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A LEGAL UPDATE ON ENVIRONMENTAL JUSTICE IN VIRGINIA: WHERE ARE WE NOW?

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ABSTRACT

Environmental justice (“EJ”) is rapidly evolving in Virginia while people are still trying to understand what EJ actually means. As a result, regulators are unsure of how to incorporate environmental justice in their decision-making process while the regulated are uncertain of how to proceed in the ever-changing political, social, and regulatory landscape. This article gives an overview of EJ’s evolution in Virginia, synthesizing notable environmental justice legal decisions; providing supplementary research on environmental justice studies, workgroups, and reports; and offering several predictions on EJ’s fate in the Commonwealth.

INTRODUCTION

While the purpose of this article is not to highlight the suffering people went through or the adverse effects that certain decisions caused, a brief description of the problems environmental justice seeks to remedy is warranted. Advocates of environmental justice argue that the path to environmental justice in Virginia is full of racism, adverse health effects, and economic suppression. Numerous studies show that pollutants disproportionately affect people of color.¹ Additionally, there are examples of state and federal government policies and decisions causing disproportionate economic and health impacts on low-income communities and communities of color.² However, thanks to the efforts of these advocates, environmental justice has finally arrived in the Commonwealth.

The General Assembly passed the Environmental Justice Act (“the Act”) on April 22, 2020, with the Act becoming effective on July 1, 2020.³ Carried by Senator Ghazala Hashmi (D-Chesterfield) and Delegate Mark Keam (D-Vienna), the statute provides that “[i]t is the *policy* of the Commonwealth to

¹ See, e.g., Marianthi-Anna Kioumourtzoglou et al., *PM_{2.5} and Mortality in 207 U.S. Cities: Modification by Temperature and City Characteristic*, 27 EPIDEMIOLOGY 221 (2016) (finding that those who live in predominantly African American communities have a greater risk of dying from particulate matter pollution than those who live predominantly white communities); Christopher W. Tessum et al., *PM_{2.5} Polluters Disproportionately and Systemically Affect People of Color in the United States*, 7 SCI. ADVANCES 1, 1 (2021) (finding that 75% of exposure to particulate matter in the United States disproportionately affects racial-ethnic minorities).

² See, e.g., Brad Plumer & Nadja Popovich, *How Decades of Racist Housing Policy Left Neighborhoods Sweltering*, N.Y. TIMES (Aug. 24, 2020), <https://www.nytimes.com/interactive/2020/08/24/climate/racism-redlining-cities-global-warming.html> (explaining the historical practice of redlining, for which race played a defining role, and how formerly redlined areas experience significantly higher temperature levels leading to increased health problems for people of color and low-income communities); Mark Robinson, *Battered by Demolition and Displacement, Jackson Ward Stands Strong at 150th Anniversary*, RICH. TIMES-DISPATCH (Apr. 17, 2021), https://richmond.com/news/local/battered-by-demolition-and-displacement-jackson-ward-stands-strong-at-150th-anniversary/article_4d064300-4d2c-56cf-b73d-4956b43b26ea.html (highlighting the methods state officials used and the explanations they gave for placing Interstate 95 directly through the Jackson Ward neighborhood, a predominantly African American community, which suffered a severe economic downturn as a result).

³ VA. CODE ANN. §§ 2.2-234–2.2-235 (2020).

promote environmental justice and ensure that it is carried out throughout the Commonwealth, with a focus on environmental justice communities and fenceline communities” (emphasis added).⁴ An important aspect of the Act is how environmental justice is defined.

The Act defines “environmental justice” as “the *fair treatment* and *meaningful involvement* of every person, regardless of race, color, national origin, income, faith or disability, regarding the development, implementation, or enforcement of any environmental law, regulation or policy” (emphasis added).⁵ The question that follows is how fair treatment and meaningful involvement are defined. “Fair treatment” is “the equitable consideration of all people whereby no group of people bears a disproportionate share of any negative environmental consequence resulting from an industrial, governmental, or commercial operation, program or policy.”⁶ “Meaningful involvement” has two requirements. The first is that vulnerable and affected community members are given access and opportunities to participate in the full decision-making process for activities that may affect their environment or health.⁷ The second is that decision-makers actively seek out, consider and allow community feedback to influence their final decision.⁸

Overall, the Act provides a policy directive for the Commonwealth. Yet, on its face, the Act is silent on the situations when the state must consider the Act, what the Act requires, or any standards it creates. Additionally, there is no case law in Virginia providing guidance on the application of the Act.⁹ Recent developments are starting to clarify these issues. Several agencies are citing to their own regulations and applicable statutes for authority when considering environmental justice. Section I of this article summarizes those developments. Section II provides explanations of various environmental justice studies, workgroups, and reports. Section III provides a prediction as to how the state will move forward with both regulatory, corporate, and political pressure in the environmental justice space.

⁴ VA. CODE ANN. § 2.2-235 (2020). See VA. CODE ANN. § 2.2-234 (defining environmental justice community as “any low-income community or community of color and a fenceline community as an area that contains all or part of a low-income community or community of color and that presents an increased health risk to its residents due to its proximity to a major source of pollution”).

⁵ VA. CODE ANN. § 2.2-234 (2020).

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ Va. Off. of the Att’y Gen., Opinion Letter #20-064 (Dec. 3, 2021), <https://www.oag.state.va.us/files/Opinions/2021/20-064-Hashmi-issued.pdf>.

I. LEGAL OPINIONS AND DECISIONS

To stay in compliance with various environmental justice statutes, the Virginia Department of Environmental Quality (“DEQ”), and other state agencies, are increasingly likely to consider environmental justice as a factor in their decision-making processes. At the same time, developers and agencies are facing increasing uncertainty as to the application of the Virginia Environmental Justice Act and its principles in permitting situations. As a result, applications to the DEQ and State Corporation Commission (“SCC”) should include robust discussion on possible environmental justice impacts and how the applicant will mitigate those effects in permit applications. Several recent decisions support this conclusion.

A. The Attorney General’s Official Opinion on the Environmental Justice Act

In late 2021, Senator Ghazala F. Hashmi, one of the Act’s sponsors, made a request to Attorney General Mark Herring for his Official Opinion on whether the DEQ must consider the Act as a factor in a landfill site suitability determination.¹⁰ In response, Mr. Herring found that the DEQ must consider the Act during the permitting process of any kind of construction, program, or policy.¹¹ Mr. Herring also said environmental justice impacts and consequences should be considered with any kind of project or construction that happens within the Commonwealth.¹²

The Attorney General’s opinion indicates that while the DEQ must consider environmental justice when making permitting decisions, other state agencies may have more leeway in whether they need to consider environmental justice. Notably, the Attorney General’s Official Opinions are offered to help clients and interested parties comply with the law.¹³ While courts may give the opinions deference, they are not binding.¹⁴ In addition to the Attorney General’s Official Opinion on the Act, there are several other examples in the Commonwealth of state agencies considering environmental justice implications in decision-making processes. One example is the Air Pollution

¹⁰ *Id.*

¹¹ *See id.*; Press Release, Off. of the Att’y Gen., New Opinion from Attorney General Herring Establishes Environmental Justice Policy (Dec. 9, 2021), <https://www.oag.state.va.us/media-center/news-releases/2219-december-9-2021-new-opinion-from-attorney-general-herring-establishes-environmental-justice-policy>.

¹² Press Release, *supra* note 11.

¹³ *Official Opinions*, ATTY. GEN OF VA., <https://www.oag.state.va.us/citizen-resources/opinions/official-opinions> (last visited Feb. 5, 2022).

¹⁴ *Id.*

Control Board's ("the Board") application of the site suitability provisions outlined in §10.1-1307(E) of the Virginia Code.¹⁵

B. Friends of Buckingham v. State Air Pollution Control Board

The Board is comprised of Virginia citizens appointed by the Governor.¹⁶ It functions within the DEQ and has statutory authority to promulgate regulations and to approve certain permits.¹⁷ The DEQ then administers the regulations as approved by the Board.¹⁸ One statute in the Code, §10.1-1307(E), states that in making regulations and approving permits, the Board "shall consider facts and circumstances relevant to the reasonableness of the activity involved and the regulations proposed to control it."¹⁹ The statute then provides four factors the Board must take into account when promulgating regulations or approving air permits.²⁰ These factors are: (1) the character and degree of interference or injury the proposed activity causes to the communities safety, health, or reasonable use of the property on which the activity would be located; (2) the economic and social value of the proposed activity; (3) the suitability of the proposed activity to its location; and (4) the scientific and economic practicality of reducing the activities emissions.²¹ In the following case, the Fourth Circuit took issue with the Air Board's analysis under two of those factors.

In *Friends of Buckingham v. State Air Pollution Control Board*, the Fourth Circuit vacated and remanded the Air Pollution Control Board's approval of a stationary source permit to construct and operate a natural gas compressor station in Buckingham County as part of the controversial Atlantic Coast Pipeline.²² That decision was based, in part, on the Board's failure to consider the compressor station's potential disproportionate impact on the local environmental justice community.²³

More specifically, the Court took issue with the Board's analysis under §10.1-1307(E)(1) of the Virginia Code. This section states that the Board shall consider "[t]he character and degree of injury to, or interference with, safety, health, or the reasonable use of property which is caused or threatened

¹⁵ VA. CODE ANN. § 10.1-1307(E) (2021); *Friends of Buckingham v. State Air Pollution Control Bd.*, 947 F.3d 68 (4th Cir. 2020).

¹⁶ *Citizen Boards*, VA. DEP'T ENV'T QUALITY, <https://www.deq.virginia.gov/permits-regulations/laws-regulations/citizen-boards> (last visited Jan. 30, 2022).

¹⁷ *Id.*

¹⁸ *See id.*

¹⁹ VA. CODE ANN. § 10.1-1307(E) (2021).

²⁰ VA. CODE ANN. § 10.1-1307(E)(1)-(4) (2021).

²¹ *Id.*

²² *Friends of Buckingham v. State Air Pollution Control Bd.*, 947 F.3d 68, 93 (4th Cir. 2020) (citing FED. ENERGY. REGUL. COMM'N, ATLANTIC COAST PIPELINE AND SUPPLY HEADER PROJECT, FINAL ENVIRONMENTAL IMPACT STATEMENT VOL. I).

²³ *Id.*

to be caused.”²⁴ The Court found that the Board did not comply with this requirement because there was no finding as to whether Union Hill, the community founded by formerly enslaved people after the Civil War which surrounds the proposed compressor station site, was a minority environmental justice community.²⁵ The minority environmental justice community designation, which is usually based on census data, is important because it can affect the safety and health analysis under §10.1-1307(E)(1). For example, African American populations tend to have higher rates of asthma and certain other health-related issues.²⁶ Compressor stations emit pollutants that are known to trigger asthma and exacerbate other health related issues.²⁷ Thus, had the Board deemed the majority-African American community around the compressor station a minority environmental justice community, then information about African American populations having higher rates of asthma and other health issues becomes an important consideration under §10.1-1307(E)(1).²⁸

The facts show that the Board did not make any finding as to whether the Union Hill community was a minority environmental justice community.²⁹ The Court took note that the Board’s final approval for the permit was only one page long and said nothing about environmental justice or which studies the Board relied on.³⁰ As such, the Court held that the Board acted arbitrarily in failing to provide “any explanation” regarding the potential environmental justice impacts on the Union Hill community.³¹

The Court also took issue with the Board’s analysis pursuant to §10.1-1307(E)(3). The section requires the Board consider “[t]he suitability of the activity to the area in which it is located.”³² In trying to comply with this section, the Board relied on the Environmental Protection Agency’s National Ambient Air Quality Standards pursuant to the Clean Air Act and dismissed environmental justice concerns.³³ However, both the Petitioners and Intervenor (collectively, “the Parties”) acknowledged that Virginia law, specifically §10.1-1307(E)(3), requires that the Board consider the project’s potential for

²⁴ VA. CODE ANN. § 10.1-1307(E)(1) (2021).

²⁵ 947 F.3d at 88.

²⁶ *Id.* (citing FED. ENERGY. REGUL. COMM’N, *supra* note 22).

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Friends of Buckingham v. State Air Pollution Control Bd.*, 947 F.3d 68, 88 (4th Cir. 2020).

³⁰ 947 F.3d at 89.

³¹ *Id.*

³² VA. CODE ANN. § 10.1-1307(E)(3) (2021).

³³ 947 F.3d at 91–92 (noting that “even if all pollutants within the county remain below state and national air quality standards, the Board failed to grapple with the likelihood that those living closest to the compressor station – an overwhelmingly minority population according to the Friends of Buckingham Survey – will be affected more than those living in other parts of the same county. The Board rejected the idea of disproportionate impact on the basis that air quality standards were met”).

disproportionate impacts to minority and low-income communities.³⁴ The Court accepted the Parties' acknowledgment and found that the Board did not adequately consider the disproportionate impact on those living closest to the compressor station, and as such, had a flawed analysis under §10.1-1307(E)(3).³⁵ In conclusion, the Court said, "[w]hat matters is whether the Board has performed its statutory duty to determine whether this facility is suitable for this site, in light of EJ and potential health risks for the people of Union Hill. It has not."³⁶

Friends is a landmark ruling in that it is one of the first examples in Virginia of a court overturning a state agency's decision on environmental justice grounds. The result of the case has left a lasting impact on environmental permitting decisions, declaring that "environmental justice is not merely a box to be checked."³⁷ The decision caused the DEQ to initiate the regulatory development process by publishing a notice of intended regulatory action ("NOIRA") on May 10, 2021.³⁸ The goal of the NOIRA, and any potential rulemaking that follows, is to provide clarity for the regulated community and public on what environmental justice parameters the Air Pollution Control Board and the DEQ will use to implement the site suitability determination factors outlined in §10.1-1307(E).³⁹

C. The Lambert Compressor Station

On December 3, 2021, the Air Pollution Control Board voted 6-1 to deny an air permit for the proposed Lambert Compressor Station ("Station" or "proposed Station") in Pittsylvania County.⁴⁰ The Board's denial of the permit, which went against the DEQ's recommendation of approval, was based on the following findings: (i) the community impacted by the facility is an environmental justice community; (ii) the "fair treatment" requirements of the Virginia Environmental Justice Act were not met; and (iii) the site is not

³⁴ *Id.* at 87.

³⁵ *Id.*

³⁶ *Id.* at 93.

³⁷ *Id.* at 91–93.

³⁸ VA. DEP'T OF ENV'T QUALITY, PUBLIC PARTICIPATION REPORT FOR NOIRA CONCERNING REGULATION REVISION G20, SITE SUITABILITY encl. I (2021), <https://www.deq.virginia.gov/home/show-publisheddocument/10515/637654124291400000>.

³⁹ *Site Suitability for Air Permits*, VA. DEP'T ENV'T QUALITY, <https://www.deq.virginia.gov/permits-regulations/laws-regulations/air/site-suitability> (last visited Jan. 29, 2022); VA. DEP'T ENV'T QUALITY, NOTICE OF ACTION BY THE AIR POLLUTION CONTROL BOARD: PERMITS FOR STATIONARY SOURCES, <https://townhall.virginia.gov/L/ViewAction.cfm?actionid=5624> (last visited Jan. 29, 2021).

⁴⁰ Patrick Larsen, *Key Mountain Valley Pipeline Structure Fails to Get Permit Approval*, VPM NPR NEWS (Dec. 3, 2021), <https://vpm.org/news/articles/27615/key-mountain-valley-pipeline-structure-fails-to-get-permit-approval>.

suitable based on the requirements of the *Friends* decision, the Virginia Environmental Justice Act, and §10.1-1307(E) of the Virginia Code.⁴¹

The Board's first finding of an environmental justice community was uncontested and quick due to members of the public, the DEQ and the Applicant, Mountain Valley Pipeline LLC, all agreeing that the community impacted is an environmental justice community.⁴² The second finding relating to the Applicant's failure to meet the "fair treatment" requirement of the Act is more complex. As stated in the introduction, the Act defines "fair treatment" as "the equitable consideration of all people whereby no group of people bears a disproportionate share of *any* negative environmental consequence resulting from an industrial, governmental, or commercial operation, program, or policy" (emphasis added).⁴³ One board member, who voted against the permit, focused her comments and analysis on the word "any" immediately preceding "negative environmental consequence."⁴⁴ She said it was difficult to find that there was "not any environmental consequence" based on the information provided.⁴⁵ Interestingly, she did not offer any analysis on the "disproportionate share" language.

A different Board member, who also voted against the permit, focused her entire "fair treatment" analysis on the "disproportionate share" phrase.⁴⁶ She used reports provided to the Board to show that there were minimal environmental consequences at one, three, and five miles away from the Station.⁴⁷ However, environmental justice communities at ten miles, and farther show higher levels of cancer and other illnesses.⁴⁸ The Board member argued the environmental justice communities at ten miles and farther would bear a disproportionate share of the negative environmental consequences stemming from the Station due to the higher rates of cancer and other health issues in those communities.⁴⁹

The last Board member to speak on the "fair treatment" requirement focused on two factors. First, she mentioned that the existing health conditions of the environmental justice community where the Station is proposed are currently unknown.⁵⁰ Second, there are already two compressor stations

⁴¹ Decision Minor New Source Review Permit for Mountain Valley Pipeline, LLC Lambert Compressor Station, Registration No. 21652, (State Air Pollution Control Board Dec. 3, 2021).

⁴² Virginia DEQ, *State Air Pollution Control Board Meeting (Day 2) - Dec 2-3, 2021*, YOUTUBE (Dec. 3, 2021), <https://www.youtube.com/watch?v=DneSlf58VP0>.

⁴³ VA. CODE ANN. § 2.2-234 (2020).

⁴⁴ Virginia DEQ, *supra* note 42.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

located in the environmental justice community, meaning the Lambert Compressor Station would be the third.⁵¹ The Board member argued the health impacts from three compressor stations, all within one mile of each other, would cause the local environmental justice community to bear a disproportionate share of the negative environmental consequences from the Station.⁵²

As these comments and analyses show, the Board was not entirely sure how to determine “fair treatment” or what factors to consider in their analysis when applying the Environmental Justice Act. The Act does not define or provide a list of “environmental consequences.” Nor does the Act define what constitutes a “disproportionate share” of an environmental consequence. Consequently, until further guidance or rules are developed to provide clarity to the Act, decision-makers will continue to have significant power in what they choose to factor into an Environmental Justice Act analysis and how they interpret disproportionate share and environmental consequences.

The Board’s final finding relates to site suitability. As previously mentioned §10.1-1307(E)(1)-(4) of the Virginia Code outlines four factors that the Board must consider when determining whether a project is suitable for the proposed site.⁵³ These factors are: (1) the character and degree of interference or injury the proposed activity causes to the communities safety, health, or reasonable use of the property on which the activity would be located; (2) the economic and social value of the proposed activity; (3) the suitability of the proposed activity to its location; and (4) the scientific and economic practicality of reducing the activities emissions.⁵⁴

One Board member focused on the third factor when stating that the proposed site had significant undisturbed land and wondered if there was a different location that gave the proposed Station more distance from the two existing compressor stations.⁵⁵ Another member touched on the first, third, and fourth factors when restating that locating the proposed Lambert Compressor Station within a mile of two existing compressor stations would impact the health of the local environmental justice community more than if the compressor stations were not all in the same location.⁵⁶ Finally, a different Board member, who voted for approval of the permit, considered the third factor when saying he believed the site was suitable from an engineering standpoint because the other two compressors stations, which are already built, provide existing infrastructure for the proposed Station to connect to.⁵⁷

⁵¹ *Id.*

⁵² *Id.*

⁵³ VA. CODE ANN. § 10.1-1307(E)(3) (2021).

⁵⁴ *Id.*

⁵⁵ Virginia DEQ, *supra* note 42.

⁵⁶ *Id.*

⁵⁷ *Id.*

Interestingly, the Board did not address the second factor of the site suitability provisions, which is the “social and economic value of the activity involved.”⁵⁸

The Board’s analysis shows that the requirements of the Environmental Justice Act and the Air Pollution Control Board’s site suitability provisions remain unclear and difficult to apply. This makes it difficult for permit applicants to know what studies to conduct, information to include, and analysis to provide in their applications. Agencies and Board members are finding it hard to know what factors they must consider and what weight to give each factor. Consequently, until new regulations are developed, or further guidance is offered from the legislature or agencies, applicants should provide robust and detailed analysis on potential environmental justice impacts that their projects may cause.

D. Environmental Justice in State Corporation Commission Proceedings

Environmental justice considerations are starting to appear in energy-related decisions as well. During its 2020 session, the Virginia General Assembly enacted Chapters 1193 (HB 1526) and 1194 (SB 851) of the 2020 Virginia Acts of Assembly.⁵⁹ These duplicate Acts of Assembly, also known as the Virginia Clean Economy Act (“VCEA”), became effective on July 1, 2020.⁶⁰ The VCEA establishes a mandatory renewable energy portfolio standard (“RPS”) program for both Virginia Electric Power Company (“Dominion”) and Appalachian Power Company (“APCo”).⁶¹ The VCEA also requires Dominion and APCo to submit an annual RPS plan and petition to the State Corporation Commission (“Commission”) for approval in developing new solar and onshore wind generation capacity (“RPS Filing”).⁶² An RPS Filing can include requests that the Commission grant certificates of public convenience and necessity (“CPCN”).⁶³ A CPCN is a type of regulatory compliance certification in which the Commission reviews the proposed project to determine if it complies with the relevant regulations and code sections.⁶⁴ There are several factors that the Commission must consider when granting

⁵⁸ VA. CODE ANN. § 10.1-1307(E)(2)(2021).

⁵⁹ Final Order Virginia, *ex rel.* State Corp. Comm., No. PUR-2020-00135 (Apr. 30, 2021), <https://scc.virginia.gov/docketsearch/DOCS/4%254r01!.PDF>.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *See id.*; Final Order Virginia, *ex rel.* State Corp. Comm., No. PUR-2020-00134 (Apr. 30, 2021), <https://scc.virginia.gov/docketsearch/DOCS/4%254p01!.PDF>; VA. CODE ANN. § 56-585.5(D)(4) (2021).

⁶³ *See* Final Order Virginia, *ex rel.* State Corp. Comm., No. PUR-2020-00134, *supra* note 62; VA. CODE ANN. § 56-580(D) (2021).

⁶⁴ *See* VA. CODE ANN. § 56-580(D) (2021).

a CPCN.⁶⁵ For purposes of this article, the factor of greatest interest is the recent addition found in §56-585.1 (A)(6) of the Virginia Code. The VCEA amended §56-585.1 (A)(6) to include the following language, “[t]he Commission shall ensure that the development of new, or expansion of existing, energy resources or facilities does not have a disproportionate adverse impact on historically economically disadvantaged communities” (emphasis added).⁶⁶ Historically economically disadvantaged communities are either communities in a low-income geographic area or communities in which a majority of the population are people of color.⁶⁷

In its 2020 RPS Filing, Dominion included requests that the Commission grant CPCN’s for three solar generating facilities.⁶⁸ In response, the Commission observed that the filing only contained limited information regarding the projects impacts on environmental justice and historically economically disadvantaged communities.⁶⁹ Indeed, the only information in the record concerning environmental justice came from the testimony of three individuals.

When asked if the projects would have a disproportionate impact on historically economically disadvantaged communities, Emil Avram, the Vice President of Business Development for Dominion Virginia, simply testified no and said none of the proposed solar projects are located in a historically economically disadvantaged community.⁷⁰ Additionally, Karl R. Rábago, who testified on behalf of the non-profit organization Appalachian Voices, said while Dominion’s petition is minimally compliant with the VCEA, the Commission should require Dominion to develop screening criteria and development planning that will identify opportunities to enhance the economic benefits of clean energy development in historically economically disadvantaged communities.⁷¹ Gregory L. Abbott, the Deputy Director in the Commission’s Division of Public Utility Regulation, testified that Dominion did

⁶⁵ See *id.* (providing the following three criteria for granting a CPCN: (1) the project has “no material adverse effect upon reliability of electric service provided by any regulated public utility”; (2) the project is “required by the public convenience and necessity”; and (3) the project is “not otherwise contrary to the public interest.”); VA. CODE ANN. § 56-46.1(A) (2021) (stating that “the Commission . . . shall give consideration to the effect of [the] facility [and associated facilities] on the environment and establish such conditions as may be desirable or necessary to minimize adverse environmental impact” and that “the Commission (a) shall consider the effect of the proposed facility on economic development within the Commonwealth, including but not limited to furtherance of the economic and job creation objectives of the Commonwealth. . .”).

⁶⁶ VA. CODE ANN. § 56-585.1 (A)(6) (2021).

⁶⁷ VA. CODE ANN. § 56-576 (2021).

⁶⁸ See Final Order Virginia, *ex. rel.* State Corp. Comm., No. PUR-2020-00135, *supra* note 59; VA. CODE ANN. § 56-580 (2021); VA. ADMIN. CODE § 20VAC-302-20 (2021) (showing filing requirements in support of applications for authority to construct and operate an electric generating facility).

⁶⁹ Final Order Virginia, *ex. Rel.* State Corp. Comm., No. PUR-2020-00135, *supra* note 59.

⁷⁰ Transcript of Direct Testimony of Emil Avram Virginia, *ex. rel.* State Corp. Comm., No. PUR-2020-00135 (Apr. 30, 2021), (<https://scc.virginia.gov/docketsearch/DOCS/4s1%2301!.PDF>).

⁷¹ Direct Testimony of Karl R. Rábago Virginia, *ex. rel.* State Corp. Comm’n., No. PUR-2020-00134 (Jan. 4, 2021), (<https://scc.virginia.gov/docketsearch/DOCS/4s1%2501!.PDF>).

not include an analysis of environmental justice in its RPS Filing.⁷² Mr. Abbott also mentioned, “[t]o the extent that the DEQ and local officials have already considered environmental justice, it is unclear to [Commission] Staff what role the Commission has beyond the DEQ and local reviews and permits.”⁷³

Overall, Mr. Abbott’s testimony included several Staff recommendations to the Commission regarding environmental justice. These include: (1) that in future proceedings, the Commission should require Dominion to develop the record more fully on environmental justice; (2) that the Commission should require Dominion to identify all environmental justice and fence line communities/neighborhoods located within five miles of the project boundary, instead of within one mile as Dominion is currently doing; and (3) that the Commission should require Dominion to evaluate the potential environmental justice impacts of different renewable energy options and include the results of that evaluation in its 2021 RPS Filing.⁷⁴

Despite the limited information provided, the Commission cited both §56-585.1 (A)(6) and the Environmental Justice Act when finding that nothing in the record indicated that the proposed solar projects would have adverse impacts on environmental justice communities or historically economically disadvantaged communities.⁷⁵ However, the Commission adopted the Staff’s third recommendation and held that “Dominion should evaluate and rank the potential environmental justice impacts of different renewable options and include the results of its evaluation in its next RPS filing.”⁷⁶

The Commission’s analysis of Dominion’s 2020 RPS Filing has a similar theme to the analysis of the Air Pollution Control Board in the Lambert Compressor Station decision. In both cases, the agencies were not fully aware of what was required of them. Various terms such as disproportionate share and disproportionate adverse impact are not defined in their respective statutes. Additionally, most agencies do not have clear standards for what they must consider in an environmental justice analysis. Even the agencies that do have standards, such as the Air Pollution Control Board having §10.1-1307(E)(1)-(4), lack guidance on the consideration they should give each factor. Furthermore, agencies are unsure if, and to what extent, they must consider environmental justice when other state agencies or local governments have already

⁷² Prefiled Testimony of Gregory L. Abbott, Virginia, *ex rel.* State Corp. Comm’n., No. PUR-2020-00134 (Feb. 17, 2021), <https://scc.virginia.gov/docketsearch/DOCS/4s2601!.PDF>.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ Final Order Establishing 2020 RPS Proceeding for Virginia Electric and Power Company Virginia, *ex rel.* State Corp. Comm’n., No. PUR-2020-00134 (Apr. 30, 2021), <https://scc.virginia.gov/docketsearch/DOCS/4%254p01!.PDF>.

⁷⁶ *Id.*

done so, as shown in Mr. Abbott’s testimony for the Dominion 2020 RPS Filing. Thus, applicants should add detailed environmental justice analyses into their applications so to avoid any potential complications in the decision-making process.

In addition to a RPS Filing, the VCEA also requires that Dominion and APCo conduct a Request for Proposal (“RFP”) for new solar and wind resources at least once a year.⁷⁷ A utility can evaluate responses to its RFP based on any criteria it deems reasonable but must at a minimum consider seven factors.⁷⁸ These factors include: (1) the status of the project’s development; (2) the current age of Dominion and APCo’s generating facility; (3) the financial viability of a project and developer; (4) the developer’s prior experience in the relevant field; (5) the project’s location and effect on the transmission grid; (6) benefits that the project provides the Commonwealth; and (7) the environmental impacts of particular resources.⁷⁹ However, the Commission has added an eighth requirement, environmental justice.

In APCo’s 2020 RPS Filing, the Commission said that they will now “require that APCo’s RFPs address environmental justice considerations by assessing the impacts of proposed projects on underserved communities.”⁸⁰ Additionally, the Commission said that APCo’s RPS Filing should identify how the RFP assessed environmental justice considerations, including any non-price considerations that APCo included in its RFP analysis.⁸¹ One such consideration should include assessments of the local demographics of the people living in close proximity to each project proposal.⁸²

The respective Final Orders for both Dominion and APCo’s 2020 RPS Filings show that the Commission is beginning to consider environmental justice in their decision-making process. However, only time will tell how much consideration the utilities give environmental justice in their future filings and how much weight the Commission will put on those considerations.

II. STUDIES, WORKGROUPS, AND REPORTS

Several studies and reports conducted for state agencies provide recommendations for legislative and regulatory actions, initiatives, and policy updates, all with the goal of advancing environmental justice throughout the Commonwealth. These documents, in addition to the legal opinions and

⁷⁷ VA. CODE ANN. §56-585.5 (D)(3)(2021).

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ Final Order, *supra* note 59.

⁸¹ *Id.*

⁸² *Id.*

decisions, are useful tools in understanding how environmental justice has progressed in the Commonwealth and where it may lead in the future.

A. The Environmental Justice Study

One preeminent study is the Environmental Justice Study developed with industry stakeholders over 18 months and submitted to the DEQ in October 2020 by Skeo Solutions, Inc. and the Metropolitan Group (“the Consultants”).⁸³ The DEQ acknowledged that adopting many of the recommendations within the study would require increased financial resources, staffing, or new legislative authority.⁸⁴ Nonetheless, in 2021 the agency did adopt some suggestions. These include updating the agency’s statement of policy “to further environmental justice and enhance public participation in the regulatory and permitting processes” and creating an Office of Environmental Justice led by an Environmental Justice Director who reports directly to the DEQ Director.⁸⁵

B. Virginia Council on Environmental Justice and their 2020 Report

During his 2017 campaign, Virginia Governor Ralph Northam promised voters that he would continue the work of environmental justice if he were elected. When Northam took office, he kept his promise by extending Governor Terry McAuliffe’s environmental justice council. Then approximately a year after Northam was elected, he issued an executive order establishing the Virginia Council on Environmental Justice (“VCEJ”) on January 22, 2019.⁸⁶

The VCEJ’s mission is to provide guidance to governmental agencies in advancing policies and procedures to address environmental justice in the Commonwealth.⁸⁷ To achieve this goal, the fourteen-member council developed five standing subcommittees focused on different areas where environmental justice is impacted: (1) policy, permits, programs, and procedures; (2) outdoor access; (3) climate change and resilience; (4) clean energy and transportation, and (5) public health.⁸⁸

⁸³ SKEO SOLUTIONS, INC. & METROPOLITAN GROUP, ENV’T. JUST. STUDY FOR THE VA. DEPT. OF ENV’T. EQUAL. 1–4 (2020), <https://www.deq.virginia.gov/home/showpublisheddocument/8624/637727534058630000>.

⁸⁴ VA. DEP’T. OF ENV’T. QUALITY, EXEC. SUMMARY OF ENV’T JUST. STUDY 1 (2020), <https://www.deq.virginia.gov/home/showpublisheddocument/1813/637425424131330000>.

⁸⁵ *Id.*

⁸⁶ *Virginia Council on Environmental Justice*, SEC’Y OF NAT. & HIST. RES., <https://www.naturalresources.virginia.gov/initiatives/environmental-justice/> (last visited Feb. 21, 2022).

⁸⁷ *See id.*

⁸⁸ VA. COUNCIL ON ENVTL. JUSTICE, 2020 ANNUAL REPORT 7 (2020), https://web.archive.org/web/20211217132455/https://www.naturalresources.virginia.gov/media/governorvirginiagov/secretary-of-natural-resources/pdf/VCEJ-Report-Final_July-2020.pdf.

After their initial meeting, the VCEJ held eight meetings between 2019-2020.⁸⁹ They subsequently developed a report based heavily on citizen input outlining their recommendations on how the Commonwealth could best develop policies and procedures designed to address environmental justice.⁹⁰ This eighty-one-page report details a series of steps and actions that agencies can take to help combat environmental justice concerns.⁹¹ The report follows the five standing committees developed at VCEJ's first meeting.⁹² In each section, the VCEJ details each committee's specific charge, findings from their conducted research, and action steps needed to improve environmental justice efforts.⁹³ Recommendations included the following: (1) creating community partnerships to help guide state and local policy; (2) expanding grant opportunities for environmental justice groups; (3) providing equitable access to state parks; (4) investing in resilience efforts in low-income communities; (5) sustainable farming methods; and (6) providing energy-efficient transportation.⁹⁴ The VCEJ also recommended legislation that requires agencies to assess their activities and create comprehensive plans to address these issues.⁹⁵ Ultimately, the VCEJ stated that environmental justice is bigger than a singular solution, yet the best place to start is with an equitable and just process.⁹⁶

Although the VCEJ's mission is directed at governmental agencies, they sometimes make recommendations to the Governor on certain administrative decisions. For example, in *Friends of the VCEJ* informed Governor Northam of their recommendation to suspend the permitting decision for the compressor station "pending further review of the station's impacts on the health and the lives of those living in close proximity."⁹⁷ It is clear that Governor Northam valued the VCEJ's guidance in all things related to environmental justice and leaned on VCEJ's expertise to help him make important decisions at the beginning of his administration.

C. Environmental Justice Interagency Working Group and their 2020 Report

The Environmental Justice Interagency Working Group was created in 2020 to supplement to the 2020 Environmental Justice Act.⁹⁸ The Working

⁸⁹ *Virginia Council on Environmental Justice*, *supra* note 86.

⁹⁰ VA. COUNCIL ON ENVTL. JUSTICE, *supra* note 88 at 3.

⁹¹ *Id.*

⁹² *Id.* at 7.

⁹³ *Id.* at 7–11.

⁹⁴ *Id.* at 38–44.

⁹⁵ *Id.* at 38–39.

⁹⁶ *Id.* at 8.

⁹⁷ *Friends of Buckingham v. State Air Pollution Control Bd.*, 947 F.3d 68, 87 (4th Cir. 2020).

⁹⁸ H.B. 5005, 2020 Gen. Assemb., 1st Spec. Sess. (Va. 2020).

Group consists of fourteen representatives, known as “Environmental Justice Coordinators,” from each of the Governor’s Secretariats.⁹⁹ The group’s purpose is to develop effective ways to engage environmental justice and fenceline communities in the decision-making process on projects affecting them.¹⁰⁰

The legislation calls for the Working Group to assess and provide recommendations that at minimum establish that each agency consider environmental justice in their policies and procedures.¹⁰¹ More importantly, the legislation tasks the Working Group with ensuring that each agency that interacts with environmental justice and fenceline community issues consistently engages with these communities in a meaningful way.¹⁰² To achieve their mission, the Working Group conducted four working sessions in the fall of 2020, allowing the public to participate virtually.¹⁰³

During the sessions, the Working Group reviewed each agency’s current policies, regulations, community engagement, and fiscal impact to see how these areas intersect with environmental justice. Their assessment included whether agencies have any specific environmental justice policy, their impact or interaction with environmental justice communities, how environmental justice communities are involved in the decision-making process, and what the fiscal impacts of implementing environmental justice strategies are.¹⁰⁴

Based on the results from the sessions, the Working Group identified over 30 agencies that intersect with environmental justice policy.¹⁰⁵ These agencies included some of the following: DEQ; the Department of Housing and Community Development (“DHCD”); Virginia Department of Education (“VDOE”); and the Virginia Department of Health (“VDH”).¹⁰⁶ Some agencies like the Department of Historic Resources (“DHR”), Virginia Economic Development Partnership (“VEDP”), and the Virginia Department of Emergency Management (“VDEM”) also noted that their work includes impacts to environmental justice communities.¹⁰⁷

According to the Working Group’s report, a number of the agencies have active plans in place. For example, VDEP partners with DEQ to provide grant

⁹⁹ *Environmental Justice*, VA. DEP’T OF ENV’T QUALITY, <https://www.deq.virginia.gov/get-involved/environmental-justice> (last visited Feb. 6, 2022).

¹⁰⁰ *Id.*

¹⁰¹ H.B. 5005, Gen. Assemb., 2020 Spec. Sess. (Va. 2021).

¹⁰² *Id.*

¹⁰³ See ENVTL. JUSTICE INTERAGENCY WORKING GRP., 2020 ENVIRONMENTAL JUSTICE INTERAGENCY WORKING GROUP REPORT 4 (2020).

¹⁰⁴ *Id.* at 4–5.

¹⁰⁵ *Id.* at 43.

¹⁰⁶ See generally *id.*

¹⁰⁷ *Id.* at 8–9, 17–18, 31.

funding for communities addressing environmental issues through the Virginia Brownfields Restoration and Economic Redevelopment Assistance Fund.¹⁰⁸ The Science Museum of Virginia, spearheaded by the VDOE, partners with community organizations to discuss the impacts of climate inequity and implement green infrastructure projects.¹⁰⁹ Another agency, the Office of Drinking Water, prioritizes grant funding to waterworks owners who use their systems to address public water issues in disadvantaged communities.¹¹⁰

Separately, the Working Group identified twenty-four agencies, such as the Office of Intermodal Planning and Investment and the Virginia Department of Forestry, who need additional staffing to create and implement a plan for environmental justice initiatives.¹¹¹ The Working Group also suggested a full audit of each agency's environmental justice plans, which will require additional staffing or third-party consultants.¹¹²

At the conclusion of the report, the Working Group recommended they continue to operate in some manner.¹¹³ They believed that the group should consist of representatives of each of the agencies who impact environmental justice, environmental justice and fenceline community advocates, and make it optional for other agencies to join as needed.¹¹⁴ Furthermore, the Working Group also suggested that they provide an annual report to the several Secretariats, including the Secretary of Natural Resources, Transportation, and the Commonwealth's Chief Diversity Officer.¹¹⁵ The group stressed the need for collaboration with those agencies to ensure that environmental justice policy progresses within the Commonwealth.¹¹⁶

D. Regulatory Advisory Panel ("RAP")

The DEQ convened the RAP to review the State Air Pollution Control Board's site suitability provision, as outlined in §10.1-1307 (E), and provide the DEQ with a recommendation on how the suitability provisions should be implemented.¹¹⁷ The RAP is also meant to assist and advise the DEQ in the development of potential amendments to §10.1-1307 (E).¹¹⁸ The panel

¹⁰⁸ *Id.* at 18.

¹⁰⁹ *Id.* at 22.

¹¹⁰ *Id.* at 30.

¹¹¹ *Id.* at 43.

¹¹² *Id.*

¹¹³ *Id.* at 44.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 43.

¹¹⁷ *Site Suitability for Air Permits*, VA. DEP'T OF ENV'T QUALITY, <https://www.deq.virginia.gov/permits-regulations/laws-regulations/air/site-suitability/> (last visited Jan. 30, 2022).

¹¹⁸ *Regulatory Advisory Panel Meeting Minutes*, COMMONWEALTH OF VA. DEP'T OF ENV'T QUALITY, 1 (Dec. 8, 2021), https://townhall.virginia.gov/L/GetFile.cfm?File=meeting%5C1%5C33425%5CMinutes_DEQ_33425_v1.pdf.

consists of local government leaders, industry stakeholders, and community representatives.¹¹⁹

As of January 6, 2022, the RAP has met five times and discussed a variety of issues.¹²⁰ Examples of discussions include: what factors make a site “unsuitable” from an air quality perspective and how are those factors identified; what information should be considered in determining whether an activity is “reasonable”; how to determine what is considered as a disproportionate impact given currently available tools (i.e., environmental justice screen, modeling); and whether it’s possible to consider health consequences the same way as air quality consequences.¹²¹ These are complex questions that will take considerable time for the RAP to answer, meaning for the foreseeable future the site suitability provisions will remain as is.

III. PREDICTIONS

In early 2021, Governor Ralph Northam broke a years-long streak of conservative, utility-led rhetoric in the State Corporation Commission by his appointment of two pro-clean energy Commissioners. His first appointment, Jehmal Hudson, served as the Director of Government Affairs for the Federal Energy Regulatory Commission (“FERC”) and former Vice President of Government Affairs for the National Hydropower Association.¹²² Importantly, Judge Hudson is the first African American to hold the position in the history of the SCC.¹²³ His second appointee, Angela Navarro, served as his own Deputy Secretary of Commerce and Trade.¹²⁴ Judge Navarro also served as Deputy Secretary of Natural Resources under Governor Terry McAuliffe and Governor Northam and was a lead advisor on the Virginia Clean Economy Act.¹²⁵

Since their appointments, the SCC has made measured progress with environmental justice by adding environmental justice language in their Final Orders, as described in Section II(D) of this article. However, Judge Navarro,

¹¹⁹ *Site Suitability for Air Permits*, *supra* note 117.

¹²⁰ *Id.*

¹²¹ *See Regulatory Advisory Panel Meeting Minutes*, *supra* note 118 at 1–2.

¹²² *About the Commissioners*, VA. STATE CORP. COMM’N, <https://scc.virginia.gov/pages/About-the-Commissioners> (last visited Feb. 21, 2022).

¹²³ *Jehmal T. Hudson Appointed as First African-American on SCC*, RICH. FREE PRESS (June 11, 2020), <https://richmondfreepress.com/news/2020/jun/11/jehmal-t-hudson-appointed-first-african-american-s/>.

¹²⁴ *Navarro Takes Oath of Office; Becomes 37th SCC Commissioner*, VA. STATE CORP. COMM’N (Jan. 5, 2021), <https://www.scc.virginia.gov/newsreleases/release/Navarro-Takes-Oath-of-Office;-Becomes-37th-SCC-Com>.

¹²⁵ Kate Andrews, *Former Deputy Commerce Secretary Angela Navarro to be SCC Commissioner*, VA. BUS. (Dec. 2, 2020), <https://www.virginiabusines.com/article/angela-navarro-former-deputy-commerce-secretary-to-be-scc-commissioner/>.

whose appointment came after President Trump tapped Commissioner Mark Christie for FERC, is up for re-appointment this year.¹²⁶ Notably, the date for her re-appointment hearing has not been set. While legislators have felt positive about her performance, it is unclear how the results of the 2021 statewide election may affect both Judge Navarro's appointment and the general tone towards environmental justice and equity policies.

After a decade of Democratic control, on November 2, 2021, Republicans secured a sweep of the offices of Governor, Lieutenant Governor, Attorney General and took control of the House of Delegates.¹²⁷ Governor Glenn Youngkin (R) has been quiet up to this point when it comes to energy policy, but his recent cabinet appointments show that he is taking a more conservative approach when it comes to energy and environmental concerns. For example, the Governor recently nominated Andrew Wheeler as Secretary of Natural Resources.¹²⁸ As a former Deputy Administrator to the Trump-era Environmental Protection Agency, Andrew Wheeler's controversial energy and environmental history has many advocates concerned about the potential impact on Virginia's progressive energy policies and programs.¹²⁹

Additionally, Youngkin selected Caren Merrick for Secretary of Commerce and Trade, which is the cabinet that oversees the Department of Energy.¹³⁰ Ms. Merrick has set her focus on workforce development and employment issues rather than advancing Virginia's environmental goals.¹³¹ Time will tell if the Governor new administration picks, including Michael Rolband as the new director of the Virginia Department of Environmental Quality, support environmental justice initiatives.¹³²

¹²⁶ *Commissioner Christie*, FED. ENERGY REGUL. COMM'N, <https://www.ferc.gov/about/commission-members/commissioner-christie> (last visited Feb. 21, 2022); Laura Vozzella, *Virginia House Republicans Try Hardball to Save Youngkin Cabinet Pick*, WASH. POST (Jan. 28, 2022), <https://www.washingtonpost.com/dc-md-va/2022/01/28/andrew-wheeler-youngkin-virginia-cabinet-republicans/>.

¹²⁷ Ben Williams, *Elections 2021 Recap: A Republican Comeback in Virginia*, NAT'L CONF. OF STATE LEGIS. (Nov. 3, 2021), <https://www.ncsl.org/research/elections-and-campaigns/election-2021-recap-a-republican-comeback-in-virginia-magazine2021.aspx>.

¹²⁸ Press Release, Office of the Governor of Virginia, *Selection of the Natural Resources Secretary and Director of Environmental Quality* (Jan. 5, 2022).

¹²⁹ *EPA Adm'r Wheeler*, U.S. ENVT'L PROT. AGENCY, <https://archive.epa.gov/epa/aboutepa/epa-administrator-wheeler.html> (last visited Jan. 29, 2022).

¹³⁰ Dean Mirshani, *Gov.-Elect Youngkin Names Caren Merrick as Virginia Commerce and Trade Secretary*, WAVY (Dec. 21, 2021), <https://www.wavy.com/news/politics/virginia-politics/gov-elect-youngkin-names-caren-merrick-as-virginia-commerce-and-trade-secretary/>.

¹³¹ Nancy Sheppard, *Gov.-Elect Youngkin Announces Administration Appointments*, WILLIAMSBURG YORKTOWN DAILY (Jan. 12, 2021), <https://wydaily.com/news/2021/12/23/gov-elect-youngkin-announces-administration-appointments/>.

¹³² *Governor-Elect Youngkin Announces Selection of the Natural Resources Secretary and Director of Environmental Quality*, ROYAL EXAM'R (Jan. 5, 2022), <https://royalexaminer.com/governor-elect-youngkin-announces-selection-of-the-natural-resources-secretary-and-director-of-environmental-quality/>.

With a Republican majority, Virginians may see an emphasis placed on the right of localities to consider environmental justice case-by-case rather than by a state-level directive in permitting situations. This poses an opportunity for localities to be a leader in furthering environmental justice initiatives within the Commonwealth.

In issuing permits, local governments continue to consider the impact of solar, wind and energy storage projects on adjacent residents and surrounding communities. The development community, in consultation with citizens and local elected officials, may not only be required to mitigate offsite effects of those facilities, but will also need to determine how these facilities might directly benefit nearby residents in ways beyond simply generating revenue for the local government. This could take many forms, including investments in public infrastructure within the immediate vicinity of a project, or exploring ways in which the surrounding community might receive increased access to affordable renewable energy or become eligible for some cost savings or other direct financial benefit from a given project. These and other creative solutions will hopefully ensure that future projects not only lack a disproportionate adverse effect on environmental justice and fence-line communities but also provide a direct benefit to them.