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Alerts & Publications

Environmental Justice Update

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In 1994, President Clinton issued Executive Order 12898, "Federal Actions to Address Environmental Justice in Minority Populations and Low Income Populations," requiring USEPA to consider whether its policies and regulations "disproportionately impact" minority populations. The Order was issued, in part, based on published studies indicating that a substantial number of hazardous waste treatment, storage and disposal operations are located in areas with low income, minority populations. See epa.gov/compliance/environmental justice.

USEPA's Office of Civil Rights also issued draft guidance on environmental justice (EJ) claims arising under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq. The first draft, released in February 1998, drew opposition from virtually all stakeholders, including state environmental agencies, who expressed concern that it would allow environmental justice issues to be raised after a permit was issued. Congress later moved to bar EPA from using that draft guidance to process complaints under Title VI and USEPA ultimately withdrew the draft altogether. In June of 2001, EPA's Office of Civil Rights issued a second draft, which provided a methodology for analyzing claims of adverse disparate impacts. The public comment period on that draft closed in 2002, but a final guidance document was not issued.

In the meantime, several key court decisions have called into question whether Title VI authorizes EPA to address disparate impacts (as distinct from acts of intentional discrimination). In *Alexander v. Sandoval*, 532 U.S. 275 (2001), the Supreme Court ruled that private citizens have no implied right of action under Title VI to address disparate impacts. Similarly, in *South Camden Citizens in Action v. NJDEP*, 274 F.3d 771 (3d Cir. 2001), the Third Circuit held that 42 U.S.C § 1983, the general federal civil rights statute, cannot be used to enforce EPA's Title VI disparate impact rules.

On September 18, 2006, EPA's inspector general issued a report ("EPA Needs to Conduct Environmental Justice Reviews of Its Programs") criticizing EPA for failing to implement the executive order and directing EPA to identity those programs, policies and activities which should be subject to environmental justice review.

Decisions of the EPA Environmental Appeals Board (EAB) have tended to reject environmental justice claims in permitting decisions, either based on a finding that no environmental impact would occur, eq. *In re: Shell Offshore Inc.*, 2007 WL 3138040 (EAB 2007) or that no disadvantaged population falls in the impact area, *In re: Beckland Group LLC*, 2008 WL4517160 (EAB 2008). One recent noteworthy decision is *Communities for a Better Environment et al. v. City of Richmond et al.*, where a California Court of Appeals upheld a decision finding an oil refinery facility expansion impact analysis inadequate, in part because it failed to consider disproportionate impact on working class communities, CA 125618 (Cal. App. 2010).

Current EPA Administrator Lisa Jackson has included “equity” considerations among all the enforcement initiatives announced in 2010. Noteworthy among these is allocation of federal funding for sewage improvements, (and see *Rosemere Neighborhood Association v. EPA*, W.D. Wash. 2010) in which EPA settled municipal claims of discrimination in allocation of funding in sewage improvements).

Environmental justice considerations should be regarded with care. They have often become a precursor to (or have been combined with) toxic tort suits. They may also be central to gaining use approval for redevelopment of contaminated sites (or “brownfield” projects). Environmental justice concerns may be fueled, in part, by information on permitted releases and chemical storage reported under federal and state right-to-know laws. Also, several states are proceeding to undertake EJ initiatives independent of federal enforcement.