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ENVIRONMENTAL LAW

Environmental Justice: Past, Present and Future

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Special to the Legal

Part of our job as environmental lawyers is to immerse ourselves in the details of environmental policies affecting our clients. One of the most significant policy developments to emerge in recent years is the concept of environmental justice or “EJ.” Indeed, we have been knee-deep in EJ policies, legislation, and regulations at the federal, state, and local levels. We regularly throw around the term “EJ,” assuming it’s colloquial now—but that’s not totally accurate. In this article, we take a look at the concept of EJ through a wider-angle lens, beginning with its history and then discussing some of its current real-world implications for environmental practitioners and regulated facilities.

To start, the notion of environmental justice is not new. It began to take shape between the late 1970s and the early 1990s, after several incidents sparked interest in the environmental and health burdens facing certain minority and low-income communities. Notably, residents of Shocco Township, Warren County, North Carolina, protested the state’s selection of the township for a landfill to dispose of 30,000 gallons of polychlorinated biphenyl (PCB)



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contaminated soil that had been dumped along North Carolina roadways. At the time, Shocco Township was 75% Black, and Warren County was ranked 97th in per capita income out of 100 counties in the state. About a decade later, a group of neighbors in the Black community of Norco, Louisiana, demanded that residents of an area with over 100 petrochemical facilities be offered the opportunity to relocate, and eventually Shell Corp. agreed. There are other examples like these.

The term “environmental justice” was coined in 1990 by Robert D. Bullard as “the principle that all people and communities are entitled to equal protection of environmental and public health laws and regulations.” See

Robert D. Bullard, “The Quest for Environmental, Climate and Energy Justice in the United States, State of Black America,” (last visited Oct. 28, 2024). Shortly thereafter, the federal government—under President Bill Clinton—issued its first executive order addressing EJ, “Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations,” E.O. 12898, 59 Fed. Reg. 7629 (Feb. 16, 1994), which developed a strategy to address disproportionate adverse human health or environmental effects of federal agencies on marginalized communities. But the order never had any practical effect, and federal EJ efforts remained relatively quiet for a number of years until the Biden administration.

Biden moved fast, signing Executive Order 14008 during his first week as president. This order, “Tackling Climate Crisis at Home and Abroad,” launched the Justice40 Initiative, which set a goal of 40% of federal investment benefits to go to disadvantaged communities that are overburdened by pollution. See 86 Fed. Reg. 7619 (Feb. 1, 2021). Two years later, the administration issued Executive Order 14096, “Revitalizing our Nation’s Commitment to Environmental Justice for All,” which directs the federal government to use scientific research

and high-quality data to address environmental justice concerns. See 88 Fed. Reg. 25251 (Apr. 26, 2023). These actions have received historic levels of funding, enabling the Environmental Protection Agency (EPA) to create the Office of Environmental Justice and External Civil Rights (EJCR) to oversee enforcement of federal civil rights laws in the context of environmental permitting. EJCR released an EJ mapping tool called EJSCREEN that provides socioeconomic and environmental markers for different geographic areas, as well as guidance on how EPA intends to use the environmental statutes to address EJ. Federal funding in support of EJ has also trickled down to state and local levels. A number of states and municipalities have resurrected decades-old EJ policies or drafted new ones based on current demographics. Some, like Pennsylvania, have gone further, developing their own EJ mapping software.

In 2020, New Jersey became the first state to enact an EJ statute, and the state's Department of Environmental Protection (NJDEP) promulgated implementing regulations in 2022 (EJ rule). See N.J.A.C.7:1C et seq. Generally speaking, the EJ rule requires a detailed review of cumulative environmental and public health stressors whenever a regulated entity is seeking an environmental permit to construct a new facility or expand an existing one in area designated as an "overburdened community." OBCs are census block groups where at least 35 percent of households are low-income, 40% of residents identify as minority, or 40% of households have limited English proficiency.

Just last month, the NJDEP released its "Meaningful Public Participation Guidance," which includes suggested strategies for permit applicants to

meet the EJ rule's "enhanced" public participation requirements. Among other things, the guidance suggests including a history of all permits in the public notice for the application being reviewed; allowing the public to access the application; working with a marketing firm and a community-based organization to ensure proper notice of the public hearing is given to the affected OBC; ensuring all notices are written in and the public hearing is conducted in the prominent language of the affected OBC; and building into the application process sufficient time for the applicant to receive and respond to any comments made at the public hearing. See generally NJDEP, Meaningful Public Participation Guidance, 5-13 (Oct. 2024). For its part, the NJDEP periodically hosts EJ "engagement sessions," typically in both English and Spanish, to solicit comments from community residents about their EJ concerns generally.

But even with all the recent activity, studies show that close to 80% of Americans are unaware of any federal effort on the EJ front. Even fewer report being aware of state or local initiatives. Researchers identified another distinction insofar as a majority of U.S. adults believe low-income and minority groups are more likely to be exposed to environmental hazards, but far fewer believe such groups are more likely to be faced with environmental injustice. See Nicome et al., Down to Earth: U.S. adults back environmental justice, but policy awareness falls short, Ctr. for Health Justice (June 25, 2024).

In reality, public hearings on permit applications subject to New Jersey EJ review have garnered varying degrees of attention; some have not had any community participation at all. Maybe this is reflective of the unevenness with which Americans seem to view EJ more broadly. Time will tell whether this

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changes. Regardless, environmental practitioners and regulated facilities are currently navigating EJ issues in at least two key areas: pursuing environmental permits that have EJ implications, and responding to agency enforcement actions and third-party claims that on their face allege noncompliance with specific environmental statutes and regulations, but which are largely buoyed by the renewed focus on EJ led by the Biden administration and furthered by states like New Jersey. Depending on the outcome of the upcoming Presidential election, federal priorities could shift away from EJ once Biden-backed funding runs out. But we expect state and local programs to continue to evolve and even pick up steam in the event of a return to a Republican White House.

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