

INSIGHT: Fourth Circuit Rules ‘Environmental Justice Is Not Merely a Box to Be Checked’

By Simone Jones and Nicole Noëlliste

March 5, 2020, 4:00 AM

The Fourth Circuit recently vacated Virginia’s grant of a permit to Atlantic Coast Pipeline LLC for a compressor station near a historic, predominantly African American community. Sidley Austin attorneys say the ruling represents a potential setback to the 600-mile pipeline and raises broader questions about environmental compliance.

The conventional wisdom in the environmental bar is that “environmental justice” remains an aspirational goal, rather than a concrete compliance point.

The U.S. Court of Appeals for the Fourth Circuit recently sent the opposite message in *Friends of Buckingham v. State Air Pollution Control Board* (Jan. 7, 2020).

There, the court vacated the Virginia Air Pollution Control Board’s grant of a minor source permit to Atlantic Coast Pipeline LLC (ACP) for the construction and operation of a compressor station, intended to facilitate the transmission of natural gas through ACP’s pipeline, in a historic, predominantly African American community. The court declared that “environmental justice is not merely a box to be checked.”

In September 2015, ACP filed an application with Virginia’s Department of Environmental Quality (DEQ) for a minor source New Source Review permit to construct and operate a compressor station consisting of four natural gas-fired turbines. The compressor station would emit nitrogen oxides, volatile organic compounds, and other pollutants. The compressor station was proposed to be constructed in Union Hill in Buckingham County, Virginia—an African American community largely occupied by descendants of freed slaves.

During the public comment period, a group of Buckingham County residents conducted a demographic study finding that Union Hill was largely African American, was comprised of descendants of former slaves, and alleged that community members suffered from health conditions that would make the residents more susceptible to emissions from the compressor station. Following public hearings, the board adopted the DEQ’s recommendation to approve the permit.

Residents Challenge Permit

The Buckingham County residents challenged the permit before the Fourth Circuit, which vacated the approval of the permit on two primary grounds.

First, the court concluded that the board's environmental justice review was insufficient in that it failed to determine whether the Union Hill community was a "minority" environmental justice community—an important designation when determining the likelihood of disproportionate health impacts to residents.

Under Va. Code Ann. § 10.1-1307(E), when approving minor source permits, the board is required to consider, among other things, "the character and degree of injury to, or interference with, safety, health, or the reasonable use of property which is caused or threatened to be caused," and "the suitability of the activity to the areas in which it is located."

The court cited as an additional error the board's failure to assess the compressor station's potential for disproportionate health impacts on the predominantly African American community, rejecting the board's rationale that there could be no disproportionate health effects from air pollution below the National Ambient Air Quality Standards (NAAQS). Notably, the court reasoned that even if all pollutants within the county remained below the NAAQS, the board must still assess the effect on the communities living closest to the compressor station.

The court also found that the board erred in failing to consider electric motors as alternatives to gas-fired turbines—technology that petitioners claimed would eliminate nearly all on-site air pollution from the compressor station.

Virginia Law

Under Virginia law, minor source construction permits require best available control technology (BACT) review, a requirement that applies only under federal law to major emitting sources. The court rejected the "only rationale the Board could have ostensibly relied upon ... for refusing to consider electric motors in its BACT analysis": that replacing gas-fired turbines with electronic motors would constitute an impermissible "redefinition of the source."

The court found that it was unable to locate in the administrative record a sufficient explanation of what the phrase means under Virginia law, specifically concluding, "We—and most importantly, the citizens of Virginia—do not know what the Virginia redefining the source doctrine is, how it works, and how this project meets its requirements."

The court's stated uncertainty should serve as direction to companies that "redefining a source" is yet another important issue to be considered as part of the project planning and approval process.

Concrete Compliance Requirement

The Fourth Circuit's decision indicates that thorough consideration of a planned project's potential impact on environmental justice communities is a concrete compliance requirement. Concerns around environmental justice have previously played a critical role in delaying energy projects.

For example, in *In re: Shell Gulf of Mexico Inc. & Shell Offshore Inc.* (EPA Dec. 30, 2010), the Environmental Appeals Board, in remanding Shell's Clean Air Act permits for drilling in the Arctic, held that the EPA's analysis of the permitted drilling's effect on environmental justice communities was inadequate.

Given what appears to be an emerging trend requiring compliance, the regulated community should carefully consider environmental justice laws and their import when planning and seeking approval of major, capital-intensive projects.

This column does not necessarily reflect the opinion of The Bureau of National Affairs, Inc. or its owners.

Author Information

Simone Jones, a senior environmental associate in Sidley Austin LLP's Washington, D.C., office, specializes in complex environmental litigation and internal investigations, particularly in the automotive sector. She recently defended original equipment manufacturers and senior executives in matters involving auxiliary emission control devices, fuel economy and onboard diagnostics before federal courts, the California Air Resources Board, the EPA, the DOJ, the FBI, the SEC, and other agencies

Nicole Noëlliste is an environmental associate in Sidley Austin LLP's Washington, D.C., office, whose practice focuses on advising clients on a wide range of environmental matters, including regulatory compliance, enforcement actions, and rulemaking challenges. She formerly was a lawyer at the U.S. Nuclear Regulatory Commission, where she gained substantial enforcement experience and counseled NRC staff on the development of the agency's first Tribal Policy Statement.

The views expressed in this article are exclusively those of the authors and do not necessarily reflect those of Sidley Austin LLP and its partners.

Documents

[Write for Us: Author Guidelines](#)

Law Firms

Sidley Austin

Topics

pipelines
ambient air quality standards
natural gas
hazardous materials transportation
environmental permitting
existing sources (air pollution)
environmental justice
volatile organic compounds
coastal zones

© 2021 The Bureau of National Affairs, Inc. All Rights Reserved

Reproduced with permission. Published March 5, 2020. Copyright 2020 The Bureau of National Affairs, Inc.
800-372-1033. For further use, please visit <http://www.bna.com/copyright-permission-request/>