Legal and Practical Issues Associated with the Growing US Environmental Justice Movement

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Imagine this scenario: in the course of constructing a new manufacturing facility, your company's EHS manager applies to the state environmental agency for a general NPDES permit. While the permit application is pending, the agency informs your EHS manager that your new facility is in an "environmental justice" area and asks your company to analyze whether the proposed NPDES permit will adversely impact the health of low-income and minority citizens in that community, given the fact that elevated levels of lead have already been identified in the community drinking water supply. The agency also requests that your company hold a "listening session" at a local community center so that residents may comment on the permit application.

As general counsel, you believe your company has already satisfied all the statutory requirements for the NPDES permit to be issued. Do you comply with the agency's additional requests? And what are the consequences if you do not?

While this factual scenario is hypothetical, the key legal question it raises is not: that is, the extent to which recent environmental justice policy initiatives undertaken by state and federal environmental agencies may create de facto binding obligations upon the regulated community.

The concept of "environmental justice" (EJ) in federal policy actions first gained traction in the late 1980s, when studies found racial disparities in both the siting of hazardous waste facilities and the way in which the federal government remediated toxic waste sites and punished polluters.

In 1994, President Clinton signed Executive Order 12,898, which called for all federal agencies to incorporate the concept of environmental justice by identifying and addressing certain agency programs, policies and activities that might have disproportionately high and adverse human health or environmental effects on minority populations and low-income populations.

Although the Executive Order explicitly states that it is non-binding and does not create any judicially enforceable rights or obligations, federal and state agencies have since developed plans and policies aimed at integrating EJ into their day-to-day activities. Primarily, these efforts focus on environmental issues in socalled "EJ communities." EJ

communities are usually typified by a low-income and/or minority population above a certain baseline average, although their size may vary based on the granularity of available demographic data and an agency's own chosen definition. Therefore, an EJ community may be as large as a major city (Detroit would qualify by most EJ measures), or it may be as small as a particular city block in Brooklyn.

A key EJ policymaker in recent years has been the US Environmental Protection Agency (US EPA). In 2011, after a public comment period, US EPA released an ambitious agency initiative called "Plan EJ 2014," which the agency refers to as its "roadmap" for infusing the concept of EJ throughout all the agency's programs, policies and activities. Among other things, Plan EJ 2014 sets out US EPA's vision for incorporating EJ into formal rulemaking, permitting and compliance and enforcement activities. In conjunction with Plan EJ 2014, US EPA has prepared a 120-page document called "Legal Tools" which, among other things, lists multiple statutory provisions of federal environmental laws (including the Clean Air Act, the Clean Water Act, the Safe Drinking Water Act, RCRA, EPCRA and CERCLA) that US EPA believes can be interpreted to incorporate its EJ efforts.

From a strictly legal perspective, the vast bulk of US EPA's EJ efforts remains conceptual; the Agency has not proposed any rulemaking to formally codify any aspects of Plan EJ 2014. But it is clear that EPA will continue its EJ activism in 2015: Matthew Tejada, who leads the EPA's Office of Environmental Justice, recently told Law360 ("EPA Official Predicts Big 2015 for Enviro Justice Effort," Jan. 8, 2015) that the EPA is planning in 2015 to finalize two guidance documents that will offer guidelines for considering environmental justice issues in EPA actions and rulemaking.

At the regional and state levels, agency efforts have shifted from abstract concepts to concrete action. In particular, certain state agencies have undertaken EJ initiatives that are aimed at enabling a corps of "citizen regulators" and "democratizing" agency decision making and enforcement procedures. Some of these initiatives are based on the concept of "predictive policing"—the idea that citizens can accurately identify environmental harms and health risks in their own communities.

The California Department of Toxic Substances Control (DTSC), for example, has created a standalone agency unit —the "EJ Enforcement Initiative"—that undertakes bus tours in which residents in low-income and/or minority communities lead DTSC personnel to sites and facilities that community members suspect pose environmental hazards. By law, DTSC must then return to the community within 100 days of each tour to report on enforcement activities. DTSC has used this EJ community policing model to investigate and bring enforcement actions against a number of regulated industries, including metal shredders, rail yards, automotive dismantlers, electrical generation facilities and iron foundries.

Other predictive policing initiatives have centered around creating mapping or screening tools that use a combination of demographic, health, environmental and facility-specific data to enable agencies to draw a circle around EJ communities and the facilities within them. These mapping tools have been used by agencies in both the enforcement and permitting contexts. For example, in 2008, inspectors with US EPA Region 9's RCRA Program identified certain areas with high levels of environmental pollution, overlaid that data with demographic information (such as income levels, health indicators, access to health care, etc.) and undertook a targeted inspection sweep of 245 metal plating facilities in these areas. Even more recently, US EPA announced plans to publicly release in 2015 a screening tool called EJ Screen that can be used by US EPA (or anyone else) to determine whether communities may qualify for EJ outreach based on a number of existing data sets, such as census data, traffic models and age of housing stock.

At the state level, Illinois EPA (IEPA) recently announced that, as a matter of policy, it would begin using its internal EJ mapping tool to screen every permit application submitted to the agency. Once the EJ mapping tool identifies a pending permit application in an area deemed to be EJ community based on economic and demographic data, IEPA flags the application for targeted outreach by the agency (which might include community "listening sessions" or multilingual flyers explaining the proposed project and its anticipated environmental impacts) to community members. IEPA has made it reasonably clear that it will conduct this enhanced outreach with or without a permit applicant's

cooperation. Unlike US EPA, IEPA has no current plans to make its mapping tool available to the public.

Finally, in the enforcement context, both US EPA and state agencies have been incorporating the environmental justice concept into "supplemental environmental projects" (SEPs) that are often included in agency settlements. Typically, these settlements hold a portion of any assessed fine in abeyance, contingent upon the settling party performing a project in an EJ community—e.g., planting trees, or paying to retrofit school buses with clean fuel technologies. Some agencies have established environmental justice project databases in which communities may submit their own ideas for SEPs, and regulated actors are encouraged to choose among them.

While the aims of these recent agency EJ efforts may be noble, their execution raises potential legal issues. A threshold issue is transparency: while some EJ mapping/screening tools and their underlying methodologies are publically accessible, others are not. In the latter case, the regulated community is unable to "audit" the agency's assessment when faced with seemingly arbitrary decision making. In Illinois, for example, in the context of a threatened enforcement action, US EPA demanded that a company engage in public outreach to a community that US EPA deemed to be an EJ community, even though the activities subject to potential enforcement occurred outside of that community, and even though publically available demographic information suggested that the community at issue did not fit US EPA's own definition of an EJ community.

Moreover, certain agency EJ initiatives may effectively create or alter binding regulatory regimes, even though Executive Order 12,898 and virtually all agency EJ policy documents state that they have no legally binding effect. For example, many statutory permitting schemes direct a permit to be issued if the permittee has satisfied all the statutorily imposed requirements for the permit at issue. But certain of an agency's proposed EJ activities—e.g., additional community outreach, or a request for a disparate impacts analysis—may go beyond the statutorily imposed public notice requirements. Therefore, to the extent that an agency holds up an otherwise valid permit on environmental justice grounds, the underlying permitting statute itself may provide a basis for action.

More broadly, the federal Administrative Procedure Act (APA), and most parallel state administrative procedure acts, sets forth notice and-comment procedures that administrative agencies must follow when promulgating administrative rules. Generally, agencies must follow these notice-and-comment procedures if they adopt policies that create new rights or duties (or that substantively affect existing rights and duties) with respect to third parties outside of the agency. An agency's promise in an EJ manual that an EJ community will receive enhanced outreach during the course of a permitting decision arguably could amount to a legal obligation on the part of the permit applicant to perform this outreach, and thus could be subject to challenge under the APA or similar statutes.

Setting purely legal questions aside, federal and state EJ initiatives may also have more immediate practical effects, including delays in agency permitting or other decision making (e.g., approval of remediation or cleanup plans). The heightened public scrutiny that necessarily accompanies EJ outreach efforts may provide fodder for citizen suits, private enforcement actions or pressure from local lawmakers or organized community groups for agency action against perceived environmental harms. Finally, concepts like SEPs—as innocuous as they may initially seem—may leave regulated industries with hard choices. Suppose that, in the context of a highly publicized enforcement action in an EJ community, an agency gives a lead smelter two options: construct upgrades to the community's wastewater treatment plant at a cost of $100,000, or pay an extra $100,000 in fines. The lead smelter may have a host of sound business reasons to choose to simply pay the extra fine, but if community activists have already drummed up popular support for the idea of a new wastewater treatment plant, what practical choice might the lead smelter have as a good corporate citizen of that community?

Given that recent agency EJ efforts are fundamentally focused on giving EJ communities more information about the actions of corporate citizens within the community's borders, companies might consider identifying existing facilities in low-income or disproportionately minority communities and placing particular emphasis on sound environmental management practices at these facilities. Companies may also consider implementing a proactive communications strategy in advance of major permit applications or modifications at facilities in EJ communities, or in the event that community concerns with a particular facility are identified.

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