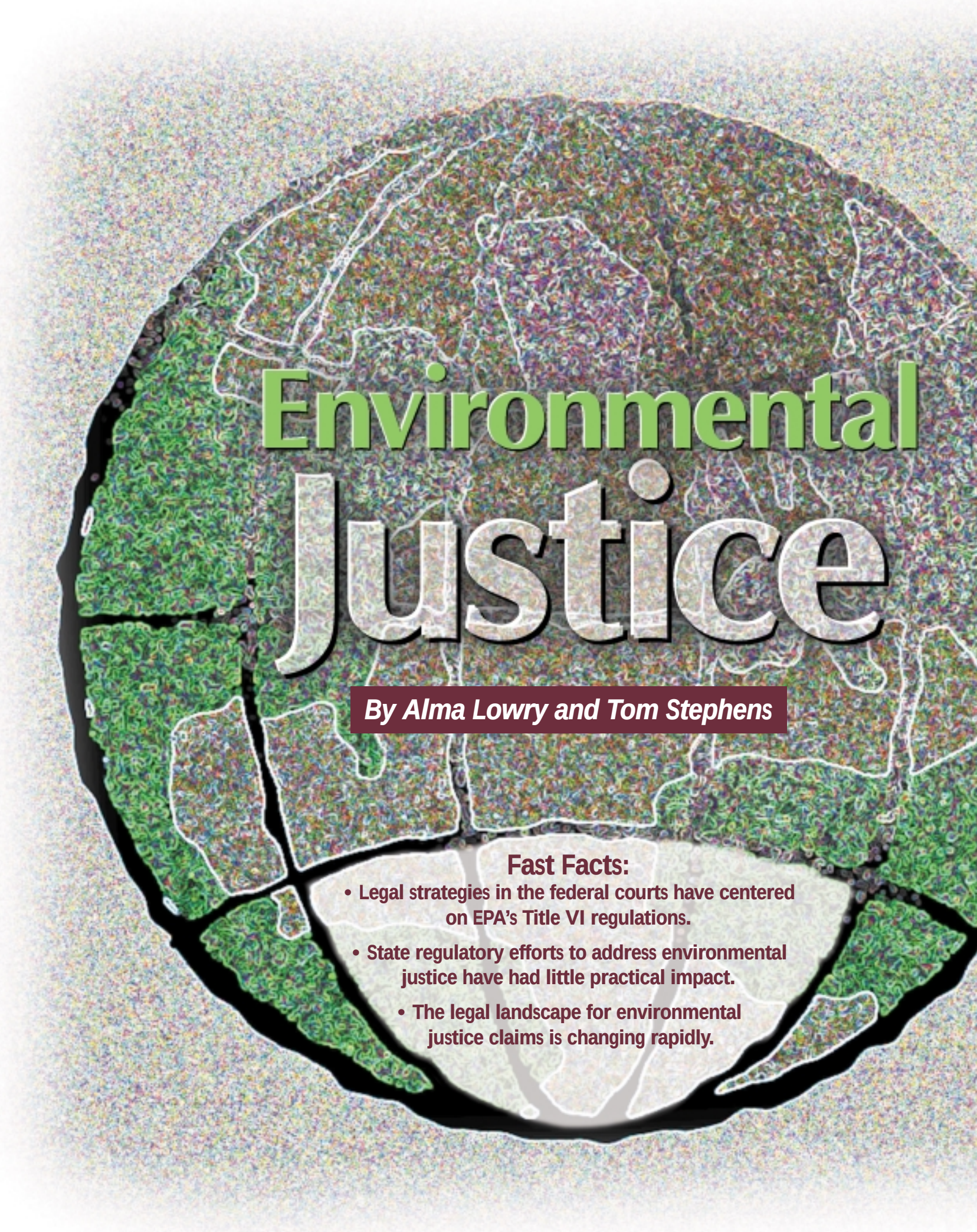

Environmental Justice

By Alma Lowry and Tom Stephens

Fast Facts:

- Legal strategies in the federal courts have centered on EPA's Title VI regulations.
- State regulatory efforts to address environmental justice have had little practical impact.
- The legal landscape for environmental justice claims is changing rapidly.

The environmental justice movement is working to prevent racial and social discrimination in an environmental context.

The environmental justice movement stems from the concern that low-income and minority communities suffer disproportionate exposure to environmental hazards, and that this disproportionate burden is unjust. Environmental justice claims typically arise in environmental site and permit decisions, which are based on administrative criteria developed by regulatory agencies under environmental statutes. The effect of these statutes and regulations on the quality of life in low-income and predominantly minority communities has generated a heated policy debate about social justice and power.

In many cases, environmental justice advocates have relied on community organizing and legislative work, rather than legal strategies, to move their struggle forward. Legal strategies have played an important role in the movement, however, and Michigan has figured prominently in the development of both administrative and judicial remedies. Due to recent United States Supreme Court and federal district court decisions in cases arising outside Michigan, the legal landscape for environmental justice claims is changing rapidly, creating new challenges and opportunities for environmental justice advocates.

Legal Framework

The first reported lawsuit alleging racial discrimination in an environmental context opposed the siting of a solid waste landfill in a Houston suburb and was filed in 1979.[1] This suit was brought under the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution but failed because the plaintiffs were unable to show intentional discrimination in the siting of landfills in their area. Since then, environmental justice advocates have tried both administrative complaints and other forms of direct litigation.

Administrative Remedies

The first steps toward formal administrative action arose out of Title VI of the Civil Rights Act of 1964.[2] Years before environmental justice was a coherent movement, the U.S. Environmental Protection Agency (EPA) adopted regulations enforcing Title VI.[3] These regulations, which are patterned after Title VI regulations issued by other federal agencies, prohibit recipients of federal funds from operating their programs in a way that has the effect of discriminating on the basis of race, national origin, or ethnicity.[4] The regulations establish a procedure for filing administrative complaints regarding their violation.[5]

In December 1992, Michigan residents challenging a proposed wood-waste fueled power plant in Flint filed the first formal environmental justice administrative complaint against the Michigan Department of Natural Resources, alleging discrimination in programs funded by the EPA.[6] Since then, the EPA's Office of Civil Rights (OCR) has agreed to investigate an additional 60 complaints, but has decided only one on its merits. Administrative enforcement of these claims has been side-tracked by political controversies arising from the EPA's efforts to formulate official written standards for deciding such cases.

On February 11, 1994, President Clinton issued an executive order[7] that nudged environmental justice from the arena of grassroots political organizing into the realm of formal regulatory activity. The order recognized environmental justice as a concern and directed federal agencies to develop plans to deal with it in their programs. After years of organizing and political advocacy, environmental justice had become a consideration in federal administrative decisions. However, the order did not create any enforceable legal rights, and environmental justice was still a long way from becoming legal grist for agency action.

In February 1998, the EPA issued its draft interim guidance regarding environmental justice claims under Title VI. The draft guidance proposed procedures for adjudicating complaints under Title VI regulations prohibiting racial discrimination, using a "disparate impact," or non-intentional standard. The draft guidance outlined the elements of a well-pleaded prima facie case of environmental racism, but was

criticized severely for many, often conflicting, reasons by environmental justice advocates, the regulated community, and state and local government. Industry and state and local government opposition centered in Michigan, where Detroit Mayor Dennis W. Archer, who cast environmental justice as incompatible with economic growth, sponsored a resolution of the U.S. Conference of Mayors opposing the EPA's Draft Guidance. OCR's only application of that guidance and resolution of an environmental justice decision on its merits dealt with a permit issued to Select Steel, a facility proposed near Flint, Michigan. *In re Select Steel Administrative Complaint File No. 5R-98-R5* (October 30, 1998).

In *Select Steel*, the EPA effectively abandoned enforcement of environmental justice, as embodied in the draft guidance. After a summary investigation of approximately two and a half months, OCR determined that, because the facility's emissions were not expected to affect the area's compliance with the National Ambient Air Quality Standards, there could be no adverse impact and, therefore, the Michigan Department of Environmental Quality's approval of a permit did not violate Title VI.

Environmental justice advocates objected to the perceived haste in OCR's *Select Steel* decision. They also argued that violation of a specific, technical regulatory standard, such as the National Ambient Air Quality Standards, should not be required to find a violation of Title VI. The EPA denied a widely supported petition for reconsideration and the *Select Steel* decision stands as the only administrative resolution of an environmental justice complaint.

In 1999, after the EPA's *Select Steel* decision, the Michigan Department of Environmental Quality (DEQ) and the city of Detroit convened a working group that issued environmental justice recommendations. Environmental justice activists withdrew from participation, because of concerns about the process and organization of the work group. The DEQ's recommendations were released publicly in January 2000, but have not been widely discussed or applied. As with the federal government, state regulatory efforts to address environmental justice have had little or no practical impact.

Actions at Law

Given the lack of success in the administrative arena, legal actions have become increasingly important for environmental justice advocates. While many claims are brought under state law or straight environmental law, others rely on federal civil rights laws, primarily Title VI.

The same Flint wood-waste burning power station that was the subject of the EPA's first administrative complaint was the target of a civil action. *NAACP–Flint Chapter v Engler, et al.*, No. 95-38228-CV (Genesee County Cir. Ct.). The plaintiffs alleged that siting the Genesee Power Station immediately to the north of Flint resulted in discrimination against the predominantly African American residents in the adjacent Flint neighborhoods. This historic action was brought under the Elliott-Larsen Civil Rights Act,[8] and the Michigan Constitution. Its trial in April 1997 received wide publicity as the first civil trial of environmental racism claims under a "disparate impact" standard. The plaintiffs focused on the state's failure to consider the cumulative impact of the lead emissions allowed under the proposed permit.

Legal strategies in the federal courts have centered on the **EPA's Title VI** regulations because they focus on the **actual effects** of a challenged policy or decision, **regardless of intent**.

On May 29, 1997, based on the "public health and general welfare" clause of the Michigan Constitution,[9] the circuit court prohibited the DEQ from granting air permits in Genesee County until it modified its permitting process to consider cumulative impacts. On appeal, the court of appeals vacated the decision because the plaintiffs had not pleaded or tried the case on the basis of that provision of the state constitution.[10] The court of appeals did not, however, invalidate the lower court's substantive interpretation of the Michigan Constitution, leaving open a potential avenue for environmental justice litigation in Michigan.

Legal strategies in the federal courts have centered on the EPA's Title VI regulations because they focus on the actual effects of a challenged policy or decision, regardless of intent. Similar regulations have been enforced judicially in other areas, such as education and employment discrimination, for years.[11] However, the availability of an implied private right of action to enforce these regulations was typically assumed or acknowledged without detailed analysis of the issue.[12]

On April 20, 2001, the Supreme Court in a non-environmental case, *Alexander v Sandoval*,[13] overturned years of judicial practice by finding that no implied private right of action existed to enforce Title VI regulations. The Court acknowledged the existence of an implied private right of action to enforce Section 601 of Title VI, which prohibits intentional discrimination on the basis of race, ethnicity, or national origin by recipients of federal funds. The Court then focused on Section 602 of the act, which mandates that federal agencies issue regulations to effectuate Section 601.[14] Because Section 602 dealt with the duties of federal agencies rather than protections afforded individual citizens, the Court found that Congress did not intend to create a private right of action under that provision and, accordingly, there was no implied private right of action to enforce Title VI regulations. However, the Court explicitly did not decide whether the regulations themselves were valid or whether they were privately enforceable by any other means.

While the civil rights and environmental justice communities were analyzing the effects of the *Sandoval* decision, a federal district court in New Jersey provided another

avenue of relief. In *South Camden Citizens in Action v New Jersey Department of Environmental Protection*,[15] residents of South Camden, New Jersey, challenged a permitting decision by the New Jersey Department of Environmental Protection under the EPA's Title VI regulations. A few days before the Supreme Court's *Sandoval* decision, the New Jersey District Court granted a preliminary injunction, halting issuance of the permit and ordering the Department of Environmental Protection to perform a cumulative impact analysis of its decision.[16] However, the case had been brought under an implied private right of action theory.[17] In response to *Sandoval*, the district court asked the parties to brief the availability of a remedy under the reconstruction-era Civil Rights Act, 42 USC 1983.

On May 10, 2001, in a detailed, 50-page opinion, the district court found that Title VI regulations create rights enforceable under 42 USC 1983, and reaffirmed the preliminary injunction in that case.[18] The district court noted that the *Sandoval* decision was expressly limited to the existence of an implied private right of action to enforce Title VI regulations[19] and that the availability of a remedy under Section 1983 is a distinct question from the existence of an implied private right of action.[20] The court then analyzed the EPA's Title VI regulations to determine if they create the kind of federal rights enforceable under Section 1983.

First, the district court determined that the regulations "have the force and effect of law" and could create federal rights enforceable under Section 1983.[21] The court then found that the EPA's Title VI regulations were intended to benefit the plaintiff; were not so vague and amorphous that enforcement would strain judicial competence; and unambiguously imposed a binding obligation on the state.[22] Finally, the district court determined that the administrative complaint procedure discussed above was not a comprehensive remedy that excluded Section 1983 claims.[23] Accordingly, the court confirmed the right to bring suit under the EPA's Title VI regulations and the appropriateness of the injunction previously issued in the case. The *South Camden* case is now on appeal to the third circuit.

In light of these recent decisions, environmental justice advocacy is now focusing on remedies available under Section 1983. On July 26, 2001, Michigan's first environmental justice claim under this provision was filed. The case, *Lucero et al. v Detroit Public Schools*, No. 01-72793 (ED Mich), challenges the Detroit Public Schools' decision to build an elementary school on a contaminated "brownfield" site in southwest Detroit, under a voluntary cleanup plan based on a barrier, rather than complete removal of contaminated soils. The plaintiffs allege that this decision subjects the predominantly African American and Hispanic students of the new school to an unreasonable risk of exposure to toxins and that this risk constitutes an adverse, disparate impact under the Department of Education's Title VI regulations.

On August 30, 2001, the court denied plaintiffs' motion for a preliminary injunction, holding that the plaintiffs had not yet proved a serious risk of exposure to contaminants remaining on the site. The court agreed, however, that the plaintiffs had the right to bring their claim under Section 1983, which clears the way for other Michigan advocates to bring Title VI claims under Section 1983 in the future.

Conclusion

Many people are concerned about environmental quality and public health conditions in low-income and minority communities. The intense legal debate surrounding environmental justice is now focused on whether there should be enforceable legal rights and meaningful standards to help resolve these concerns. The *Sandoval* and *South Camden* decisions signal only the beginning of this debate. Administrative remedies, though technically available, have limited effectiveness, but litigation options, particularly under Section 1983, remain a valid avenue for enforcement of environmental justice claims. Given the recent decisions in this area, environmental justice law will be an evolving and dynamic practice area for the foreseeable future. ✦

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Footnotes

1. *Bean v Southwestern Waste Management*, 482 F Supp 673 (SD Tex 1979).
2. 42 USC 2000d.
3. 40 CFR Part 7, published at 46 FR 2306.
4. 40 CFR 7.35.
5. 40 CFR 120 et seq.
6. *St. Francis Prayer Center, Michigan Department of Environmental Quality*, No. 05R-98-R5.
7. Executive Order No. 12898, *Federal Actions to Address Environmental Justice in Minority Populations and Low Income Populations.*
8. MCLA 37.2302
9. Const 1963, art IV, § 51.
10. *NAACP–Flint Chapter v State of Michigan, et al.*, No. 205264 (11/24/98) (unpublished decision).
11. See, e.g., *Villanueva v Carere*, 85 F3d 481, 486 (CA 10, 1996); *City of Chicago v Lindley*, 66 F3d 819, 827–29 (CA 7, 1995); *New York Urban League, Inc v New York*, 71 F3d 1031, 1036 (CA 2, 1995); *Elston v Talledega County Board of Education*, 997 F2d 1394, 1406–07 (CA 11, 1993); *David K v Lane*, 839 F2d 1265, 1274 (CA 7, 1988); *Larry P by Lucille P v Riles*, 793 F2d 969, 984 (CA 9, 1984).
12. See, e.g., *Villanueva*, 85 F3d at 486; *Lindley*, 66 F3d at 827–29; *New York Urban League, Inc*, 71 F3d at 1036; *Elston*, 997 F2d at 1406–07; *David K*, 839 F2d at 1274; *Larry P*, 793 F2d at 984.
13. 532 US ___; 121 S Ct 1511 (2001).
14. Id., slip op. at 9.
15. 145 F Supp 2d 446 (D NJ 2001).
16. Id. at 484–95.
17. Id. at 473–74.
18. *South Camden Citizens in Action v New Jersey Department of Environmental Protection*, 145 F Supp 2d 505, 549 (D NJ 2001).
19. Id. at 516–18. See also *Sandoval*, 121 S Ct at 1515–17.
20. *Middlesex County Sewerage Auth v Nat'l Sea Clammers*, 453 US 1, 18–19 (1981); *South Camden Citizens in Action*, 145 F Supp 2d at 517.
21. Id. at 526–29, 528 (citing *Chrysler Corp v Brown*, 441 US 281, 301–03 (1979)).
22. *Blessing v Freestone*, 520 US 329, 340–41 (1997).
23. Id. at 542–46.