

*Environmental Practice Group*

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## Charting a Future for Environmental Justice

Under the direction of President Trump in early 2017, the U.S. Army Corps of Engineers issued the Dakota Pipeline's most important federal permit reversing the prior administration's plans to delay project approvals.<sup>1</sup> On June 14, 2017 in Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers, however, U.S. District Court Judge James Boasberg halted the project by ruling that the Corps' environmental assessment for the pipeline's crossing of a regulated waterway was deficient in a variety of ways.<sup>2</sup> The deficiencies included the "arbitrary and capricious" environmental justice analysis. The timing of the ruling is notable for several reasons, including that President Trump's 2018 budget proposal, issued on May 22 provides no funding for the U.S. Environmental Protection Agency's environmental justice office.

### Background

In 1994 President Clinton issued Executive Order 12898, which requires federal agencies to incorporate environmental justice (EJ) concerns into environmental reviews under the National Environmental Policy Act (NEPA).<sup>3</sup> EJ reviews are triggered whenever a federal action may have a disproportionately high impact on low-income, minority or American Indian populations. In 1997 the president's Council on Environmental Quality issued guidance for implementation of the policy under NEPA. It directs federal agencies to broadly consider "both impacts on the natural or physical environment and related social, cultural and economic impacts."<sup>4</sup> This order and guidance form the basis for the Standing Rock litigation. In 1999, the NYS Department of Environmental Conservation (DEC) issued similar guidance for its environmental reviews it undertakes under the State Environmental Quality Review Act (SEQRA). The guidance only binds DEC actions but other state agencies routinely use it for their own reviews.

### Standing Rock

NEPA and SEQRA litigation based on EJ is somewhat rare; successful litigation is almost unheard of.<sup>5</sup> Standing Rock is thus groundbreaking. In a lengthy discussion of EJ, the judge chastised the Corps for setting arbitrary study boundaries that effectively cut Native American lands out of the analysis. The Corps had applied a uniform 0.5-mile study boundary around the pipeline. As summarized by the court: "Here, the Corps defined the unit of geographic analysis for its environmental-justice assessment as a 0.5-mile radius around the [pipeline] crossing, yielding a focus on the two census tracts in which the HDD boreholes would be drilled...." The court disagreed with this study rationale as it excluded tribal lands "80 yards" beyond the boundary that would be particularly impacted by any spill. The court noted both traditional environmental concerns like drinking water and also "distinct cultural practices of the Tribe and the social and economic

factors that might amplify its experience of environmental effects of an oil spill.” The court revoked the permit and remanded to the Corps for further analysis.

### Take-Away for New York

The strong lesson for federal agencies, state recipients of federal funding and state agencies following DEC’s EJ policy is the need to craft an EJ analysis that takes an individualized look at communities surrounding a project to determine a geographic scope of study. The scope must make good sense and reflect the actual neighborhood character around a project, which might be greater than the standard impact area radius for other environmental analyses. The ruling is particularly relevant for recipients of funding from the U.S. Department of Housing and Urban Development, which delegates NEPA obligations to funding recipients, which are specifically required to comply with Executive Order 12898. The court’s ruling is also likely to influence state agencies using DEC guidance to make project-specific determinations about where EJ concerns should extend.

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<sup>1</sup> President Trump directed the U.S. Department of State to approve the Keystone Pipeline on the same day.

<sup>2</sup> Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers, 2017 WL 2573994 (D.D.C. 2017).

<sup>3</sup> Executive Order 12898.

<sup>4</sup> U.S. Environmental Protection Agency Region 2 covering New York has its own guidance on environmental justice.

<sup>5</sup> There have been 34 reported federal cases since 1994 involving EJ claims.