

Tidal Turmoil: Environmental Justice and Sea Level Rise in Hampton Roads: Norfolk Case Study

Michael Boyer, J.D.
Law School Graduate
Virginia Coastal Policy Clinic
at William & Mary Law School

Erica Penn
3rd Year Law Student
Virginia Coastal Policy Clinic
at William & Mary Law School



VIMS | WILLIAM
& MARY
VIRGINIA INSTITUTE OF MARINE SCIENCE



**WILLIAM
& MARY**
Law School



SPRING 2013

Contact Us

Please contact Shana Jones at scjones@wm.edu if you have comments, questions, or suggestions.



About the Authors

Michael Boyer, J.D., graduated from William & Mary Law School in 2013. He is currently a post-graduate fellow for Food and Water Watch, focusing on environmental justice litigation. Mr. Boyer served on the board of the Environmental Law Society and as an assistant article editor for W&M's Environmental Law and Policy Review, writing a note comparing conservation easement regimes in central Appalachia. He graduated from William & Mary as an undergrad with a BA in Sociology.



Erica Penn is a 3L at William & Mary Law School. Ms. Penn is the current Environmental Law and Policy Review (ELPR) Symposium Chair 2013-14, and served as Assistant Symposium Chair the prior year. She represents the law school as a Senator in the William & Mary Student Assembly. In addition, she served as 2L Class Representative in the Student Bar Association and Chair of the Black Law Student Association's Undergraduate Outreach Committee. She graduated cum laude from the University of Florida in 2011 with a Bachelor of Arts in Political Science, and two minors in Business Administration and Organizational Leadership for Non-profits.

About the Virginia Coastal Policy Clinic

The Virginia Coastal Policy Clinic (VCPC) at William & Mary Law School provides science-based legal and policy analysis of environmental and land use issues affecting the state's coastal resources and educates the Virginia policy making, non-profit, legal and business communities about these subjects.

Working in partnership with Virginia scientists, law students in the clinic integrate the latest science with legal and policy analysis to solve coastal resource management issues. Examining issues ranging from property rights to federalism, the clinic's activities are inherently interdisciplinary, drawing on scientific, economic, and policy expertise from across the university. VCPC has a strong partnership with the Virginia Institute of Marine Science (VIMS) and Virginia Sea Grant.

VCPC is especially grateful to the Virginia Environmental Endowment for providing generous funding to establish the clinic in fall 2012.

A Note from the VCPC Director

VCPC received funding from the Virginia Environmental Endowment to produce a series of white papers analyzing legal issues Virginia localities may face as they respond and adapt to increased flooding caused by sea level rise. To focus the students' analysis, we selected two Virginia jurisdictions—Norfolk and Poquoson—to analyze. The students utilized facts from published reports and press accounts to inform their work. Although we focused on these two jurisdictions, the issues raised are broadly applicable to similarly situated cities in Virginia. The reader should be aware, however, that the legal issues that county governments may face might be different from those in the city government context.

Future work is likely to involve interviews, additional analysis, and engagement with the broader policy community about some of the issues raised. Adapting to flooding and sea level rise is a complex area. We have not identified all of the possible legal issues that may arise. Nor have we necessarily answered every possible legal question as part of the analysis that was conducted. We hope, however, that our white papers begin to answer some of the threshold questions facing Virginia localities at this time. We also anticipate that they lay the groundwork for in-depth work and identify areas of needed discussion and additional research. We therefore welcome any feedback on our work.

Finally, a special thanks goes to Erica Penn, a rising third-year law student and Virginia Sea Grant Summer Fellow, for source-checking and editing this white paper. VCPC is also grateful to Virginia Sea Grant for funding the VCPC Summer Fellow program at William & Mary Law School.

Summary

- Poor people and people of color – especially African-Americans – often disproportionately bear the burdens of environmental hazards.
- In responding to sea level rise, Norfolk – and many other localities in Hampton Roads – may face environmental justice concerns when determining whether to preserve or abandon certain neighborhoods.
 - Norfolk is unlikely to face legal liability regarding environmental justice issues.
 - Plaintiffs only presenting evidence of a neutral policy with a disparate impact on communities of color will not have a successful claim under the Equal Protection Clause, and proving racial animus in the context of city planning is incredibly difficult, if not impossible.
- Private citizens and communities have no right, or standing, to bring a claim against a government agency receiving federal funding for not enforcing its own discriminatory effect regulations based on Section 602 of Title VI of the Civil Rights Act.
- The likelihood of the federal government, in conjunction with the City of Norfolk, to be found civilly liable under the Stafford Act is low.
- Even though environmental justice liability risks are low, there are substantial ethical, moral, and political issues which make environmental justice a serious matter. In addition, the Environmental Protection Agency recently released Plan EJ 2014, which most notably outlines a plan to incorporate environmental justice across the agency into its rulemaking, permitting, compliance and enforcement functions.¹

Environmental justice is a movement emphasizing “fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.”

Norfolk can incorporate environmental justice concerns in its adaptation strategies and emergency response plans in three ways: codifying procedures that take environmental justice concerns into account, collaborating with local citizens and community groups to come up with equitable solutions, and communicating with the local communities that are particularly affected by environmental hazards about potential solutions. Specifically, Norfolk could:

- Follow Cincinnati’s lead by enacting an environmental justice ordinance and creating the position of EJ Examiner in their planning office.
- Collaborate with community organizations that primarily serve low-income minority citizens to come up with equitable outcomes and more effective planning.
- Utilize the Norfolk Environmental Commission to foster awareness and encourage communication about environmental justice as the city prepares to address sea level rise.

Introduction

On the morning of Monday, August 29th, 2005, Hurricane Katrina, a category three storm, made landfall on the shores of Louisiana.² Nearby New Orleans was battered by intense winds and rains, and with a storm surge ranging from 10-19 feet,³ many of its levees broke, causing destructive flooding throughout the city. Though the damage was great, the city suffered even greater hardships in the ensuing weeks and months. Images of people trapped

in the Superdome, the city’s football arena, haunt our memories to this day. Likewise, the federal and state governments’ response in the wake of the disaster became an international embarrassment. Nearly eight years later, New Orleans is still suffering from the effects of this environmental justice disaster.⁴

The events in New Orleans provide insight for coastal Virginia, specifically the City of Norfolk, due to demographic similarities.⁵

As the chart above illustrates, Norfolk and New Orleans have significantly higher percentages of African Americans and individuals living below the poverty line than their state averages. Homeownership rates are well below state average, and both cities have a large veteran population. Norfolk and New Orleans are also particularly vulnerable to sea level rise.⁶

	New Orleans	Louisiana	Norfolk	Virginia
Population	342,829	4,533,372	242,808	8,001,031
Percent African American	60.2%	32.4%	43.1%	19.4%
Number of Veterans	18,624	314,677	27,673	743,070
Percent Living below Poverty Line	25.7%	18.4%	17.1%	10.7%
Homeownership Rate	48.3%	67.9%	46.4%	68.4%

The Virginia Institute of Marine Science (VIMS) estimates that over the next 20-50 years, the Hampton Roads area could experience up to a 1.5 foot increase in relative sea level rise.⁷ This, combined with a modest 3 foot storm surge comparable to Hurricane Irene in 2011,⁸ would leave a significant portion of Norfolk under water.⁹ As the city acts to prevent future losses from sea level rise and flooding, it should also consider the legal and policy implications surrounding environmental justice. This paper will briefly explain and analyze the legal and non-legal environmental justice issues Norfolk will face as it prepares for sea level rise. Although the paper focuses on Norfolk, other Hampton Roads localities similarly face many of the same issues. The paper concludes with a series of recommendations for incorporating environmental justice concerns into adaptation planning.

What is environmental justice?

In 1968, the Presidential Advisory Commission on Civil Disorders, popularly called the Kerner Commission, produced a report seeking to understand the causes of racial unrest in American inner cities.¹⁰ The report concluded what civil rights leaders already knew, “our nation is moving toward two societies, one black, one white - separate and unequal.”¹¹ In the South, black populations historically received *de jure*¹² racial victimization through the so-called “Jim Crow” laws: laws that forbade inter-racial marriage, allowed racially-discriminatory hiring practices, and so on. These explicitly racist laws were largely repealed by Congress through passage of the Civil Rights Act of 1964.¹³

However, the Kerner Commission reported that blacks in Northern cities were victims of *de facto*¹⁴ discrimination, especially through facially neutral policies involving the availability of housing and education.¹⁵ Though not explicitly discriminatory, many

federal policies created a functionally segregated society. “Redlining,” for example, occurred when the Federal Housing Administration, which was responsible for mapping out neighborhoods, identified areas that were safe for bank investment through the issuance of mortgages, and areas that were considered “risky.”¹⁶ The latter were often historically-black neighborhoods. Since banks primarily invested in the “safe” neighborhoods, whites received mortgages, fled the cities for the suburbs, and left poor African-Americans behind.¹⁷ This, combined with the decline in social services in the inner-cities, resulted in concentrated persistent urban poverty.¹⁸ Despite appearing racially neutral, these kinds of government policies have had profoundly negative consequences on African-American communities.

Environmental Justice is a movement responding, in part, to this history as it attempts to address laws and policies that, on their face, appear neutral, but in practice disproportionately affect communities of color by exposing them to environmental hazards. In 1985, the Government Accounting Office produced a report analyzing hazardous waste landfills and census tract information.¹⁹ They found that three out of the four hazardous waste landfills in the American Southeast (EPA region four), are located in neighborhoods with residents predominately of color.²⁰ A later study showed that, regardless of income, African-Americans disproportionately live near toxic waste sites.²¹ This trend extends to other kinds of environmental hazards, such as air, water and land pollution.²²

Hurricane Katrina, of course, was a multi-faceted environmental justice disaster. The flooding from breached levees introduced severe bacterial contamination and toxic waste into communities, causing a public health hazard.²³ Additionally, the wards most damaged by flooding were some of the poorest in the city, with a majority of African American residents. These communities continued, as in the past, to disproportionately bear environmental burdens imposed on them by a government that failed to maintain its levees and provide speedy emergency response plans.

Norfolk and sea level rise: the need for environmental justice.

VIMS conservatively estimates that Norfolk will experience at least 1.5 feet of sea level rise within the next 20 to 50 years.²⁴ However, with the level of uncertainty in predicting the future, it could be much higher. To put this in perspective, if Norfolk experienced 1.5 feet of sea level rise and an estimated 3 feet of storm surge, the majority of the city, with its current infrastructure, would be flooded. This scenario is very likely. For example, in August of 2011, Hurricane Irene, a category-1 hurricane that only grazed Hampton Roads, produced 4 feet of storm surge.²⁵ Sea level rise compounds the effects of storm surge dramatically, causing flooding, as a result of extreme weather, to be more frequent and costly.

The city of Norfolk is also likely to face environmental justice concerns as it responds to the threat of sea level rise. The city’s potential responses can generally be placed into two categories: ones which allow residents to remain in their homes, and ones which do not. The former would include actions such as constructing sea walls and drainage systems. These would be designed to keep the water out and allow people to remain comfortable and dry in their current homes. The latter would primarily involve condemnation: forcibly evicting people from their homes in order to affect a larger public policy, such as making room for hard engineering projects, or limiting liability for homes doomed to be destroyed by recurrent flooding.

Norfolk is unlike most major American cities²⁶ in that a significant percentage of its population, 43%, identifies as black,²⁷ and 19% of the city currently falls within the 5-year floodplain.²⁸ Without any intent to discriminate, the city could nevertheless engage in facially-neutral policies that have a disproportionately negative affect on people of color. Studies have shown that in coastal communities, the most vulnerable citizens are most affected by sea level rise.²⁹ As cities across the nation address the concerns of their vulnerable population, a pattern has developed. In areas of higher social vulnerability, property is more likely to be abandoned than protected; and in areas of lower social vulnerability, property is more likely to be protected than abandoned.³⁰ For instance, it may make financial sense to build hard engineering projects to protect wealthier neighborhoods because they provide the most income through tax revenue; when the wealthier neighborhoods are predominately white, however, it invokes the idea that only the white communities are worth protecting. In Norfolk's case, the city is considering condemnation projects in the Spartan Village neighborhood, a majority-black community, to address sea level rise.³¹ While these adaptation measures very likely reflect the city's intention to protect human life and property first and foremost, and may be necessary, the potential for communities of color to be disproportionately affected is nevertheless very real.

The remainder of this paper will discuss the potential environmental justice concerns Norfolk will face as it addresses catastrophic sea level rise: does the city open itself to liability for failing to address environmental justice? And what are the political, social, and moral effects for behaving in an environmentally unjust manner?

Legal Obstacles

Though there are a variety of legal defenses, or legal measures, in place to assert claims of environmental injustice, in practice, few of them will prove successful against localities. Historically in the environmental justice context, the primary means of challenging government decisions has been through invoking the Equal Protection Clause of the 14th Amendment, or Title VI of the Civil Rights Act. Newer legislation, such as the Stafford Act, or the Post-Katrina Emergency Management Reform Act of 2007, might also impose certain obligations and obstacles to the city of Norfolk in formulating its adaptation strategies. However, these provisions are unlikely to pose legal problems for Norfolk, as environmental justice groups have had very limited success litigating their concerns.

Equal Protection Clause

Invoking the Equal Protection Clause is a popular option for environmental justice litigants; however, it has been largely unsuccessful.³² The argument is fairly straightforward: when a government action, such as approving a waste dump site, has a disproportionately negative affect on a community of color, in a way not experienced by white communities, the effected community claims that allowing such an action is a violation of the 14th Amendment's guarantee that all people shall be treated equally under the law.

Courts, however, have narrowly interpreted the Equal Protection Clause with regards to racial inequalities, to only apply in cases where there is an explicit "racial animus."³³ That is, plaintiffs in an equal protection case against the

government need to prove that the government agency, official, or policy is explicitly targeted towards communities of color because they are communities of color. **Plaintiffs only presenting evidence of a neutral policy with a disparate impact on communities of color will not have a successful claim under the Equal Protection Clause.**³⁴

The burden on environmental justice plaintiffs in an equal protection case is often too high to be met; proving racial animus in the context of city planning is incredibly difficult, if not impossible.³⁵ Unless a city official says something explicitly discriminatory on the record regarding sea level rise policy planning, Norfolk is unlikely to be threatened by equal protection claims.

Title VI of the Civil Rights Act of 1964

The city is also unlikely to receive environmental justice challenges under Title VI of the Civil Rights Act of 1964. Section 601 of the Act reads, “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”³⁶

Environmental justice groups have historically attempted to use Title VI to impose injunctions, a legal remedy that requires a party to perform or refrain from performing an act, against entities that create environmental hazards affecting their communities. Prior to 2001, the Supreme Court held that under Section 601, plaintiffs asserting a Title VI violation must prove discriminatory intent, and that under Section 602, agencies have the right to regulate against actions that produce a discriminatory effect.³⁸ This meant that plaintiffs without evidence of discriminatory intent were not barred if they could show that an environmental hazard produced a discriminatory effect in violation of an agency regulation, and that the agency failed to enforce their regulation.

However, in 2001 the **United States Supreme Court in *Alexander v. Sandoval* ruled that private citizens and communities have no right, or standing, to bring a claim against a government agency receiving federal funding, for not enforcing its own discriminatory effect regulations based on Section 602 of Title VI.**³⁹ This ruling effectively barred environmental justice groups from filing discriminatory effect claims based on Title VI. Now, government agencies are essentially responsible for policing themselves against discriminatory effect enforcement violations, which has prompted the creation of administrative bodies, similar to the EPA’s Office of Civil Rights (OCR).⁴⁰ The EPA’s OCR reviews hundreds of claims asserting Title VI violations, and by most accounts its review process is unsuccessful.⁴¹ Only one complaint was ever decided on the merits in favor of the complainant, making this a difficult avenue for environmental justice groups as well.⁴² The EPA recently released Plan EJ 2014, which most notably delineates its plan to incorporate environmental justice across the agency into its rulemaking, permitting, compliance, and enforcement functions.⁴³

Since most of Norfolk’s sea level rise adaptation strategies will likely involve some degree of federal funding, Title VI could have imposed a potential problem for the city by delaying funding and exposing the city and federal government to litigation. However, this is not a likely problem because of the *Sandoval* ruling. After *Sandoval*,

even if the city's actions resulted in a discriminatory effect, residents affected would be legally barred from litigating the issue in court, unless they could prove the city acted with a discriminatory intent. Agencies like the EPA might, on administrative review, find that a particular proposal violates its Title VI regulations, and cities such as Norfolk should be mindful of how the EPA implements its Plan EJ 2014 going forward.⁴⁴

Stafford Act and Post-Katrina Emergency Management Reform Act of 2006

In 1988, Congress passed the Stafford Disaster Relief and Emergency Assistance Act ("Stafford Act").⁴⁵ Amended in 2000 and again in 2006, the Act delineates the federal government's powers and responsibilities should the President declare a state of emergency.⁴⁶ It includes a clause that states: "distribution of supplies, the processing of applications, and other relief and assistance activities shall be accomplished in an equitable and impartial manner, without discrimination on the grounds of race, color, religion, nationality, sex, age, disability, English proficiency, or economic status."⁴⁷

This clause would likely not impede the city of Norfolk's sea level rise adaptation strategies because the Stafford Act applies only to federal programs created during specific emergencies and disasters. It is unlikely that the city of Norfolk would ever be liable under the Stafford Act for an adaptation action, such as building a sea wall to protect a majority-white neighborhood in lieu of a neighborhood of color. However, if the city of Norfolk, in conjunction with the Federal Emergency Management Agency (FEMA) and the Department of Homeland Security (DHS), decided to create an emergency plan for the city in case of a disaster, such a plan, under the Stafford Act, must comply with the demands of § 5151(a), or the city, and the Agency, might risk exposing themselves to civil liability, depending on their actions.

Section 5148 of the Stafford Act states: "[t]he Federal Government shall not be liable for any claim based upon the exercise or performance of or the failure to exercise or perform a discretionary function or duty on the part of a Federal agency or an employee of the Federal Government in carrying out the provisions of this chapter."⁴⁸ This effectively gives the federal government immunity against any suit as long as its actions are discretionary. The majority of courts have adapted the Federal Tort Claims Act (FTCA) two part test to determine if an action is discretionary.⁴⁹

Part 1: Is the action a matter of choice for the governmental employee, meaning it is not promulgated by statute, regulation or policy?⁵⁰

Part 2: Does the challenged conduct involve an element of judgment that exception was designed to shield?⁵¹

If the agency answers YES to both of the questions above, then its actions are discretionary and it is immune from liability under the Stafford Act. In 2006, when § 5151(a) was added to the Stafford Act, it implied that the act of distributing supplies, review of applications and other disaster relief activities were very discretionary and employees needed guidance as they make those decisions. However, under the two part discretionary test above, the language in § 5151(a) does not explicitly tell employees how to allocate resources or review applications and it does involve judgment calls that § 5148 was created to shield. **Therefore, the likelihood that the**

Federal Government, in conjunction with the City of Norfolk, would be found civilly liable under the Stafford Act is low.

The Post-Katrina Emergency Management Reform Act of 2006 (Post-Katrina Act)⁵² elevates FEMA's role within the DHS. In addition to its previous responsibilities "to build, sustain, and improve our capability to *prepare* for, *respond* to, recover from, and *mitigate* all hazards," this Act added an additional responsibility to *protect* against hazards.⁵³ The Act's expansion of FEMA's power and responsibility did not, however, come with any added protections for people of color. However, as stated above, the Stafford Act applies in all situations where the President declares a state of emergency. Therefore, FEMA, after the Post-Katrina Act, must still abide by the Stafford Act when allocating resources.⁵⁴

Virginia Law

Under Virginia law, if the state or local government condemns a property, the government must pay just compensation to both the landowner *and* any tenants on the property.⁵⁵ Most of Norfolk's poorer citizens are renters,⁵⁶ as is true for all major cities. If Norfolk wishes to condemn a neighborhood as part a comprehensive plan to address sea level rise, then it must consider the cost of paying tenants as well as homeowners. If it fails to do so, the city risks being exposed to civil liability, as was the case in *Pitt v. City of Portsmouth*. In an attempt to redevelop the area of Fairwood Homes, which was predominately African-American, the City of Portsmouth purchased the property and proceeded to evict residents without providing relocation compensation.⁵⁷ The residents sued the city in a class action law suit that ultimately ended up being settled out of court.⁵⁸

Compelling Political and Moral Obligations

Outside of the legal obligations, there are compelling political and moral obligations involved with environmental justice. Hurricane Katrina revealed how unprepared local, state and federal governments can be when responding to an environmental disaster. In the ensuing media frenzy, the world watched as journalists captured the destruction and pain on nightly news. Anderson Cooper's on-air confrontation with Louisiana Senator Mary Landrieu vocalized the anger that Americans, especially those in the Gulf region, felt toward the government's lackluster response.⁵⁹ Cooper replied to the Senator, "I got to tell you, there are a lot of people here who are very upset, and very angry, and very frustrated. And when they hear politicians . . . thanking one another, it just, you know, it kind of cuts them the wrong way right now. Because literally there was a body on the streets of this town yesterday being eaten by rats, because this woman had been lying in the street for 48 hours. And there's not enough facilities to take her up. Do you get the anger that is out here?"⁶⁰ Even after eight years, Hurricane Katrina and its aftermath remain a deeply shameful moment in our history.

To many, the race of the victims, in some part, explained the government's incompetent response.⁶¹ This widespread perception fueled the anger of many African-American community leaders in New Orleans and throughout the nation, further damaging the relationship between the community and government.⁶² Whether true or not, a disproportionate number of those who suffered in New Orleans were poor African-

Americans, which raised social justice concerns. While Norfolk is a different city from New Orleans, as sea levels rise, a strong hurricane could flood the city, stranding many of its most vulnerable residents.

Beyond any bad press that may result, the Commonwealth of Virginia, Norfolk and all localities in the Hampton Roads region have an ethical and moral obligation to care for all their citizens regardless of race, income, or other categorical factors.⁶³ And, indeed, there is no evidence that this obligation is not shared by city public officials and leaders. It is understandable that city governments, often overburdened with financial challenges, must make hard decisions that cannot please everybody – and it may also be true that safety concerns will ultimately require some communities of color to be relocated. Even so, misunderstandings and a lack of trust could arise if environmental justice concerns are not openly and squarely confronted as adaptation planning moves forward. The trust between the citizen and their government is the defining feature of a functioning democracy. Individuals understand that their government must serve the needs of the community as a whole, and may even understand being personally inconvenienced in the name of the greater good, but they still demand being treated with respect and dignity.⁶⁴

Looking Forward

In the past few years, several cities have implemented policies and programs that address environmental justice head on. Norfolk and other cities in Hampton Roads can follow their lead by *codifying* environmental justice procedures, *collaborating* with local environmental justice community groups to come up with equitable solutions and *communicating* to the local communities that are particularly affected by environmental hazards.

- **Codifying:** The city of Cincinnati made history when it enacted the nation’s first environmental justice city ordinance in 2009.⁶⁵ The purpose of the ordinance is to “provide Environmental Justice to all citizens of Cincinnati by insuring that Proposed Projects will not have a material cumulative adverse impact on the communities in which they are located.”⁶⁶ If a project is deemed by the EJ Examiner to have an adverse effect on the health or environment of a community, it must apply for an Environmental Justice (EJ) Permit.⁶⁷ The community is made aware of all EJ permit applications and given an opportunity to submit public responses to the EJ Examiner before a decision to either approve or reject the EJ permit is made.⁶⁸ If the EJ Examiner approves a project’s EJ permit, the community is still able to appeal this decision to the EJ Board of Appeals which is a five person body appointed by the Mayor and approved by the City Council.⁶⁹

The City of Norfolk could follow Cincinnati’s lead by enacting an environmental justice ordinance and creating the position of EJ Examiner in their planning office.

- **Collaborating:** The city of North Charleston, South Carolina, partnered with several local community organizations, such as the Lowcountry Alliance for Model Communities (LAMC) and the South Carolina State Ports Authority, to help create its community mitigation plan as well as revitalization plans in some of its lower income communities.⁷⁰ By working with community groups like LAMC, the city has opened a dialogue between residents, businesses and governments that promotes compromise and mutual respect. This collaborative

effort to address environmental justice was recognized nationally by the EPA.⁷¹

There are several community organizations that primarily serve low-income minority citizens in Norfolk such as the Eastside Community Development Corporation, Garden of Hope Community Development Corporation, and Oakmont Community Development Corporation. As the city creates its sea level rise adaptation and mitigation policy, it should collaborate with such organizations to come up with equitable outcomes and more effective planning.

- **Communicating:** In Baltimore, the city is working through its transportation department, to host community workshops dealing with Environmental Justice and Title VI in transportation planning.⁷² These workshops are meant to educate citizens about their rights.

Norfolk's city commission currently appoints members of the Norfolk community to serve on the Norfolk Environmental Commission.⁷³ The commission is charged with "monitoring and researching current environmental issues, fostering awareness, developing and promoting effective strategies, and encouraging communication."⁷⁴ This commission would be a great liaison between the city and the community on environmental justice issues that arise as the city prepares for sea level rise. Since the commission is already tasked with fostering awareness and encouraging communication, the city would not have to spend additional resources to educate its citizens on environmental justice issues and their rights.

Conclusion

The City of Norfolk and, indeed, all cities in Hampton Roads, have many hard decisions to make in the upcoming years. From raising financing for complicated engineering solutions to ensuring that the most vulnerable citizens are protected from coastal hazards, much must be done. While there is currently little legal risk to cities from an environmental justice challenge perspective, taking environmental justice concerns into account must be part of the solution for community safety, moral, and ethical reasons. This paper proposes three options Norfolk can take right now to begin to address environmental justice concerns, which will very likely arise given geography and demographic realities. The three options are for the city to: codify environmental justice procedures, collaborate with local environmental justice community groups to come up with equitable solutions and to communicate to the local communities that are particularly affected by environmental hazards. As the city begins to plan for its future, hopefully it will consider these options to promote equity and justice for all.

Acknowledgement

Funding for this project came from the Virginia Environmental Endowment

Notes

- 1 ENVIRONMENTAL PROTECTION AGENCY, PLAN EJ 2014 4 (2011).
- 2 CHRISTINE F. ANDERSEN, ET AL., AM. SOC'Y OF CIVIL ENG'RS, THE NEW ORLEANS HURRICANE PROTECTION SYSTEM: WHAT WENT WRONG AND WHY 1 (2007).
- 3 NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION'S NATIONAL CLIMATE DATA CENTER, HURRICANE KATRINA: CLIMATOLOGICAL PERSPECTIVE 4 (2005).
- 4 Barbara L. Allen, Environmental Justice and Expert Knowledge in the Wake of Disaster, 37 SOC. STUD. OF SCI. 103, 104 (2007).
- 5 United States Census Bureau, Quick Facts: New Orleans, Louisiana, <http://quickfacts.census.gov/qfd/states/22/2255000.html>; United States Census Bureau, Quick Facts: Norfolk, Virginia, <http://quickfacts.census.gov/qfd/states/51/5157000.html>.
- 6 Mike Tidwell, Will Norfolk be the next New Orleans?, THE VIRGINIA PILOT (June 2, 2013), <http://hamptonroads.com/2013/05/will-norfolk-be-next-new-orleans>.
- 7 Relative Sea Level Rise is "the change in sea level relative to the elevation of the land, which includes global sea level rise, land subsidence and changes in ocean circulation". VIRGINIA INSTITUTE OF MARINE SCIENCE, RECURRENT FLOODING STUDY FOR TIDEWATER VIRGINIA 2 (2013) [hereinafter VIMS].
- 9 Dave Forster, Storm Surge from Hurricane Irene falls short of Predictions, THE VIRGINIA PILOT (Aug. 28, 2011), <http://hamptonroads.com/2011/08/storm-surge-hurricane-irene-falls-short-predictions>.
- 10 VIMS, supra note 7, at 8-9.
- 11 Carlton Waterhouse, Abandon All Hope Ye That Enter? Equal Protection, Title VI, and the Divine Comedy of Environmental Justice, 20 FORDHAM ENVTL. L. REV. 51, 56 (2009).
- 12 Id.
- 13 De Jure discrimination occurs when a "government's rules or programs classifies ? – the phrase seems awkward to me -- so as to distinguish between individuals 'who should be regarded as similarly situated". Nicholas C. Christiansen, Environmental Justice: Deciphering the Maze of A Private Right of Action, 81 MISS. L.J. 843, 849 (2012).
- 14 Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 2 U.S.C., 28 U.S.C., and 42 U.S.C.).
- 15 De facto discrimination occurs when "government's rules or programs fail to classify individuals who 'should be regarded as differently situated". Christiansen, supra note 12, at 849.
- 16 Waterhouse, supra note 10, at 55-56.
- 17 "Redlining consists[] of the denial of home loans or insurance coverage in certain neighborhoods, as discrimination in violation of § 804 and 805 of Fair Housing Act (42 U.S.C.A. §§ 3604, 3605)." 73 A.L.R. Fed. 899 (Originally published in 1985).
- 18 Alexandra M. Curley, Theories of Urban Poverty and Implications for Public Housing Policy, 32 J. SOC. & SOC. WELFARE 97, 100 (2005).
- 19 Id.
- 20 GENERAL ACCOUNTING OFFICE, SITING OF HAZARDOUS WASTE LANDFILLS AND THEIR CORRELATION WITH RACIAL AND ECONOMIC STATUS OF SURROUNDING COMMUNITIES (1983).
- 21 Id.
- 22 Waterhouse, supra note 10, at 58-59.
- 23 Shannon M. Roesler, Addressing Environmental Injustices: A Capability Approach to Rulemaking, 114 W. VA. L. REV. 49, 57 (2011).
- 24 Hurricane Katrina - Assessing the Present Environmental Status: Hearing before Subcomm. on Env't & Hazardous Materials of the H. Comm. on Energy & Commerce, 109th Cong. (2005) (statement by Robert R.M. Verchick, Professor of Law, Loyola University New Orleans).
- 25 VIMS, supra note 7, at 2.
- 26 Forester, supra note 8.
- 27 Stephanie Czekalinski & Doris Nhan, 7 of 15 Most Populous U.S. Cities Are Majority-Minority, NATIONAL JOURNAL (July 2, 2012), <http://www.nationaljournal.com/thenextamerica/demographics/7-of-15-most-populous-u-s-cities-are-majority-minority-20120702>
- 28 United States Census Bureau, supra note 5.
- 29 National Oceanic and Atmospheric Administration, Coastal County Snapshots, <http://www.csc.noaa.gov/snapshots/#flood%2651710>.
- 30 Jeremy Martinich et al., Risks of sea level rise to disadvantaged communities in the United States, 18 MITIG ADAPT STRATEG GLOB CHANGE 169, 182 (2013); Lisa R. Kleinosky et al., Vulnerability of Hampton Roads, Virginia to Storm-Surge Flooding and Sea-Level Rise, 40 NAT. HAZARDS 43, 67 (2007).
- 31 Jeremy Martinich et al., Risks of sea level rise to disadvantaged communities in the United States, 18 MITIG ADAPT STRATEG GLOB CHANGE 169, 178-79 (2013).
- 32 Darryl Fears, Built on sinking ground, Norfolk tries to hold back tide amid sea-level rise, WASHINGTON POST, June, 17, 2012, available at http://articles.washingtonpost.com/2012-06-17/national/35459771_1_sea-level-rise-sea-levels-hampton-roads.
- 33 Philip Weinberg, Equal Protection, in THE LAW OF ENVIRONMENTAL JUSTICE: THEORIES AND PROCEDURES TO ADDRESS DISPROPORTIONATE RISKS 3, 10 (Michael B. Gerrard & Sheila R. Foster eds., 2d ed. 2008).

- 34 Christiansen, *supra* note 12, at 852.
- 35 “An action will not be held unconstitutional ‘[s]olely because it has a racially disproportionate impact.” Janell Smith & Rachel Spector, *Environmental Justice, Community Empowerment and the Role of Lawyers in Post-Katrina New Orleans*, 10 N.Y. CITY L. REV. 277, 284 (2006) (quoting *Washington v. Davis*, 426 U.S. 229, 242 (1976)). See also *R.I.S.E. v. Kay, Inc.*, 786 F. Supp. 1144, 1150 (E.D. Va. 1991), *aff’d*, 977 F.2d 573 (4th Cir. 1992)
- 36 (“[T]he Equal Protection Clause does not impose an affirmative duty to equalize the impact of official decisions on different racial groups. Rather, it merely prohibits government officials from intentionally discriminating on the basis of race.”)
- 37 “The placement of landfills in King and Queen County from 1969 to the present has had a disproportionate impact on black residents. However, official action will not be held unconstitutional solely because it results in a racially disproportionate impact...The plaintiffs have not provided any evidence that satisfies the remainder of the discriminatory purpose equation set forth in *Arlington Heights*. Careful examination of the administrative steps taken by the Board of Supervisors to negotiate the purchase of the Piedmont Tract and authorize its use as a landfill site reveals nothing unusual or suspicious.” *R.I.S.E., Inc. v. Kay*, 768 F. Supp. 1144, 1149-50 (E.D. Va. 1991), *aff’d*, 977 F.2d 573 (4th Cir. 1992).
- 38 42 U.S.C.A. § 2000d.
- 39 See *Chester Residents Concerned for Quality Living v. Seif*, 132 F.3d 925 (3d Cir. 1997) vacated, 524 U.S. 974 (1998); *Bean v. Sw. Waste Mgmt. Corp.*, 482 F. Supp. 673 (S.D. Tex. 1979).
- 40 Mike Ewall, *Legal Tools for Environmental Equity vs. Environmental Justice*, 13 SUSTAINABLE DEV. L. & POL’Y 4, 7 (2013)
- 41 “Neither as originally enacted nor as later amended does Title VI display an intent to create a freestanding private right of action to enforce regulations promulgated under § 602.8 We therefore hold that no such right of action exists.” *Alexander v. Sandoval*, 532 U.S. 275, 293 (2001).
- 42 Ewall, *supra* note 40, at 9-10.
- 43 Haydn Davies, *From Equal Protection to Private Law: What Future for Environmental Justice in U.S. Courts?*, 2 BRIT. J. AM. LEGAL STUD. 163, 177 (2013); U.S. COMMISSION ON CIVIL RIGHTS, *NOT IN MY BACKYARD: EXECUTIVE ORDER 12,898 AND TITLE VI AS TOOLS FOR ACHIEVING ENVIRONMENTAL JUSTICE* 55-62 (2003).
- 44 Ewall, *supra* note 40, at 10.
- 45 ENVIRONMENTAL PROTECTION AGENCY, *PLAN EJ 2014 4* (2011).
- 46 Ewall, *supra* note 40, at 10; See Davies, *supra* note 43, at 177.
- 47 42 U.S.C.A. § 5121 et seq.
- 48 *Id.*
- 49 42 U.S.C.A. § 5151(a).
- 50 42 U.S.C.A. § 5148.
- 51 Nathan Smith, *Water, Water Everywhere, and Not A Bite to Eat: Sovereign Immunity, Federal Disaster Relief, and Hurricane Katrina*, 43 SAN DIEGO L. REV. 699, 719 (2006). See *Dureiko v. United States*, 209 F.3d 1345, 1351 (Fed. Cir. 2000).
- 52 Nathan Smith, *Water, Water Everywhere, and Not A Bite to Eat: Sovereign Immunity, Federal Disaster Relief, and Hurricane Katrina*, 43 SAN DIEGO L. REV. 699, 712 (2006).
- 53 *Id.*
- 54 6 U.S.C.A. § 701.
- 55 *Id.*; See Federal Emergency Management Agency, *Policies*, <http://www.fema.gov/policies> (last visited June 30, 2013).
- 56 When the President, at the request of that state’s Governor, declares a state of emergency in that state, “an array of Federal programs to assist in the response and recovery effort” become available through FEMA. See Federal Emergency Management Agency, *Declaration Process*, <http://www.fema.gov/declaration-process> (last visited June, 30, 2013).
- 57 VA. CODE ANN. § 25.1-406 (2013).
- 58 See United States Census Bureau, *supra* note 5.
- 59 *Pitt v. City of Portsmouth, Va.*, 221 F.R.D. 438, 441 (E.D. Va. 2004).
- 60 *Id.*
- 61 Jonathan Van Meter, *Anderson Cooper’s Hurricane Katrina Coverage – A Breakthrough for TV News*, N.Y. MAGAZINE (Nov. 16, 2005), <http://nymag.com/nymetro/news/features/14301/>.
- 62 *Id.*
- 63 John M. Broder, *Amid criticism of federal efforts, charges of racism are logged*, THE NEW YORK TIMES (Sept. 5, 2005), http://www.nytimes.com/2005/09/05/national/nationalspecial/05race.html?_r=0.
- 64 *Id.*
- 65 VA. CONST. ART. I, §§ 1,3.
- 66 See generally, April Hendricks Killcreas, *The Power of Community Action: Environmental Injustice and Participatory Democracy in Mississippi*, 81 MISS. L.J. 769, 774 (2012).
- 67 David C. Crowley, *Vice Mayor Crowley on Environmental Justice Ordinance*, The Cincinnati Beacon (June 30, 2009), http://www.cincinnati-beacon.com/index.php?contents/comments/vice_mayor_crowley_on_environmental_justice_ordinance/.
- 68 Cincinnati Code §1041-3 (2009).
- 69 Cincinnati Code §§ 1041-7, 1041-9 (2009).
- 70 Cincinnati Code §§ 1041-13, 1041-15 (2009).

- 71 Cincinnati Code § 1041- 19 (2009).
- 72 City of North Charleston, Community Mitigation Plan, <http://www.northcharleston.org/residents/community/neighborhoods/mitigationplan.aspx> (last visited July 1, 2013).
- 73 Environmental Protection Agency, Environmental Justice Achievement Awards, <http://www.epa.gov/environmentaljustice/awards/index.html> (last visited July 10, 2013).
- 74 Bernard Young, Jack's Journal: Coming Up in Baltimor (June 19, 2013), http://www.baltimorecitycouncil.com/Jacks_Journal_Pages/June_19/Jack's%20Journal%206-19-13.html.
- 75 Norfolk Environmental Commission, About us, <http://www.norfolkbeautiful.org/norfolk-environmental-commission> (last visited July 12, 2013).
- 76 Id.

Cover Image Source:
NASA.

VSG-13-16