

[Center for Community Action and Environmental Justice v. FAA](#) is a Ninth Circuit opinion decided before the Thanksgiving break. It involved to a legal challenge to the FAA's [refusal](#) to prepare a full-scale environmental impact statement before approving a major Amazon distribution center at the San Bernardino airport. I probably wouldn't have read the decision if my colleague Bob Infelise hadn't brought the dissent to my attention because of its focus on environmental racism.

Before turning to the details of the legal dispute, Judge Johnnie Rawlinson's dissent points out that the FAA found the impacts insignificant despite: (1) the county's designation as "an 'extreme' non-attainment area for ozone and 'serious' non-attainment for PM2.5, (2) a "finding one year earlier by the San Bernardino International Airport Authority that the project would have significant and unavoidable environmental impacts," and (3) "the release of one ton of additional air pollution a day into the already overly polluted air of San Bernardino County." She then wrote that "this conclusion would be laughable if the consequences were not so deadly to the population of San Bernardino County."

In closing, Judge Rawlinson asked, "Does anyone doubt that this Environmental Analysis would not see the light of day if this project were sited anywhere near the wealthy enclave where the multibillionaire owner of Amazon resides?" "Certainly not," was her answer (an answer I find it hard to dispute). The conclusion: "The same standard should apply to the residents of San Bernardino Valley, who have already borne for many years the heavy cost of pollution resulting in a quantifiable detriment to their health. But such is the nature of environmental racism."

The majority opinion was written by Judge Eugene Siler, a George H.W. Bush appointee sitting by designation from the Sixth Circuit. His opinion was joined by a concurring Ninth Circuit Judge Patrick Butamay, a Trump appointee. They protested against impugning the motivations of FAA staff and other experts involved in the environmental assessment. Judging from what they wrote, they were upset and perhaps offended to be associated with the idea of racism.

Perhaps this response is a tribute to the ability of the word "racism" to arrest attention while also sowing confusion. The majority judges clearly understood it to refer to conscious bias. That's not what Judge Rawlinson seems to have meant. She nowhere made any accusation that the people involved were motivated by racial animus. If there is any implication about motivation, it is that the people of San Bernardino didn't count enough to prompt a serious analysis by the FAA, not that the FAA was out to get them.

Judge Rawlinson took strong exception to the response of her fellow judges. I know that

many people tend to skip block quotes, but this is one you really should read:

“My concurring colleague chastises me for ‘mark[ing] . . . government employees’ ‘with advancing environmental racism.’ For the record, I grew up in the segregated South and looked racism in the face, up close and personal, long before my concurring colleague was born. So pardon me if I take a hard pass on the lecture on when, where, and how to identify racial injustice. Indeed, if any compassion is owed in this case, it should be directed toward the people in San Bernardino County who are literally dying from being subjected to pollution on top of pollution. As for those involved in the preparation of this report who co-sign my colleague’s accusation, I leave you with the wise words of my dearly departed Mama Louise: ‘Only hit dogs holler.’”

Much of the legal debate between the majority and the dissent turns on details of the regulatory record rather than these larger issues. It would be tedious to go through all of them in detail. I decided to focus on just one: the number of daily truck trips that the new center would provide. As the majority explained, “the FAA itself sometimes refers to the Project as generating ‘3,823 daily truck trips’ but uses a 192 daily truck trips figure to calculate air quality impact.” There’s a lot of back and forth about just where these numbers came from and how FAA used them. Because the challengers did not explain how the discrepancy would impact estimates of air pollution, according to the majority, their challenge based on this discrepancy failed to undermine the validity of the environmental assessment.

The dissent makes what seems to be a strong response: “No logical reason exists to divorce traffic figures from emission calculations. Emissions are generated from mobile sources, like trucks. If the FAA did not account for most mobile sources when it calculated emissions, it failed to provide ‘a convincing statement of reasons to explain impacts are insignificant.’”

It would take a deep dive into the record to decide whether the dissent or the majority had the better of the wrangling over the administrative record. I have to say, however, that I found the majority opinion unsatisfying. There are several red flags about the FAA’s environmental assessment. The assessment failed to follow its own guidelines in defining the study area. It failed to explain just why its conclusion differed from the environmental assessment performed under California law, which did find significant environmental impacts. It had important examples of what seemed to be at best sloppiness, like the inconsistency about the number of truck trips. The majority’s explanations for why none of

these issues mattered is too diffuse and meandering to be persuasive.

More fundamentally, neither the majority nor the FAA seems to have come to grips with the dissent's central argument. The new Amazon center would clearly add environmental stress to a community that was already severely impacted by air pollution and riddled with toxic waste sites. The San Bernardino/Riverside area, according to [Grist](#), "has emerged as one the largest warehousing hubs in the world over the past few decades, due largely to the growth of e-commerce." The result of the court's opinion will be "more flights, more warehouses, more truck traffic, and a lot more pollution in a region that's already endured the worst effects of the online commerce industry."

The majority opinion is essentially a litany of bureaucratic rationalizations for dismissing each individual impact as insignificant without ever looking at the situation as a whole. It also leaves me with little confidence that the FAA took a hard look at the environmental consequences. Given that the FAA was headed by a former airline executive appointed by Trump, there's no reason to think that environmental issues of any kind were really on the agenda.

If the majority opinion is correct under current law, that seems like an indictment of how NEPA is currently implemented. We should not be content with the FAA's halfhearted effort to consider the environmental impacts of its decision on a vulnerable community.