



Environmental Justice Risks for Regulated Entities

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Early Inspiration for Environmental Justice

- Commission for Racial Justice of the United Church of Christ in 1987 performed a Study entitled “Toxic Wastes and Race in the United States.”
- One Major Finding – Locations of commercial hazardous waste facilities were more likely than not to be near communities of color.
- One Major Recommendation – Urge the President of the United States to issue an Executive Order mandating that federal agencies consider the impact of their policies and regulations on racial and ethnic communities.



Executive Order 12898

- Signed by President Bill Clinton on February 11, 1994.
- Was designed to focus federal attention on environmental and human health conditions in minority and low-income communities with a goal of achieving environmental justice.



Some Terms that Stirred Debate

- Environmental High Impact Areas
- Minority Community
- Low Income
- Disproportionately High and Adverse Human Health or Environmental Effects



EPA'S Response

- September 30, 1997, EPA issued an Interim Final Guidance for Incorporating Environmental Justice Concerns in EPA's NEPA Compliance Analyses.
- Delegated states

Note: Most EPA permitting actions are exempt from NEPA review as a result of functional equivalence.



Deference and Discretion

- Under most major environmental statutes, EPA is afforded deference in interpreting its own regulations and actions and are reversible by a reviewing court, typically, only upon a showing that the action is:
 1. Arbitrary and capricious
 2. An abuse of discretion
 3. Not in accordance with the law



Tug of War for Decades

- When does discretion end and an abuse of discretion begin?
- Discretionary authority by the Administrator of EPA and/or its Regional Offices appears in most statutes for which EPA has authority.



EJ Screening Standards

According to EPA'S website, EJSCREEN:

- Is for guidance only
- “...was not designed to be the basis for agency decision-making or determinations regarding the existence or absence of EJ concerns...”
- Should not be used:
 1. As a means to identify or label an area as an EJ community,
 2. To quantify specific risk values, or
 3. To measure cumulative impacts of multiple environmental factors.
- Significantly supports public outreach



Allowing for Some Risks, Most Environmental Statutes Provide For MANDATES Utilizing DISCRETION

- CAA
 - ❖ Regulators MUST protect public health and MUST work toward maintaining or making reasonable further progress toward achieving NAAQs.
- RCRA
 - ❖ Permits for TSDFs MUST contain terms and conditions necessary to protect human health.
- CWA
 - ❖ Water quality standards MUST protect designated uses and MAY be conditioned as DETERMINED by the Administrator to protect those uses.

* Similar provisions are in most environmental statutes.



Permit Writers, Decision Makers, Administrative Tribunals and Courts

- Permit writers make recommendations to decision-makers based upon their own interpretations of the regulations and their discretion.
- Decisions by agency heads may typically be appealed to administrative tribunals.
- Further appeals are to the courts.
- This process is often long and expensive, especially for EJ Communities.

Note: There is often disagreement along the way.



Executive Orders by President Joseph R. Biden, Jr.

Executive Order 13985 – On Advancing Racial Equity and Support for Underserved Communities Through the Federal Government

- Signed January 20, 2021
- Among other things, “...requires a systematic approach to embedding fairness in the decision-making process...” with regard to executive departments and agencies

Executive Order 13390 - On Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis

- Signed January 20, 2021
- Among other things, “... to hold polluters accountable, including those who disproportionately harm communities of color and low-income communities...” and “... to prioritize both environmental justice and the creation of the well-paying union jobs necessary to deliver on these goals.”



Industry Risks

- Uncertainty of a clear mandate and applicability of EJ
- Enforcement actions
- Costly litigation
- Timing and extensions of the permitting process
- Negative publicity
- NIMBY, NOPE, NITU



Strategies for Avoiding and Minimizing Enforcement Actions

- Staff training and documentation of same
- Prioritizing environmental compliance
- Routine audits
- Timely release reporting
- Building margins of safety into permits
- Supplemental Environmental Projects
- Root cause analyses and future prevention



Opportunities and Strategies for Regulated Entities

- Communicate with communities prior to and during the permitting process (open houses, community action panels, public forums, etc.).
- Encourage agency representatives to attend voluntary events, even if without active participation.
- Encourage government to provide technical assistance grants with possible no-strings-attached contributions from industry, providing that no ethical standards prevent such.



Opportunities and Strategies for Regulated Entities (cont'd)

- Thoroughly explain and discuss pollution control equipment.
- Demonstrate a true desire to protect the health, environment and welfare of EJ communities by going beyond minimum requirements when feasible.
- Bottom Line, as others have said, **COMMUNICATE EARLY AND OFTEN!**