

Environmental Law

A Heightened Commitment to Environmental Justice: Recent Federal and State Developments

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Over the past few months, the United States Environmental Protection Agency has signaled that environmental justice (EJ) will play an increased role in the agency's policy and decision-making. For instance, on February 22, EPA announced its national enforcement initiatives for fiscal years 2011-2013. Five of the six initiatives specifically reference environmental justice principles, including consideration of urban populations, minority and low-income communities, children, and communities with disproportionate exposure to environmental risks. Similarly, in 2009 the New Jersey Department of Environmental Protection (NJDEP) made strides in developing a strategy to incorporate EJ into its decision making. This article outlines EPA's and NJDEP's recent pronouncements and examines the practical effects of the regulatory prioritization of EJ.

Recent Developments

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According to EPA, the concept of EJ — the fair treatment and meaningful involvement of all people in the development, implementation, and enforcement of environmental laws regardless of race, color, national origin or income — grew out of the assertion that racial minority and low-income populations bear a higher environmental risk burden than the general population. In June 1992, an EPA workgroup report, "Reducing Risk in All Communities," provided support for this idea. In 1994, President Clinton directed federal agencies to develop strategies to address the problem with Executive Order 12898.

The effectiveness of EPA's prior EJ initiatives is sometimes considered uneven, but EPA has recently made very public pronouncements that suggest a reaffirmed commitment. Administrator Lisa Jackson's January 12 memorandum to EPA employees referenced EJ as one of her seven "themes to focus the work of our agency." She wrote, "We have begun a new era of outreach and protection for communities historically underrepresented in EPA decision-making." Then, on February 22, EPA announced its national enforcement initiatives for 2011-2013. EPA sets these initiatives every three years to address some of the more com-

plex pollution problems, especially those confined to a particular sector or source, and that can be most effectively addressed through a concentrated enforcement initiative. EPA forms teams to direct work and monitor progress under the strategy assigned to each initiative area. The initiatives announced this year address aging sewer systems in older urban areas; storm water runoff; air pollution, particularly from large sources; pollution from mineral processing operations; and concentrated animal feeding operations. EJ on its own was one of the original 16 enforcement initiative candidates, but EPA instead apparently chose to incorporate EJ into the final initiatives listed above, so that each of these considers the disproportionate impact of pollution on minority and low-income communities.

How EJ will actually impact these sector-based initiatives remains to be seen, but the background paper for EJ as a stand-alone candidate stated that targeted enforcement would occur in "communities of concern" identified by each EPA region. This suggests heightened activity within the targeted sectors in geographic areas considered to be disproportionately affected by environmental issues. The EPA has not yet revealed how it will identify communities of concern, or if it will,

but in November 2009, in a project unrelated to the enforcement initiatives, EPA listed 10 “showcase communities” across the country, including Bridgeport, Conn., and the North Shore of Staten Island, N.Y., that are receiving grants to help address environmental risk concerns. These and other communities of concern could probably be given priority or consideration in actions to replace wastewater infrastructure and in the siting or permitting of new industrial facilities or concentrated animal feeding operations.

Identifying geographic areas of concern also became the EJ-driven goal of the NJDEP in 2009. On February 5, 2009, Gov. Corzine signed Executive Order 131, which directed state agencies to address EJ and disproportionate exposure. In March 2009, the NJDEP Environmental Justice Advisory Council (EJAC) presented then-Commissioner Mauriello with a report, “Strategies for Addressing Cumulative Impacts in Environmental Justice Communities,” which recommended that the state identify “hot spots” — communities of concern — where DEP would then act to reduce or eliminate existing impacts by, for instance, requiring additional controls for new and modified sources, rejecting permit applications, and undertaking enforcement sweeps. In December 2009, EJAC released its “Preliminary Screening Method to Estimate Cumulative Environmental Impacts,” a screening tool designed to assist NJDEP with identifying New Jersey’s communities of concern. The screening tool relies, in part, on U.S. Census data, EPA data, NJDEP emission inventories, and the density of major regulated sites, known contaminated sites, dry cleaners, and junkyards with respect to their proximity to minority and low-income communities. NJDEP has not yet reported on results of the screening tool. Whether EJAC will have the opportunity to identify any hot spots is now in question, however. On April 19, Gov. Christie’s Red Tape Review Group recommended the elimination of executive orders “that confuse or impede New Jersey’s growth strategies” — including EO 131. Although news reporting on this development indicates that this executive order may have been inadvertently included in the report and EO

131 has not yet been rescinded, the pace of EJAC’s cumulative impacts analysis initiative may be slowing.

Nonetheless, recent public statements by NJDEP indicate that EJ concerns remain a priority. During a May 24 public meeting convened by NJDEP, the agency outlined its new Remedial Priority Scoring (“RPS”) system initiative, which is designed to rank New Jersey’s contaminated sites and then prioritize their cleanup. In response to questions regarding whether EJ concerns will be incorporated into the RPS, NJDEP responded that EJ is and remains a consideration, and will eventually be incorporated into the RPS system.

Practical Impacts

Even if EPA intensifies its focus on EJ as a factor in its decisions, or if environmental groups take the EPA’s recent pronouncements as an invitation to challenge EPA decisions more aggressively, it does not necessarily mean that industry faces greater levels of scrutiny. Even prior to the EPA’s recent pronouncements, EPA’s regulatory framework has included analysis of EJ factors and petitioners have experienced little success challenging EPA decisions on the basis of EJ. As an example, EPA’s Environmental Appeals Board addressed in 2008 the petition of environmental groups who alleged that EPA failed to perform an adequate EJ analysis before issuing the final permit for a waste injection well in Michigan. *In re Beeland Group, LLC*, UIC Appeal No. 08-02 (Oct. 3, 2008). The EAB agreed that EPA should include in its analysis whether a minority or low-income community was environmentally threatened. The Board pointed out, however, that the EPA’s EJ analysis — guided by the Agency’s 2004 “Toolkit for Assessing Potential Allegations of Environmental Justice” — had determined prior to the final rule that the economic status of the population surrounding the proposed well was comparable to that of the rest of the county and state; that is, the population was not a low-income community. In contrast, the environmental group could not offer any evidence that the well had been placed in an area of disproportionate impact. The board determined that no further EJ analy-

sis was required. Even if it can be shown or stipulated that minority and low-income communities reside in an impacted area, the inquiry turns on whether the views of those communities were received and considered by the Agency, and the extent to which those communities will be affected by the permitted activity. For instance, in *In re Envotech*, 6 E.A.D. 260 (Feb. 15, 1996), the board found that the petitioner had not shown that the permit would not protect drinking water of the affected populations and denied further EJ review.

In the arena of rulemaking, the EPA is currently engaged in an expanded environmental justice analysis of October 2008 revisions to the definition of solid waste in the hazardous waste regulations. The EPA originally found that the rule would have no adverse impact to minority or low-income communities, but following the release of the revisions, the Sierra Club filed a petition challenging that finding and requested that EPA repeal the rule. After a public meeting in June 2009, and an extension of the comment period in January, EPA issued the complex methodology that will guide its EJ analysis. EPA anticipates that it will complete its expanded analysis and respond to the Sierra Club’s petition by the end of this year.

Although past practices can be a guide, how EPA and NJDEP’s recent affirmative pronouncements regarding EJ will actually be implemented “on the ground” remains to be seen. In particular, questions persist with respect to “where” and “whom” EPA and NJDEP will target to live up to these new pledges to incorporate EJ considerations in their decision-making. Until these questions are answered, the regulated community should be aware of EJ issues and the possible impacts that recent EPA and NJDEP initiatives may have when siting industrial operations, seeking environmental permits and developing site remediation recommendations, especially in low-income communities. What is beyond question, however, is that for the immediate future, EPA and NJDEP are committed to the inclusion and consideration of EJ issues in carrying out their legislative mandates. ■