Environmental Justice Index III

by Denis Binder

Editors’ Summary: This index has been updated to include environmental justice case law since 1999. Following a brief narrative describing the expansion in scope of environmental justice claims, the author categorizes the case law as follows: Part I, Types of Disputes, describes the types of grievances that form the basis of these claims, such as the siting of facilities or housing in environmentally hazardous areas. Part II, Causes of Action, lists the federal statutes and constitutional amendments under which the claims arise. Part III, Cases, is an alphabetical listing of the cases and citations.

This Article is the third in a series of environmental justice indices, representing both a decade of extensive litigation and a compilation of earlier cases. The index includes the cases published since 1999, and a few cases added to the earlier indices. As with the first two indices, only cases published in the West Reporter Series, Westlaw, or in looseleaf services are included.

The index does not include the mere filing of a complaint, law review articles and other secondary sources, books, studies, treatises and casebooks, state and federal statutes, administrative law materials, and Executive Orders or studies. It also does not include state attempts to close environmental justice clinics and disputes involving great public interest but no published decisions. We are certainly aware of disputes that are resolved short of litigation.

Several changes are made in this index. First, our approach to environmental justice claims is now expanding. Environmental justice can narrowly encompass the siting of locally unwanted land uses in minority- and low-income neighborhoods, exclusionary zoning, and the failure to provide services to these neighborhoods. It is also today the failure of environmental and cleanup programs to respond to the needs of these communities. Thus, the environmental justice claim might not be in a siting decision, but rather in disparate cleanup efforts.

It may also involve differences in the manner of how facilities are sited or constructed.

An open issue today is the failure of governmental agencies to abate problems, such as lead paint and lead contamination in the water supply. These cases have underlying environmental justice claims but they are not brought on that basis. In addition, they may include cities, such as De-

8. Litigation is but one tool in the battle for environmental justice. A comprehensive environmental justice campaign may include intensive use of the media, including public hearings, press conferences, public relations, and legislative battles.

9. For example, Gigante, a large Mexican supermarket chain, has announced plans to expand into the United States. The Anaheim, California, planning committee rejected granting a liquor license to Gigante, essentially preventing the opening of a store. Litigation was threatened under the North American Free Trade Agreement, but was not necessary because the city council reversed the planning committee. WALL ST. J., Aug. 22, 2002, at B7. The store opened on May 4, 2003.


Detroit, with a minority political structure such that they do not directly include traditional discrimination claims but rather reflect the result of budgetary constraints.

Second, the 10-year span of the indices now allows us to provide updates of earlier decisions. We can also reassess the significance of earlier decisions, which may not have been included in this index.

For example, a controversial case of 25 years ago was the Poletown Neighborhood Council v. Detroit decision in Michigan. The Michigan Supreme Court upheld the taking of private land for the construction of a new Cadillac assembly plant. General Motors Corporation had threatened to move the plant outside the state if the city did not cooperate.

The community involved was an ethnically diverse working-class neighborhood, originally settled by Polish immigrants, hence the nickname Poletown. The case stood for the proposition that communities could engage in civil improvements, especially through construction projects such as “big box” stores, by condemning privately owned lands. Poletown has been cited by a number of courts for the proposition that economic development is a sufficient public use to justify the use of eminent domain. It also became the center of a fundamental dispute involving economic liberties and property rights, which often overshadow the underlying environmental justice claim.

On July 31, 2004, the Michigan Supreme Court unanimously overturned the Poletown decision. The federal constitutional due process issue was decided on June 23, 2005, by the U.S. Supreme Court in Kelo v. City of New London in a 5 to 4 vote upholding the right of the municipality. The original index included the famous 1886 case of Yick Wo v. Hopkins, an attempt by San Francisco to ban Chinese laundries. A few years later the San Francisco Board of Health responded to reports of nine deaths from bubonic plague by quarantining a predominantly Chinese neighborhood comprising 12 blocks and over 10,000 residents instead of the individual houses. No one would be allowed to enter or leave the neighborhood. The restrictions were not in fact applied to physicians visiting non-Chinese residents of the district. Indeed, the restrictions effectively applied only to the Chinese residents. The district court followed Yick Wo in striking it down.

Sometimes communities have related problems. Perhaps the litigation is coincidental, but it may also reflect the underlying socioeconomic nature of the community. Thus, Camden County also saw litigation over lead paint contamination in the school water supply, and Anniston, Alabama, is the site of the U.S. Army’s incineration of seven nerve gases.

A third major change is to expressly recognize traditional personal injury/civil liability litigation, often through class action suits, as a separate category. Civil liability is a proven means of changing behavior. Large judgments or settlements, especially with punitive damages, in personal injury or class action litigation, send a message to the greater economic or civic community. Our original index included a class action suit arising out of Cancer Alley in Louisiana. Civil litigation/class action suits are formally added to the index this year. Ill-advised siting decisions, as well as subsequent inadequate enforcement or maintenance, result in personal injuries.

Two liability disputes have generated a large number of judicial decisions. An outstanding example of class action litigation involved the leakage of butadiene and subsequent fire from a rail tank car in the Gentilly area of New Orleans, Louisiana. A jury awarded $2.5 billion in punitive damages, of which $850 million was ultimately upheld by an appellate jurisdiction. The Louisiana Supreme Court had earlier held it was improper for the court to enter the punitive damages judgment in favor of all 8,000 class members when the jury verdict was only in favor of 20 representative plaintiffs. The case against CSX was settled for $36 million.

A second case involving pollution on refinery Row in Corpus Christi, Texas, resulted in total settlements of $24.6 million. Similarly, a settlement was also reached in the polychlorinated biphenyl (PCB) contamination litigation in Anniston, Alabama.

16. Kelo v. City of New London, No. 04-108 (June 23, 2005). As a matter of federal constitutional law, the Court held that the Due Process Clause of the Fifth Amendment does not preclude state and local governments from exercising their powers of eminent domain to transfer private property from one owner to another. The issue thereby becomes one of state law.
17. 118 U.S. 356 (1886).
21. As recognized by the Court, damages “can be as effective a means for the infringement of a constitutional right as injunctive relief might be . . . .” Scheuer v. Rhodes, 416 U.S. 232, 239 (1974).
25. In re New Orleans Train Car Leakage Fire Litig., 702 So. 2d 677 (La. Ct. 1997). See also In re New Orleans Train Car Leakage Fire Litig., 728 So. 2d 853 (La. 1999); 697 So. 2d 239 (La. 1997). The Louisiana Supreme Court issued a memorandum opinion challenging the course of litigation. See In re New Orleans Train Car Leakage Fire Litig., 717 So. 2d 147 (La. 2000); 753 So. 2d 217 (La. 2000); 745 So. 2d 626 (La. 1999); 745 So. 2d 621 (La. 1999); 743 So. 2d 654 (La. 1999); 738 So. 2d 585 (La. 1999); 697 So. 2d 1330 (La. 1997); 696 So. 2d 994 (La. 1997); 675 So. 2d 1120 (La. 1996); 675 So. 2d 1121 (La. 1996); 794 So. 2d 954 (La. Ct. App. 2001); 794 So. 2d 955 (La. Ct. App. 2001); 794 So. 2d 856 (La. Ct. App. 2001).
29. State and federal settlements in the Anniston, Alabama, PCB litigation totaled $700 million, including $600 million in cash as well as...
A Court decision, which having a major impact on the drafting of environmental justice claims, is Alexander v. Sandoval. Alabama is the only state that requires driver’s license applicants to take their written exam in English even if they are non-English speaking. Suit was brought pursuant to Title VI of the Civil Rights Act of 1964.

Section 601 prohibits discrimination on the basis of race, color, or national origin under any program or activity that receives federal financial assistance. Agencies are authorized by §601 to promulgate regulations to prevent discrimination in any program or activity covered by Title VI. The U.S. Environmental Protection Agency’s regulations issued pursuant to Title VI prohibited disparate impacts on racial groups.

The Court in a 5 to 4 decision held a private cause of action exists for intentional discrimination prohibited by §601. However, no private cause of action exists for violation of the disparate impact regulations issued under §602. Sandoval’s effect was immediately felt in South Camden Citizens in Action v. New Jersey Department of Environmental Protection. The state granted an air pollution permit to a cement processing plant. A community group of African Americans and Hispanic residents alleged the facility would have a racially discriminatory impact on the surrounding neighborhood.

The trial court applied the disparate impact regulation of §602 and issued an injunction five days before Sandoval was issued. The decision was withdrawn and the court found for plaintiffs under 42 U.S.C. §1983 based on the §602 violations, thereby indirectly relying upon the regulations for a cause of action. The U.S. Court of Appeals for the Third Circuit reversed, following Sandoval, reasoning that a regulation does not create a right enforceable through §1983. The district court then held against the defendants on the grounds of intentional discrimination in permitting the plant.

As in the previous indices, we accept the allegations as pled as true. We also do not attempt to recognize the ultimate success or failure of a lawsuit. However, not all claims of racial discrimination or racism constitute environmental racism.

A question may arise if a case includes environmental justice claims or simply involves traditional in my back-yard (NIMBY) opposition. Sometimes a knowledge of the surrounding area reveals the answer. Thus Communities for a Better Environment v. Cenco Refining Co. is listed in the index.

A major conclusion from the index is the widespread use of 42 U.S.C. §1983 to bring claims against state and local governments, based on a myriad of underlying federal claims. The claimants are in federal courts on a federal cause of action, thereby avoiding state courts. Conversely, only a few cases were filed in state court. State claims exist, but are attached to the federal claims under pendant jurisdiction. A related observation is that a large number of cases involve constitutional claims, either directly or through 42 U.S.C. §1983.

One limitation on 42 U.S.C. §1983 is that it does not apply to either federal action or unilateral private action.

The Fourteenth Amendment is now as popular as 42 U.S.C. §1983 as a cause of action. The two other popular claims are Title VI of the Civil Rights Act of 1964 and Title VIII of the Fair Housing Act of 1968.

Finally, we note again the wide variety of environmental justice disputes.

I. Types of Disputes

Civil Rights Attorneys Fees Awards Act of 1976

Hispanics United of DuPage County v. Village of Addison, Illinois

Demolition of Single-Family Homes

James v. City of Dallas, Texas

Denial of Services

Fallon Paiute-Shoshone Tribe v. City of Fallon

Kennedy Park Homes Ass’n v. City of Lackawanna

Discrimination in Rental Housing

Langlois v. Abington Housing Authority

Discrimination in Railroad Safety Measures

Powers v. CSX Transportation, Inc.

Facility Expansion

North Baton Rouge Environmental Ass’n v. Louisiana Department of Environmental Quality

Facility Reopening

Communities for a Better Environment v. Cenco Refining Co.
Facility Siting

South Camden Citizens in Action v. New Jersey Department of Environmental Protection

Golf Resort

Save Our Aquifer v. City of San Antonio

Landfill Siting

Franks v. Ross

Low-Income Housing

City of Cuyahoga Falls v. Buckeye Community Hope Foundation
Macone v. Town of Wakefield
Tyler v. Cuomo (successor to Tyler v. Cisneros)
Winchester Coalition for Responsible Development v. U.S. Department of Housing & Urban Development
Woodwind Estates, Ltd. v. Gretkowski

Low-Income Housing Near Superfund Site (Inadequate Cleanup)

Broward Garden Tenants Ass’n v. U.S. Environmental Protection Agency
Washington Park Lead Committee, Inc. v. U.S. Environmental Protection Agency

Mass Transit

Save Our Valley v. Sound Transit

Only Allowed to Purchase Homes or Live in Neighborhood of Hazardous Waste Recycler

Achee v. Port Drum Co.

Personal Injury Litigation

Achee v. Port Drum Co.
Ball v. Union Carbide Corp. (radiation contamination)
Powers v. CSX Transportation, Inc.

Corpus Christi Refinery Row
Citgo Refining & Marketing, Inc. v. Garza
Amerada Hess Corp. v. Garza

Corpus Christi Refinery Explosion
Southwestern Refining Co. v. Bernal

New Orleans Railcar Litigation
In re New Orleans Train Car Leaking Fire Litigation

Power Plant

Sur Contra la Contaminación v. U.S. Environmental Protection Agency

Rehabilitation of Public Housing

Darst-Webbe Tenant Ass’n Board v. St. Louis Housing Authority

School Proposed for Contaminated Site in Poor Neighborhood

Lucero v. Detroit Public Schools

Selective Enforcement of Ordinances and Policies

Eberhart v. Gettys

Senior Citizen Housing

Fair Housing in Huntington Committee v. Town of Huntington, New York

II. Causes of Action

Administrative Procedure Act

Darst-Webbe Tenant Ass’n Board v. St. Louis Housing Authority
Sur Contra la Contaminación v. U.S. Environmental Protection Agency
Winchester Coalition for Responsible Development v. U.S. Department of Housing & Urban Development

Administrative Regulations

U.S. Department of Transportation Regulations
Save Our Valley v. Sound Transit

U.S. Environmental Protection Agency Regulations

South Camden Citizens in Action v. New Jersey Department of Environmental Protection

U.S. Department of Housing and Urban Development Regulations

Winchester Coalition for Responsible Development v. U.S. Department of Housing & Urban Development

Title VI Regulations

Lucero v. Detroit Public Schools

Executive Order No. 12898

Langlois v. Abington Housing Authority
Sur Contra la Contaminación v. U.S. Environmental Protection Agency

Executive Order No. 11063

Langlois v. Abington Housing Authority

Clean Air Act

Communities for a Better Environment v. Cenco Refining Co.
North Baton Rouge Environmental Ass’n v. Louisiana Department of Environmental Protection
Sur Contra la Contaminación v. U.S. Environmental Protection Agency

National Environmental Policy Act of 1970

Save Our Valley v. Sound Transit
Tyler v. Cuomo (successor to Tyler v. Cisneros)
Winchester Coalition for Responsible Development v. U.S. Department of Housing & Urban Development

National Historic Preservation Act

Tyler v. Cuomo (successor to Tyler v. Cisneros)

Quality Housing and Work Responsibility Act

Langlois v. Abington Housing Authority

Robinson-Patman Antidiscrimination Act

Fallon Paiute-Shoshone Tribe v. City of Fallon


James v. City of Dallas, Texas
Oti Kaga, Inc. v. South Dakota Housing Development Authority
Pisello v. Town of Brookhaven
Washington Park Lead Committee, Inc. v. U.S. Environmental Protection Agency
Woodwind Estates, Ltd. v. Gretkowski

42 U.S.C. §1982

Broward Garden Tenants Ass’n v. U.S. Environmental Protection Agency
Franks v. Ross
Oti Kaga, Inc. v. South Dakota Housing Development Authority
Powers v. CSX Transportation, Inc.
Washington Park Lead Committee, Inc. v. U.S. Environmental Protection Agency

42 U.S.C. §1983

Broward Garden Tenants Ass’n v. U.S. Environmental Protection Agency
Darst-Webbe Tenant Ass’n Board v. St. Louis Housing Authority
Fallon Paiute-Shoshone Tribe v. City of Fallon
Langlois v. Abington Housing Authority
Lucero v. Detroit Public Schools
Oti Kaga, Inc. v. South Dakota Housing Development Authority
Pisello v. Town of Brookhaven
Save Our Valley v. Sound Transit
South Camden Citizens in Action v. New Jersey Department of Environmental Protection
Washington Park Lead Committee, Inc. v. U.S. Environmental Protection Agency

Equal Protection
Eberhart v. Gettys

James v. City of Dallas, Texas
Macone v. Town of Westfield
Powers v. CSX Transportation, Inc.

Substantive Due Process
Macone v. Town of Westfield
Powers v. CSX Transportation, Inc.

42 U.S.C. §1985

Pisello v. Town of Brookhaven
Powers v. CSX Transportation, Inc.
Woodwind Estates, Ltd. v. Gretkowski

Fourth Amendment

James v. City of Dallas, Texas

Fifth Amendment

Broward Garden Tenants Ass’n v. U.S. Environmental Protection Agency
James v. City of Dallas, Texas
Lucero v. Detroit Public Schools

Due Process Clause
Ball v. Union Carbide Corp.
Fallon Paiute Shoshone Tribe v. City of Fallon
Lucero v. Detroit Public Schools

Takings Clause
Fallon Paiute-Shoshone Tribe v. City of Fallon

Thirteenth Amendment

Broward Garden Tenants Ass’n v. U.S. Environmental Protection Agency
City of Cuyahoga Falls v. Buckeye Community Hope Foundation
James v. City of Dallas, Texas

Due Process Clause
City of Cuyahoga Falls v. Buckeye Community Hope Foundation
Fallon Paiute-Shoshone Tribe v. City of Fallon
Langlois v. Abington Housing Authority
Lucero v. Detroit Public Schools

Equal Protection
Ball v. Union Carbide Corp.
City of Cuyahoga Falls v. Buckeye Community Hope Foundation
Fair Housing in Huntington Committee v. Town of Huntington, New York
Fallon Paiute-Shoshone Tribe v. City of Fallon
Civil Rights Act of 1964

Fair Housing in Huntington Committee v. Town of Huntington, New York

Title VI of Civil Rights Act of 1964

Achee v. Port Drum Co.

Broward Garden Tenants Ass’n v. U.S. Environmental Protection Agency

City of Cuyahoga Falls v. Buckeye Community Hope Foundation

Darst-Webbe Tenant Ass’n Board v. St. Louis Housing Authority

Fair Housing in Huntington Committee v. Town of Huntington, New York

Langlois v. Abington Housing Authority

Macon v. Town of Wakefield

Oti Kaga, Inc. v. South Dakota Housing Development Authority

Powers v. CSX Transportation, Inc.

Save Our Valley v. Sound Transit

South Camden Citizens in Action v. New Jersey Department of Environmental Protection

Title VIII of Fair Housing Act of 1968

Achee v. Port Drum Co.

Broward Garden Tenants Ass’n v. U.S. Environmental Protection Agency

City of Cuyahoga Falls v. Buckeye Community Hope Foundation

Darst-Webbe Tenant Ass’n Board v. St. Louis Housing Authority

Fair Housing in Huntington Committee v. Town of Huntington, New York

Langlois v. Abington Housing Authority

Macon v. Town of Wakefield

Oti Kaga, Inc. v. South Dakota Housing Development Authority

Powers v. CSX Transportation, Inc.

Save Our Valley v. Sound Transit

South Camden Citizens in Action v. New Jersey Department of Environmental Protection

State Claims

Achee v. Port Drum Co. (negligence, negligence per se, negligent misrepresentation, res ipsa loquitur, intentional infliction of emotional distress, nuisance, trespass, fraud, assault and battery, gross negligence)

Communications for a Better Environment v. Cenco Refining Co. (air quality standards)

Fallon Paiute-Shoshone Tribe v. City of Fallon (breach of contract and breach of covenants running with the land)

Langlois v. Abington Housing Authority

North Baton Rouge Environmental Ass’n v. Louisiana Department of Environmental Quality (administrative review)

Pisello v. Town of Brookhaven (defamation)

South Camden Citizens in Action v. New Jersey Department of Environmental Protection (public and private nuisance)

Woodwind Estates, Ltd. v. Gretkowski

III. Cases


Ball v. Union Carbide Corp., 376 F.3d 554 (6th Cir. 2004)


City of Cuyahoga Falls v. Buckeye Community Hope Foundation, 538 U.S. 188 (2003)43

Darst-Webbe Tenant Ass’n Board v. St. Louis Housing Authority, 339 F.3d 702 (8th Cir. 2003)


Fair Housing in Huntington Committee v. Town of Huntington, New York, 316 F.3d 357 (2d Cir. 2003)44


Franks v. Ross, 313 F.3d 184, 33 ELR 20120 (4th Cir. 2002)


James v. City of Dallas, Texas, 254 F.3d 531 (5th Cir. 2001)

Kennedy Park Homes Ass’n v. City of Lackawanna, 436 F.2d 108 (2d Cir. 1970)


Macon v. Town of Wakefield, 277 F.3d 1 (1st Cir. 2002)

North Baton Rouge Environmental Ass’n v. Louisiana Department of Environmental Quality, 805 So. 2d 255 (La. Ct. App. 2001)

Oti Kaga, Inc. v. South Dakota Housing Development Authority, 342 F.3d 871 (8th Cir. 2003)


Save Our Valley v. Sound Transit, 335 F.3d 932 (9th Cir. 2003)


44. Follow-up to Huntington Branch, National Ass’n for the Advancement of Colored People v. Town of Huntington, 844 F.2d 926 (2d Cir. 1988).


46. Should have been in earlier index.
*Sur Contra la Contaminación v. U.S. Environmental Protection Agency*, 202 F.3d 443, 30 ELR 20358 (1st Cir. 2000)
*Tyler v. Cuomo*, 236 F.2d 1124 (9th Cir. 2000)\(^{47}\)

\(^{47}\) Successor to *Tyler v. Cisneros*, 136 F.3d 603, 28 ELR 20540 (9th Cir. 1998).

*Woodwind Estates, Ltd. v. Gretkowski*, 205 F.3d 118 (3d Cir. 2000)