

RECENT DEVELOPMENT

THE KEYSTONE PIPELINE: ENVIRONMENTALLY JUST?

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I. INTRODUCTION

In 2008, TransCanada began construction on the Keystone Pipeline, a mega-transport for oil derived from the large reserves of tar sands found in Alberta, Canada.¹ On March 14, 2008, the U.S. Department of State issued a Presidential Permit authorizing the construction, maintenance, and operation of oil transport facilities at the United States-Canada border.² Keystone's first phase was highlighted by the conversion of natural gas pipelines to crude oil pipelines and the construction of a new pipeline that brought the crude oil non-stop from

1. See *Keystone Pipeline Project*, TRANSCANADA, available at <http://www.transcanada.com/keystone.html> (last visited Mar. 18, 2011).

2. See Transcanada, *State Dept. Grants Keystone Permit; Work To Start In Q2*, DOWNSTREAM TODAY, Mar. 17, 2008, available at [http://www.downstreamtoday.com/\(S\(s00ny2nrygyxgc45sasojc55\)\)/news/article.aspx?a_id=9385](http://www.downstreamtoday.com/(S(s00ny2nrygyxgc45sasojc55))/news/article.aspx?a_id=9385).

Canada to market hubs in the United States Midwest.³ The phase one pipeline was over 2,000 miles long, and created to transport crude oil from Hardisty, Alberta to United States refineries in Wood River and Patoka, Illinois.⁴ TransCanada is currently constructing the second phase of the pipeline, expected to be complete between 2012 and 2013.⁵ Phase two, entitled “Keystone Cushing,” is an extension of the Keystone Pipeline from Steele City, Nebraska to Cushing, Oklahoma.⁶ The 36-inch pipeline will connect to storage and distribution facilities in Cushing, a city that is a major hub for crude oil marketing, refining, and pipelines.⁷ Phase three, “Keystone XL,” will extend from Hardisty, Alberta through Saskatchewan, and in the U.S. through Montana, South Dakota, and Nebraska.⁸ It will incorporate a portion of the Keystone Cushing through Nebraska and Kansas to serve markets in Cushing, Oklahoma, and ultimately to a delivery point near existing terminals in Port Arthur, Texas and Houston, Texas.⁹

At phase three, the ambitious TransCanada Keystone pipeline reaches a point of significant controversy. In November 2010, a National Resources Defense Council (“NRDC”) study listed numerous concerns about environmental impacts along the Keystone pipeline, concerns which included terrorist threats, migratory birds, clean drinking water, and increased CO₂ emissions, among others.¹⁰ The 2010 report stated, “in addition to the damage that would be caused by the increased tar sands extraction, the pipeline threatens to pollute freshwater supplies in America’s agricultural heartland and increase emissions in already-polluted communities of the Gulf Coast.”¹¹

The previous year, the NRDC filed suit against the U.S. State Department, claiming, “the State Department’s environmental impact statement virtually ignored the

3. See *Keystone*, supra note 1. The initial capacity of the thirty-six inch wide Keystone Pipeline was 435,000 barrels per day, and this capacity was expected to increase to almost 600,000 barrels a day upon completion of the Keystone XL portion, the final phase of planned construction. See Dina O’Meara, *U.S. Delays Decision on Tarsands Pipeline*, The Calgary Herald, July 27, 2010.

4. See Upstream Staff, *Canada-US Link Gets Green Light*, *Upstream Online*, Mar. 14, 2008, available at <http://www.upstreamonline.com/live/article150750.ece>.

5. See *Keystone*, supra note 1.

6. *Id.*

7. *Id.*

8. *Id.*

9. See *Keystone*, supra note 1.

10. See Susan Casey-Lefkowitz & Elizabeth Shope, *Say No to Tar Sands Pipeline: Proposed Keystone XL Project Would Deliver Dirty Fuel at a High Cost*, NATURAL RESOURCES DEFENSE COUNCIL, Nov. 2010, available at <http://www.nrdc.org/land/files/TarSandsPipeline4pgr.pdf>. The authors provide the complete list of environmental concerns related to the Keystone pipeline.

11. *Id.*

devastating impacts of refining and extracting tar sands oil.”¹² However, a federal court judge held that the NRDC did not have the authority to bring the claim and dismissed the case.¹³ This immediately increased TransCanada’s belief that the project would move forward; however, the opposition has not ceased.

In November 2010, the No Tar Sands Oil Coalition launched a campaign to urge President Obama to stop construction on the Keystone XL pipeline.¹⁴ This \$500,000 campaign was sponsored by several energy and environment action groups, including Corporate Ethics International, NRDC, Sierra Club, National Wildlife Federation, Friends of the Earth, Greenpeace, and Rainforest Action Network.¹⁵

II. A THIRST FOR ENERGY

So far, efforts by multiple environmental bodies have not succeeded in halting the Keystone project nor in overcoming America’s thirst for oil from its neighbor to the north. The United States consumes roughly nineteen million barrels of oil per day¹⁶ and the Keystone project, once completed, could satiate up to five-to-six percent of that demand for oil.¹⁷ According to a Canadian study of future oil production from the Alberta tar sands, production could grow from 1.2 million barrels per day in 2008 to over 3.3 million barrels per day by 2020.¹⁸ These numbers make a compelling case for extending America’s use of Canadian tar sands in order to serve our continually growing energy needs. Furthermore, geopolitical unrest in the Middle East, unfriendly relations with Venezuela, political controversy over oil exploration in Alaska, and deepwater drilling in the Gulf

12. See Josh Mogerman, *Keystone Pipeline Suit Shifts Towards Local Efforts and New Refineries*, NATURAL RESOURCES DEFENSE COUNCIL, Sep. 23, 2008, available at <http://www.nrdc.org/media/2008/080923a.asp>.

13. See Steven Zweig, *NRDC’s Suit to Block Canada-US Oil Pipeline Thrown Out*, HEATINGOIL.COM, Oct. 2, 2009, <http://www.heatingoil.com/blog/nrdcs-suit-to-block-canada-us-oil-pipeline-thrown-out102/>.

14. Dirtyoilsands.org, *Keystone XL: Recent Events*, http://dirtyoilsands.org/dirtyspots/category/keystone_xl/ (last visited Mar. 22, 2011).

15. See Dina O’Meara, *Pressure in U.S. Mounts Against Oilsands Pipeline*, CALGARY HERALD, Dec. 8, 2010, available at http://www.calgaryherald.com/business/Pressure+mounts+against+oilsands+pipeline/3942156/story.html?cid=megadrop_story.

16. See *Oil: Crude and Petroleum Products Explained: Petroleum Statistics 2009*, U.S. Energy Information Administration, Oct. 28, 2010, available at http://www.eia.doe.gov/energyexplained/index.cfm?page=oil_home#tab2.

17. See Zweig, *supra* note 13.

18. David Collyer, *Leveraging Technology to Support a “3E” Approach*, CANADIAN ASSOCIATION OF PETROLEUM PRODUCERS, Apr. 29, 2009, available at <http://www.capp.ca/getdoc.aspx?dt=PDF&docID=151110>.

portrays Canadian tar sands as the most practical option.¹⁹ However, recent actions by U.S. federal agencies have cast some doubt on Canadian tar sands' role as a centerpiece of U.S. energy policy.

III. THE POLITICAL DEBATE

During the past several months, Secretary of State Hillary Clinton and EPA administrator Lisa Jackson have been at the epicenter of debate over the Keystone pipeline project. On October 15, 2010, Clinton made comments that placed her squarely in the middle of the heated discussion among government officials, environmental groups and the oil industry.²⁰ During a question and answer session on climate change at the Commonwealth Club of San Francisco, Secretary Clinton seemed to explain that the State Department was 'inclined' to approve the Keystone XL pipeline project.²¹ An audience member initially asked her about State Department approval of the Clipper pipeline (a similar project bringing tar sands to the United States): "This is some of the dirtiest fuel in the world. And how can the U.S. be saying climate change is a priority when we're mainlining some of the dirtiest fuel that exists... Are you willing to reconsider it?"²² Secretary Clinton responded, "Probably not, but we haven't finished all of the analysis. So as I say, we've not yet signed off on it. But we are inclined to do so and we are for several reasons...we're either going to be dependent on dirty oil from the Gulf or dirty oil from Canada."²³ Secretary Clinton's comments set off a firestorm of debate, with most commentators coming to the conclusion she was referencing the Keystone XL pipeline proposal, not the Clipper pipeline project.²⁴ Fears spread that Clinton was fast-tracking the Keystone proposal and unfairly making conclusions while the environmental assessment of the plan was still open for public comment.²⁵ Senator Mike Johanns of Nebraska argued, "For her to come out and say we're inclined to grant it when the public comments had not been fully reviewed certainly is going to lay the groundwork for someone to claim that the process was

19. See Luiza Ch. Savage, *Hillary Clinton: "Inclined to" Okay Keystone XL Pipeline*, MACLEANS.CA, Oct. 20, 2010, available at <http://www2.macleans.ca/2010/10/20/hillary-clinton-inclined-to-okay-keystone-xl-pipeline/>.

20. *Id.*

21. *Id.*

22. *Id.*

23. See Savage, *supra* note 19.

24. See Darren Goode, *Hillary Clinton's Remarks Fuel Pipeline Debate*, POLITICO.COM, Dec. 15, 2010, <http://www.politico.com/news/stories/1210/46377.html>.

25. *Id.*

arbitrary and capricious.”²⁶ Clinton later emphasized that the department has not finished its review of the plan: “In order for the State Department to make a sound decision, it is important that we conduct our review in a thorough and transparent manner, taking into consideration all relevant factors, including both environmental and economic impacts.”²⁷

Secretary Clinton is just one piece of a complex puzzle of competing interests for and against approval of the Keystone XL pipeline project. Multiple labor groups, who would benefit from thousands of construction and manufacturing jobs, continue to push for quick approval of the project.²⁸ Some state leaders, however, are firmly against the project. Both Senator Mike Johanns and Senator Ben Nelson from Nebraska have argued against the Keystone XL pipeline because of concerns that the project will ruin the Ogallala Aquifer, a critical source of freshwater for Nebraska and neighboring states.²⁹ Two of the environmental action groups that launched the No Tar Sands Oil Coalition filed a Freedom of Information request with the State Department asking for access to all communication between State Department officials and the TransCanada lobbyist Paul Elliot.³⁰ Although TransCanada denies Paul Elliot or other TransCanada officials took part in any unethical behavior, Secretary Clinton’s statements clearly sent shockwaves of panic throughout the critics’ community that the State Department will unfairly approve Keystone XL. Other groups, such as the American Petroleum Institute, will continue, through media campaigns and lobbying, to endorse the Keystone XL pipeline plan.³¹

26. *Id.*

27. *Id.*

28. Steve Hargreaves, *Giant Oil Pipeline in the Works from Alberta to the Gulf*, CNNMONEY.COM, Dec. 23, 2010, http://money.cnn.com/2010/12/23/news/economy/oil_sands_pipeline/index.htm?

29. *Bipartisan Senators Critique Clinton on Oil Pipeline*, FRIENDS OF THE EARTH, Oct. 22, 2010, <http://www.foe.org/bipartisan-senators-critique-clinton-oil-pipeline>.

30. Jess Leber, *Hillary Clinton Has Deep Ties to Oil Lobbyist for TransCanada Pipeline*, CHANGE.ORG, Dec. 16, 2010, <http://news.change.org/stories/hillary-clinton-has-deep-ties-to-oil-lobbyist-for-transcanada-pipeline>.

31. Elizabeth McGowan, *Spotlight on Clinton Ties to Pipeline Lobbyist in Permit Battle*, REUTERS, Dec. 15, 2010, available at <http://www.reuters.com/article/2010/12/15/idUS113281348720101215>.

IV. THE SHADOW CAST BY ENVIRONMENTAL JUSTICE

In August 2010, EPA administrator Lisa Jackson cast doubt on the project, in the name of ‘environmental justice.’³² This was not the first time the EPA expressed reservations with regard to the Keystone XL project. Earlier that summer, the EPA joined Democrats and environmental groups in criticizing a draft environmental impact statement issued by the State Department for inadequately taking into account the pipeline’s potential to pollute air and water resources and damage migratory birds and other wildlife.³³ As a result, the State Department extended a preliminary September deadline an additional ninety days for federal agencies to comment on the Keystone XL project, postponing completion of the environmental impact statement until early 2011.³⁴ The EPA also reflected on what they considered to be insufficient pipeline safety and emergency spill response for the Keystone XL project.³⁵ Furthermore, in a letter addressed to the State Department, Cynthia Giles, the EPA’s assistant administrator for enforcement and compliance assurance, said the impact of “air emissions from refineries and the potential contamination of drinking water supplies from an oil spill have not been fully evaluated.”³⁶ Giles also stated that the environmental impact statement does not “evaluate the environmental justice issues associated with potential impacts to communities in Port Arthur, Texas, where numerous industrial facilities, including chemical plants and a hazardous waste incinerator, are contributing to the residents’ overall exposure to contaminants.”³⁷ TransCanada responded by saying the seven billion-dollar pipeline would “provide more than \$20 billion in new spending to the U.S. economy and more than \$585 million in state and local taxes in states along the pipeline route.”³⁸

EPA Administrator Lisa Jackson also made it very clear that the EPA will consider issues of environmental justice in

32. See Matthew Tresaugue, *EPA Questions Plan For Canada-Texas Pipeline: Agency Calling For a Closer Look at Its Impact on Minorities, Poor*, HOUSTON CHRONICLE, Aug. 15, 2010, available at <http://www.chron.com/disp/story.mpl/metropolitan/7154758.html>.

33. See Maria Sudekum Fisher, *EPA: Keystone XL Impact Statement Needs Revising: EPA Says TransCanada's Environmental Report Doesn't Address Key Concerns*, THE ASSOCIATED PRESS, July 21, 2010, available at <http://abcnews.go.com/Business/wireStory?id=11219127>.

34. Darren Goode, *State Dept. Extends Review of Canadian Pipeline*, THE HILL, July 26, 2010, available at <http://thehill.com/blogs/e2-wire/677-e2-wire/110969-state-dept-extends-review-of-canadian-pipeline>.

35. See Fisher, *supra* note 33.

36. *Id.*

37. *Id.*

38. *Id.*

approving energy related proposals. In August, Ms. Jackson stated, “Historically, the low-income and minority communities that carry the greatest environmental burdens haven’t had a voice in our policy development or rule-making,” and Plan EJ 2014 is “part of my ongoing commitment to give all communities a seat at the decision-making table.”³⁹ The EPA is particularly worried about Port Arthur, where one section of the Keystone XL pipeline will end. Port Arthur was one of ten locations across the U.S. that received grants in 2009 as part of the environmental justice focus of the EPA.⁴⁰ About forty-five percent of Port Arthur’s population is African-American, many of which are living near numerous refineries, chemical plants, and a waste incinerator.⁴¹ Port Arthur is also home to the Motiva refinery, which if utilized by the Keystone XL pipeline development, would become the largest refinery in the world.⁴² The Motiva refinery sits just across the fence line from the Carver Terrace public housing project and currently produces almost 300,000 barrels of refined oil a day.⁴³ Motiva is one of several refineries that surround Carver Terrace.⁴⁴

A further concern is located one mile to the west of Carver Terrace where a large waste incinerator generates over one hundred tons of criteria air pollutants a day.⁴⁵ Residents of Carver Terrace, who are mostly African-American, have described the conditions surrounding that facility as less than optimal. Annie Edwards, a long-term resident, recounts the feeling she gets when heavy gusts of polluted air engulf her from the surrounding refineries, “Like I panic and can’t catch enough air, and if I go outside it’s worse. I have to strap on my breathing machine [oxygen supply] at night so I don’t pass out,” she says.⁴⁶ Reverend Alfred Dominic described his life in Carver Terrace, “All this pollution [has] affected my health. I have problems with breathing, problems with nausea, and now I have problems with forgetting...many of my friends have died of cancer and many of them are sick at the present because of the emissions.”⁴⁷

39. See Tresaugue, *supra* note 32.

40. *Id.*

41. *Id.*

42. *Id.*

43. See Steve Lerner, *Port Arthur, Texas: Public Housing Residents Breathe Contaminated Air From Nearby Refineries and Chemical Plants*, COLLABORATIVE ON HEALTH AND THE ENVIRONMENT, Apr. 30, 2007, available at <http://www.healthandenvironment.org/articles/homepage/1008>.

44. *Id.*

45. *Id.*

46. *Id.*

47. See Lerner, *supra* note 43.

Dr. Marvin Legator, a former professor of environmental toxicology at the University of Texas Medical Branch at Galveston, confirmed many residents' suspicions that pollution from nearby plants was damaging their health.⁴⁸ Legator conducted a study in the early 2000's of the West Port Arthur community (near Carver Terrace).⁴⁹ He found that approximately eighty percent of residents he interviewed in West Port Arthur reported cardiovascular and respiratory problems, as compared to much lower levels in an economically and racially similar community in Galveston.⁵⁰ Correspondingly, roughly eighty percent of residents on the fence line of the numerous Port Arthur refineries suffered from ear, nose, and throat problems compared with around twenty percent in the control group.⁵¹

Taken together, the plants and other polluting facilities of West Port Arthur generate enough pollutants to "make Jefferson County, in which Port Arthur is located, one of the dirtiest counties in the country."⁵² Furthermore, Jefferson County "ranks in the worst percentile for total environmental releases for increased cancer and other non-cancer health risks, for releases of recognized carcinogen, as well as for developmental and reproductive toxicants."⁵³ The added cancer risk from hazardous air pollutants is higher in Jefferson County, at a rate of 670 parts per million, compared to the overall rate in the state of Texas of 550 parts per million.⁵⁴ Even more startling, the "added cancer risk in Jefferson County is also 670 times higher than the goal of the Clean Air Act."⁵⁵

In 2001, the Lone Star Chapter of the Sierra Club and other environmental groups wrote a lengthy letter to the EPA "commenting on the agency's failure to enforce the Clean Air Act."⁵⁶ The letter asserted that more than fifty percent of Port Arthur's residents were poor and minority, "rising to 100 percent in areas near the fenceline with industry."⁵⁷ The letter went on to state, "Recent documents indicate that federal housing for poor minorities was allowed to be built in Port Arthur directly adjacent to these large polluting facilities with little regard for the health and welfare of those citizens."⁵⁸ Industry executives

48. *Id.*

49. *Id.*

50. *Id.*

51. *See* Lerner, *supra* note 43.

52. *Id.*

53. *Id.*

54. *Id.*

55. *See* Lerner, *supra* note 43.

56. *Id.*

57. *Id.*

58. *Id.*

and others skeptical of environmental justice concerns have often asserted that those living around refineries and other polluting facilities were well aware of the possible dangers to their health when they moved to these communities.⁵⁹ The skeptics further argued that residents in essence “moved to” the nuisance and could vote with their feet by either not moving there in the first place or leaving.⁶⁰ Unfortunately, many residents do not have the financial ability to live in more expensive communities that are at a greater distance from the polluting facilities and often cannot sell their homes at a fair price.

Since the election of President Obama and the appointment of EPA Administrator Lisa Jackson, the EPA has begun to heed the calls for a comprehensive environmental justice policy, and Port Arthur has become the focus of increased concern. Both President Obama and Ms. Jackson have to balance their desire for environmental justice with the pressing issue of economic development in a period of economic distress. This balancing act often means that questions of environmental justice are deferred to another time and place. The apparent turf war between the EPA and State Department seems to showcase this dilemma.

Since being appointed in 2009, Administrator Jackson has visited low-income and minority communities across the country and developed a four-year plan to address these communities’ environmental and health problems.⁶¹ In her January 23, 2009, “Opening Memorandum to EPA Employees,” Jackson stated, “the EPA must take special pains to connect with those who have been historically underrepresented in EPA decision-making.”⁶² Jackson’s proposal is Plan EJ 2014, which is currently open for public comment. The plan is an effort to develop “a national database to identify small tracts of people as unfairly affected over the years by pollution.”⁶³ The national database would be created using The Environmental Justice Strategic Enforcement Assessment Tool. This tool utilizes “a complex combination of census data, a respiratory hazard index, poverty levels, toxic emissions, infant mortality, an index of documented pollution events and other such numbers to assign a score to a

59. See Lerner, *supra* note 43.

60. *Id.*

61. See Tresaugue, *supra* note 32.

62. See *Environmental Justice Fact Sheet: National Environmental Justice Advisory Council*, ENVIRONMENTAL PROTECTION AGENCY, OFFICE OF ENVIRONMENTAL JUSTICE, January 2010, available at <http://www.epa.gov/compliance/ej/resources/publications/factsheets/fact-sheet-nejac-2009.pdf>.

63. See Tresaugue, *supra* note 32.

geographical area.”⁶⁴ Officials then employ the database as a way to make more informed land-use and permit decisions.⁶⁵

The EPA’s efforts to address environmental justice began in 1992, “when the Agency created an Office of Environmental Justice and implemented a new organizational infrastructure to integrate environmental justice considerations into EPA policies, programs, and activities.”⁶⁶ In 1993, the EPA established the National Environmental Justice Advisory Council (NEJAC) to obtain independent advice and recommendations from those involved in the environmental justice movement.⁶⁷ Then, in 1994, President Clinton issued Executive Order 12898, “Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations.”⁶⁸ The order, still in effect, “requires most federal agencies to actively collect, monitor and use information on health and environmental effects within populations.”⁶⁹ Although these actions were taken, the EPA has not had an excellent record in the field of environmental justice since their adoption. As late as April 2005, the Government Accountability Office issued a report entitled, “EPA Should Devote More Attention to Environmental Justice When Developing Clean Air Rules.”⁷⁰ In 2007, the GAO again “criticized the EPA, saying that although the agency had made some progress, significant challenges remained.”⁷¹ However, critics are now gaining more confidence in the EPA’s commitment to environmental justice. With Plan EJ 2014, the year chosen to mark the 20th anniversary of President Clinton’s Executive Order, advocates of environmental justice are hopeful that those communities without a voice will gain one. Nevertheless, the environmental justice movement will continue to face many serious and real obstacles.

Heather Case, deputy director of the Office of Environmental Justice (“OECJ”), has discussed important shortcomings within the newly devised environmental justice tool.⁷² Ms. Case mentioned that “there is potential for false negatives” when collecting census data and “there are also considerable data gaps

64. See Gayathri Vaidyanathan, *EPA Developing Tool to Assist in Enviro Justice Initiative*, GREENWIRE, July 20, 2010, available at <http://www.nytimes.com/gwire/2010/07/30/30greenwire-epa-developing-tool-to-assist-in-enviro-justic-11341.html>.

65. See Vaidyanathan, *supra* note 64.

66. See Environmental Justice Fact Sheet, *supra* note 62.

67. *Id.*

68. See Vaidyanathan, *supra* note 64.

69. *Id.*

70. *Id.*

71. *Id.*

72. See Vaidyanathan, *supra* note 64.

in land, water and other environmental data in the United States, making it necessary for EPA to rely mostly on air toxics data.”⁷³ Furthermore, data on pollution within America’s drinking water is often deficient when received yearly from different EPA regions.⁷⁴ In addition, Ms. Case acknowledged that “health indicators, such as cancer rates and neurological effects, can be even sparser,” and that this “data is critical, and often data is not great when it comes to health,” so the EJSEAT can really only be used as a screening tool.⁷⁵ Whether using the EJSEAT as a screening tool will be adequate to address the issue of environmental inequity and discrimination is yet to be determined. Likewise, the question of whether the Plan EJ 2014 endeavor will be worth the time and financial investment has yet to be answered.

V. ENVIRONMENTAL JUSTICE IN COURT

Litigation in the realm of environmental justice has yet to be fruitful, which can either mean it is a failed theory or that it should be confronted within government entities, such as the EPA. Some environmental groups and individuals have brought suit with regard to environmental issues via the Equal Protection Clause of the 14th amendment.⁷⁶ The most commonly used provisions for issues of environmental inequality have been Section 601 and 602 of Title VI of the Civil Rights Act of 1964.⁷⁷ Section 601 forbids discrimination based on race, color, or national origin by any government agency receiving federal assistance. Under section 601, the plaintiff must prove the agency intended to discriminate.⁷⁸ This means that the entity or individual must show that the federal agency intended to create environmental inequity through its actions. Although, courts have held that individuals or entities can sue federal agencies under section 601, proving discriminatory intent is virtually impossible in cases of disparate environmental inequality.

Section 602 requires federal agencies to establish rules and regulations that uphold section 601, and is particularly useful in

73. *Id.*

74. *Id.*

75. *Id.*

76. See R. Gregory Roberts, *Environmental Justice and Community Empowerment: Learning from the Civil Rights Movement*, 40 AM. U. L. REV. 229, 233 (1998), available at <http://www.wcl.american.edu/journal/lawrev/48/pdf/roberts.pdf?rd=1>.

77. *Id.* at 236.

78. Civil Rights Act of 1964, 42 USC §§ 2000(d)-2000(d)(1) (2006). This section provides the general principle that no person in the United States shall be excluded from participation in or otherwise discriminated against on the ground of race, color, or national origin under any program or activity receiving Federal financial assistance.

cases of environmental discrimination because the plaintiff must only prove that the rule or regulation in question created a discriminatory impact. This allows the plaintiff to avoid showing concrete discriminatory intent on the part of the federal agency. However, no case to date has successfully utilized section 602 to challenge a federal discriminatory action in the area of environmental inequality.⁷⁹ Environmental groups, as well as disgruntled individuals will more than likely continue to use traditional litigation to sue industry for environmental damages, however traditional litigation of this sort can never really tackle systematic discrimination on the part of business and government. It seems logical that only government regulation can truly shift behavior within government agencies and business entities. Nevertheless, there will always remain the complex dilemma of establishing a definitive causal link between government and business action and the harmful consequences on health and the environment.

VI. CONCLUSION

Environmental justice will only move forward if there is motivation, not only within government and business entities, but within the affected communities as well. Historically, advocates of environmental justice have pointed to lack of knowledge as the biggest obstacle to creating real change within these degraded communities. It is not surprising that neighborhoods of poor, working-class minorities lack the political influence to challenge environmental injustices. For decades, low income, non-white populations have either lacked the knowledge or influence to improve policies ranging from health care to education, and environmental justice has thus far been no different. But just as in other cases of discrimination or inequality, the federal government can often be a leading voice for change. However, the most powerful force against environmental justice may be financial well-being. Poor minority communities that have experienced decades of environmental degradation must often choose between environmental justice and a job. For example, "built on oil wealth, Port Arthur has fallen on hard times, with one of the highest unemployment rates in Texas at 11 percent."⁸⁰ If the Keystone XL pipeline is approved it could bring thousands of jobs to Port Arthur. For those living in this environmentally damaged community having a job may be more important than long-term health and better breathing

79. See Roberts, *supra* note 76.

80. See Tresaugue, *supra* note 32.

conditions. As one resident and advocate for the community said, "The community has bought into the idea because of jobs, but they're not looking at the longer-term issue of emissions...they say, 'It's easier to die from starvation than pollution.' What do you choose? Until we get other companies interested in our area, then that's the dilemma we're facing."⁸¹ In other words, Port Arthur is built on the necessary evil of refining oil, therefore until economically disadvantaged individuals in the community can have well-paying jobs in another less damaging industry, the refineries and plants are there to stay. Even with valiant efforts by local citizens and other regional and national environmental groups places such as Port Arthur may still be trapped in a cycle of environmental injustice.

As officials in Washington hash out the details of the Keystone XL pipeline and The Environmental Justice Strategic Enforcement Assessment Tool the balance between environmental justice and energy driven economic growth will continue to tilt in favor of the latter. Plan EJ 2014 is a courageous effort to defend the health and welfare of the economically and socially disadvantaged, but it is a long way from being a comprehensive and effective tool. In the past fifteen years, the environmental justice movement has started, sputtered, stalled, and reignited, without ever becoming a permanent fixture of government and business policy. At every point it has faced either indifference or higher priorities of economic advancement. It is very unlikely that Plan EJ 2014 will be any different. Transporting and refining dirty tar sands, imported from our friendly neighbor to the north, may be the lesser of two evils at a time when cheap oil and economic growth are so desired. The residents of Port Arthur and other affected communities across the United States will have to continue to fight at the local and state level to balance environmental justice with economic progress. Proponents of environmental justice and advocates of clean energy can at least count the presence of debate as a small victory, but where this small victory will lead is yet to be determined.

81. *Id.*

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