

Protection for all

Environmental Justice is a key component of environmental law and regulation. Here, Connell Foley's Steve Barnett summarizes the current developments in its implementation

There is no federal Environmental Justice (EJ) statute, rather the basis for EJ at the federal level is the Equal Protection Clause of the U.S. Constitution. The 14th Amendment provides that the states may not deny any person equal protection of the laws. On February 11, 1994, President Clinton signed Executive Order (E.O.) 12898, titled "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations". E.O. 12898 noted existing federal laws that can be used to further EJ: Title VI of the Civil Rights Act of 1964, and the National Environmental Policy Act (NEPA).

EPA defines "environmental justice" as "the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies".

They span the range of EPA programs, including air, water and waste, chemical regulation, grants and resources, planning, partnerships. United States Environmental Protection Agency (USEPA) Office of General Counsel issued its report entitled "Plan EJ 2014: Legal Tools" to identify legal tools for EPA to advance its EJ goals under each EPA law and regulation, including air, water, waste, pesticides and toxics programs, tribal programs, environmental review programs, grants and procurement, and freedom of information.

EPA released two documents related to EJ during rulemaking: Guidance on Considering Environmental Justice During the Development of Regulatory Actions, May 2015, and Technical Guidance for Assessing Environmental Justice in Regulatory Analysis, June 2016, available on EPA's EJ website with other information on EPA EJ plans, activities, and resources. EPA EJ activities and requirements span the range of EPA rules and programs. Review EPA rules and guidance governing specific programs to identify EPA EJ requirements.

CALOPR/CALEPA

The California Constitution prohibits discrimination, and numerous California laws prohibit discrimination, including in land ownership and tenancies. In 1999, California passed its first EJ law, defining EJ and establishing California Governor's



It's important for businesses to understand the complexities of environmental justice

Office of Planning and Research (CalOPR) as the coordinating agency for State EJ programs. California law requires each planning agency to prepare and the legislative body of each county and city to adopt, a comprehensive, long-term General Plan for the physical development of the county or city, and of any land outside its boundaries, which in the planning agency's judgment bears relation to its planning.

CalOPR publishes a Directory of Planning Agencies at both the city/town and county level. CalOPR develops General Plan Guidelines, which the local planning agencies must follow. The Guidelines include mandatory EJ elements for jurisdictions with "disadvantaged communities". In 2020, CalOPR updated the General Plan Guidelines EJ Section.

California Environmental Protection Agency (CalEPA) is tasked by law with identifying "disadvantaged communities", which it does by a mapping program on its website. In addition, CalEPA maintains an EJ Program and an EJ Task Force. These and additional EJ programs and initiatives are highlighted in CalEPA's EJ website.

NJDEP

The New Jersey Environmental Justice Law was signed into law September 18, 2020. It is one of the most robust in the country, specifying an EJ procedure, including public hearings, for environmental permitting by New Jersey Department of Environmental Protection (NJDEP) statewide, as opposed to California law, for example, which requires local planning agencies to include EJ in their General Plans. NJDEP Permit applicants for facilities in overburdened communities must prepare an Environmental Justice Impact Statement (EJIS), submit it to NJDEP and the municipality, and conduct a public hearing in the overburdened community.

The law defines "overburdened communities", "facilities" and "permits" for purpose of the law. NJDEP decides what qualifies as an overburdened community and provides a list on its website. According to NJDEP, there are approximately 310 municipalities with populations totaling approximately 4,489,000 that have overburdened communities within their municipalities.

At the hearing, the applicant must "provide clear, accurate, and complete information about the pro-

posed new or expanded facility” and the “potential environmental and public health stressors associated” with it. The applicant must additionally accept written and oral comments from any interested party, and provide an opportunity for meaningful public participation in the hearing. No later than 10 days after the hearing, the applicant must submit to NJDEP a transcript of the hearing and all written comments received. NJDEP considers the testimony presented, comments received, and evaluates the issuance of, or conditions to the permit as necessary to avoid or reduce the adverse environmental or public health stressors affecting the overburdened community. No permit may be issued until at least 45 days after the public hearing.

NYDEC

New York courts have recognized EJ since the 1980s, holding that the New York State Environmental Quality Review Act (SEQRA) requires consideration of EJ impacts. In 2003, New York Department of Environmental Conservation (NYDEC) issued its Policy on Environmental Justice and Permitting, providing definitions and scope applicable

to EJ considerations in NYDEC review and approval of all permit applications. DEC is required to consider EJ in selecting remedial actions for brownfield sites. The New York Climate Leadership and Community Protection Act of 2019 (CLCPA) requires New York to reduce economy-wide greenhouse gas emissions 40% by 2030 and no less than 85% by 2050 from 1990 levels.

It also established the Climate Justice Working Group (CJWG) to identify disadvantaged communities for pollutant reductions, and a Just Transition Working Group to advise on workforce development and training on renewable and clean energies in disadvantaged communities. The CLCPA directs DEC to develop community air monitoring systems in disadvantaged communities by October 1, 2022; and, by January 1, 2024, to promulgate regulations to ensure DEC rules do not disproportionately burden disadvantaged communities, and a strategy to reduce air pollution in disadvantaged communities. It also directs that all state agencies shall not disproportionately burden disadvantaged communities and shall prioritize reduction of pollutants in disadvantaged

communities. CJWG’s draft disadvantaged communities criteria, interactive map, and list are available for public comment through July 7, 2022.

New York enacted new Article 48 of its Environmental Conservation law dedicated to EJ, effective January 1, 2020. It provides that “all people, regardless of race, color, religion, national origin or income, have a right to fair treatment and meaningful involvement in the development, implementation and enforcement of laws, regulations and policies that affect the quality of the environment”. Each New York State agency is to adopt EJ policy and rules, appoint an EJ coordinator, and conduct EJ staff training.

EJ is a critical component of environmental law and regulation today and will continue to be. It is important to know and track whether your facility is a facility for EJ purposes, is in an overburdened or disadvantaged community, and whether a planned transaction, expansion, addition, permit application or other action will be impacted by EJ requirements. ■

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