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EPA's Environmental Justice Plan May Bring Changes to Environmental Rulemaking, Permitting and Enforcement

The term "environmental justice" or EJ, broadly encompasses the principle that low-income or minority communities should not be disproportionately burdened by federal environmental regulatory programs. Why does this matter to the private sector? Because the federal government is increasingly adding EJ policies to its regulatory, permitting and enforcement programs. If you need permits, comply with regulations or face enforcement actions, you will be running head first into these new EJ policies.

No statute or regulations address EJ. Rather, Executive Order 12898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations" (February, 1994) codified the principles that federal agencies should consider how their actions impact disadvantaged populations. Since 1994, the Environmental Protection Agency (EPA) has taken the lead in implementing EJ policies, and virtually all federal agencies now must meet EJ standards. Virtually all of the standards for EJ are found in policies and guidance documents, rather than laws.

Most recently, EPA has taken EJ to a new level, unveiling Plan EJ 2014, which lays out an ambitious set of goals and action plans for more fully integrating EJ into its operations by 2014. The plan is timed to coincide with the twentieth anniversary of the 1994 E.O. 12898 that directed each federal agency to "make achieving environmental justice part of its mission." With Plan EJ 2014, EPA is signaling that EJ will play an increasingly substantial role in the agency's regulatory, permitting, enforcement and research activities going forward.

What Can You Expect?

EPA will be implementing Plan EJ 2014 over several years. In the short run, before the agency develops additional policies or regulations, EJ considerations will become a routine part of environmental compliance and enforcement actions. This can include selection of supplemental environmental projects (SEPs) or other remedial steps addressed in such actions. In the mid-term and long term, EPA will be taking various steps to meet the broad goals of Plan EJ 2014.

Plan EJ 2014 consists of nine broad goals, with strategies to achieve each one. Four of the goals are deemed, "Tools Development Areas." To meet these goals, EPA intends to devote its scientific, legal, informational and financial resources to promoting EJ.

The regulated community can expect more changes to come from EPA's five "Cross-Agency Focus Areas," however. The focus areas outline how EPA will further incorporate EJ considerations into its rulemaking, permitting, enforcement and community-based action programs. Additionally, EPA's plans in these areas may eventually be adapted to other agencies as EPA has been tasked by President Obama with assisting other federal agencies with their EJ plans.

Plan EJ 2014's potential changes to EPA's rulemaking, permitting and enforcement actions are summarized as follows.

Rulemaking

Plan EJ 2014 contains a three-part plan for making EJ a more integral part of rulemaking. First, EPA intends to finalize its guidance document for considering EJ in the rulemaking process. EPA issued interim guidance in July 2010. The guidance requires EPA staff to facilitate EJ community involvement in the process, consider whether EJ communities would be disproportionately impacted by the rule, and assess how public participation and potential disproportionate impacts influenced the final rule. EPA intends to issue a final version of the guidance by the end of 2011. Second, EPA's staff will be given more training on EJ principles and practices, and EPA will monitor how effectively this training is being applied to rulemaking. Third, EPA will work with other agencies to develop technical guidance for conducting EJ assessments of proposed rules.

The plan may have a significant effect on rulemaking, as evidenced by a recently proposed rule showcased in Plan EJ 2014 as an example of the agency's renewed focus on EJ. In that proposal, EPA is seeking to reverse a rule that is less than three years old and which was intended to relax regulations on hazardous waste to encourage recycling. At the request of environmental groups, EPA conducted a new

EJ analysis and concluded that the 2008 final rule had the possibility of disproportionately impacting EJ communities, even though no problems have arisen with the rule. The proposal, if finalized, would significantly increase the regulation of hazardous secondary materials intended for recycling.

Permitting

To enhance EJ in permitting, EPA has already developed a set of draft “tools” to increase the participation of EJ communities in permitting and to ensure that EJ concerns are fully considered in permitting decisions. These tools include EPA staff training, guidance and best practices documents, and increased funding for community engagement. Going forward, Plan EJ 2014 calls for its draft tools to be tested in selected EPA permitting decisions. By early 2012, the agency will decide whether the tools should be implemented as guidance, policy or regulation. EPA expects to have its EJ permitting tools in place within the next year.

With EPA’s renewed focus on EJ, permit applicants in areas with EJ communities would do well to be proactive in engaging and soliciting the support of those communities by, for example, holding town hall gatherings, meeting with community leaders, publishing notices in local publications (in multiple languages if appropriate), and participating in local civic events.

Compliance and Enforcement

Plan EJ 2014 calls for a greater proportion of EPA’s compliance and enforcement resources to be focused on EJ communities. EJ will be taken into account when making decisions on which potential enforcement cases to pursue. Likewise, EPA’s compliance resources, such as monitoring and inspection programs, will be directed to issues that have a greater impact on EJ communities. As an example, EPA notes that one of its current enforcement priorities is water pollution from concentrated animal feeding operations (CAFO). EPA states in the plan that it will give priority to cases involving CAFOs that are suspected of contaminating drinking water sources of EJ communities.

EJ considerations also will affect the resolution of cases under Plan EJ 2014. EPA, along with the Department of Justice, has recently had a focus on crafting settlements with violators that include substantial company-wide environmental commitments or Supplemental Environmental Projects in lieu of hefty fines. EPA’s goal with Plan EJ 2014 is to continue and broaden its practice of using settlements to induce companies to take actions that environmentally benefit EJ communities.

Companies with facilities near EJ communities should expect greater environmental oversight. If a violation is discovered by environmental regulators, it is advisable that companies be willing to commit to voluntary changes in environmental practices (e.g., implementing best management practices, upgrading control equipment) as part of any settlement negotiations.

If you have any questions about how EPA’s Plan EJ 2014 will affect your operations, please contact any of the attorneys listed in the left rail of this message.

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