Toxic Oil and Gas Facilities*, Mother Jones, Nov. 14, 2017, <https://tinyurl.com/ypam8rzz>.
3. EPA, *Study Finds Exposure to Air Pollution Higher for People of Color Regardless of Region or Income*, Sept. 20, 2021, <https://www.epa.gov/sciencematters/study-finds-exposure-air-pollution-higher-people-color-regardless-region-or-income>.
4. Victoria Peña-Parr, *The Complicated History of Environmental Racism*, UNM Newsroom, Aug. 4, 2020, <http://news.unm.edu/news/the-complicated-history-of-environmental-racism>.
5. Patnaik, *supra* note 1.
6. Karen Feldscher, *Race Still a Factor in Air Pollution Exposure*, The Harvard Gazette, Jan. 25, 2022, <https://news.harvard.edu/gazette/story/2022/01/study-shows-stark-disparities-in-race-and-pollution-exposure/>.
7. Kimberly Terrell & Gianna St. Julien, *Air Pollution Is Linked to Higher Cancer Rates*

- Among Black or Impoverished Communities in Louisiana*, 17 *Env't Rsch. Letters* 1, 1 (Jan. 2022), <https://iopscience.iop.org/article/10.1088/1748-9326/ac4360>.
8. *Id.*
  9. Tracy Fernandez Rysavy & André Floyd, *People of Color Are on the Front Lines of the Climate Crisis*, *Green Am.*, <https://www.greenamerica.org/climate-justice-all/people-color-are-front-lines-climate-crisis>.
  10. Kiyana Patel, *The Jackson Water Crisis: A Relic of Environmental Racism?*, *Davis Vanguard*, Sept. 18, 2022, <https://tinyurl.com/26mebdkv>.
  11. Ivana Ramirez, *10 Examples of Environmental Racism and How It Works*, *Yes Mag.*, Apr. 22, 2021, <https://www.yesmagazine.org/environment/2021/04/22/environmental-racism-examples>.
  12. Xiao Wu et al., *Air Pollution and COVID-19 Mortality in the United States: Strengths and Limitations of an Ecological Regression Analysis*, *Sci. Advances*, Nov. 4, 2020, <https://projects.iq.harvard.edu/covid-pm>.
  13. This “refer[s] to vulnerability mitigation and adaptation planning projects that altogether overlook racial inequality—or worse dismiss its systemic causes and explain away racial inequality by attributing racial disparities to non-racial causes.” R. Dean Hardy, Richard A. Milligan, & Nik Heynen, *Racial Coastal Formation: The Environmental Injustice of Colorblind Adaptation Planning for Sea-Level Rise*, 87 *Geoforum*, 62, 62 (Dec. 2017), <https://doi.org/10.1016/j.geoforum.2017.10.005>.
  14. EPA, *Environmental Justice Timeline*, July 18, 2022, <https://www.epa.gov/environmentaljustice/environmental-justice-timeline>.
  15. *Id.*
  16. *Id.*
  17. *Id.*
  18. Dr. Robert Bullard, considered the father of the environmental justice movement, conducted a study on solid waste sites in Houston that determined that Black neighborhoods housed all five city-owned garbage dumps, 80% of city-owned garbage incinerators, and 75% of privately owned landfills, despite only representing 25% of the city's population. Robert Bullard, *Solid Waste Sites and the Black Houston Community*, 53 *Socio. Inquiry* 273 (Apr. 1983), <https://tinyurl.com/fjy9fe84>.
  19. GAO, *Siting of Hazardous Waste Landfills and Their Correlation With Racial and Economic Status of Surrounding Communities*, June 1, 1983, at 1, 3, <https://tinyurl.com/2sn358k9>.
  20. United Church of Christ, Comm'n for Racial Justice, *Toxic Wastes and Race in the United States*, 1987, at 1, 8, <https://www.nrc.gov/docs/ML1310/ML13109A339.pdf>.
  21. EPA, *supra* note 14.
  22. For more on the decades of activism following these studies, see *id.*
  23. EPA, *Summary of Executive Order 12,898—Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*, <https://www.epa.gov/laws-regulations/summary-executive-order-12898-federal-actions-address-environmental-justice>.
  24. U.S. Comm'n on Civil Rights, *Environmental Justice: Examining the Environmental Protection Agency's Compliance and Enforcement of Title VI and Executive Order 12,898*, Sept. 2016, at 1, 2, [https://www.usccr.gov/files/pubs/2016/Statutory\\_Enforcement\\_Report2016.pdf](https://www.usccr.gov/files/pubs/2016/Statutory_Enforcement_Report2016.pdf).
  25. *Id.*
  26. EPA, *EPA Launches New National Office Dedicated to Advancing Environmental Justice and Civil Rights*, Sept. 24, 2022, <https://www.epa.gov/newsreleases/epa-launches-new-national-office-dedicated-advancing-environmental-justice-and-civil>.
  27. *Id.*
  28. I recommend starting with Dr. Robert Bullard's book *Unequal Protection*.
  29. Jerry Anderson, *Environmental Justice: Where Are the Roadblocks?*, Jan. 20, 2021, *JD Supra*, <https://www.jdsupra.com/legalnews/environmental-justice-where-are-the-7811624/>.
  30. Linda Villarosa, *Pollution Is Killing Black Americans. This Community Fought Back*, *N.Y. Times Mag.*, July 28, 2020, <https://www.nytimes.com/2020/07/28/magazine/pollution-philadelphia-black-americans.html>.
  31. *Id.*
  32. See generally *Alexander v. Sandoval*, 532 U.S. 275 (2001). The case was a class action to enjoin Alabama from requiring driver's license exams be administered in English only as a violation of Title VI regulations that prohibit using federal funds in a way that effectively discriminates on the basis of race or national origin. See also *South Camden Citizens in Action v. N.J. Dep't of Env't Prot.*, 274 F.3d 771 (3d. Cir. 2001) (interpreting *Sandoval* in an environment case). The Supreme Court also has ruled that §1983 does not create privately enforceable rights related to disparate impact claims. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283–84, 286–87 (2002).
  33. *Sandoval*, 532 U.S. at 293.
  34. *Id.*
  35. See, e.g., *Bean v. Sw. Waste Mgmt. Corp.*, 482 F. Supp. 673, 680 (S.D. Tex. 1979). This case involved an allegation of discrimination based on the siting of a solid waste facility in a minority community. To establish that the siting decision was driven by a discriminatory intent, the plaintiff alleged that it was based on a pattern or practice of discrimination and that the decision amounted to discrimination because of the events leading up to the siting decision and the historical placement of landfills in minority communities. To show intentional discrimination, the plaintiff relied on statistical data, which the district court said was compelling at face value but could not prove intent because it didn't provide sufficiently detailed factual information showing that the decision was based on race.
  36. See Kyle W. La Londe, *Who Wants to Be an Environmental Justice Advocate?: Options for Bringing an Environmental Justice Complaint in the Wake of Alexander v. Sandoval*, 31 *B.C. Env't Aff. L. Rev.* 27, 35 (2004).
  37. *Id.* at 44–45. See also, e.g., *Baptiste v. Bethlehem Landfill Co.*, 965 F.3d 214 (3d Cir. 2020). For a thorough analysis of environmental torts, see Gerald W. Boston & M. Stuart Madden, *Law of Env't & Toxic Torts* 21–139 (1994).
  38. La Londe, *supra* note 36.
  39. See, e.g., Paul Kneitz, *Using Citizen Suits to Remedy Environmental Injustice and Achieve Clean Water in California*, *Golden Gate Univ. Sch. of Law Digital Commons* (Apr. 2020) (part of *Symposium: Poverty Law Conf. & Symposium*), <https://tinyurl.com/4ftzcmrk>; see also *Atl. Richfield Co. v. Christian*, 140 S. Ct. 1335 (2020).
  40. U.S. Comm'n on Civil Rights., *supra* note 24, at 22.
  41. *Id.* at 162.
  42. *Id.* at 163.
  43. The Environmental Justice for All Act was introduced in the last Congress as S. 872/H.R. 2021.
  44. For more information on environmental justice legislation at the state and federal levels, see Nat'l Conf. of State Legislatures, *State and Federal Environmental Justice Efforts*, Jan. 13, 2022, <https://tinyurl.com/mrynrah5>.
  45. The White House, *The Bipartisan Infrastructure Law Advances Environmental Justice*, Nov. 16, 2021, <https://tinyurl.com/29e2v349>.
  46. The White House, *Fact Sheet: Inflation Reduction Act Advances Environmental Justice*, Aug. 17, 2022, <https://tinyurl.com/yc2rups9>.