



Chapter 4

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Environmental Justice and the Mining and Energy Industries

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Slowly but surely, principles of environmental justice are working their way into environmental law. What began as a movement based largely on mass protest is gradually leading to the creation of legal tools that communities can try to use to influence the outcome of decisions that affect their environment, both in the United States and abroad. Government agencies and the regulated community have begun to take these principles seriously. We are a long way away from understanding how these principles

¹ The views expressed herein are solely those of the authors and should not be attributed to the firm or its clients.

will affect the day-to-day operations of companies in regulated industries, but the concept of environmental justice is apparently here to stay.

The first step in trying to understand how these principles can affect regulated industries is determining what is meant by environmental justice. The United States Environmental Protection Agency (EPA) explains it in terms of empowerment, so that our environmental laws are implemented in a way that

no group of people, including racial, ethnic, or socioeconomic groups

* * *

bear a disproportionate share of the negative environmental consequences resulting from the industrial, municipal, and commercial operations or the execution of federal, state, local, and tribal programs and policies.²

Others believe that environmental justice requires that persons of all racial, ethnic, and socioeconomic groups are adequately represented among decision-making boards, commissions and regulatory bodies,³ and that minorities and low income communities have adequate opportunity to make their views known prior to agency approvals of projects in their communities.⁴

Environmental justice issues frequently arise when new projects are proposed to be sited in minority or low income communities, or when existing projects in such communities must undergo permit or licensing renewal. Members of these communities contend that they must bear “a

² EPA, *Final Guidance For Incorporating Environmental Justice Concerns in EPA's NEPA Compliance Analysis* 5 (1998).

³ See Benjamin F. Chavis, Jr., *Foreword* to Robert D. Bullard, *Confronting Environmental Racism: Voices from the Grassroots* 3 (1993) (“Environmental racism is racial discrimination in environmental policy-making [including] . . . the history of excluding people of color from the mainstream environmental groups, decision making boards, commissions, and regulatory bodies.”).

⁴ United States Department of Agriculture, Departmental Regulation 5600-2, *Environmental Justice* 2-3 (1997).

disproportionate share of the negative environmental consequences” of projects being approved by the relevant regulatory bodies.⁵ In fact, the environmental justice movement first received national attention in 1982 when a state agency issued a permit to build a hazardous waste landfill in a predominantly African-American community in North Carolina that already had similar facilities. The community protested, more than 500 were jailed, and national civil rights organizations got involved.⁶ Although the protests did not halt the landfill, they motivated national studies that concluded there was a statistical correlation between race, socioeconomic status, and the location of hazardous waste facilities.⁷

The siting of planned facilities has so far been the primary focus of environmental justice concerns, but the concept has also been invoked to oppose – or urge that changes be made to – the terms of permit renewals being considered for existing facilities. Moreover, based upon recent guidance documents from various federal agencies, environmental justice proponents have already begun to push for more stringent pollution controls, or more mitigation measures, for planned or existing facilities where potential releases occur in minority and low income communities. Thus, even if communities cannot stop approvals for new facilities or renewals for existing facilities, they may be able to use environmental justice principles to impose more stringent environmental practices.

The environmental justice movement is by no means focused solely or even primarily on the mining and energy industries. But many facilities in these industries are located or may be located in or near minority (including Native American) or low income communities. Moreover, continued operation of existing facilities, planned modifications to those

⁵ See, e.g., *Chester Residents Concerned for Quality Living v. Seif*, 132 F.3d 925 (3d Cir. 1997), *vacated as moot*, 524 U.S. 974 (1998).

⁶ See Robert D. Bullard, *Unequal Protection: Environmental Justice and Communities of Color* 5 (1994).

⁷ See, e.g., United Church of Christ Commission for Racial Justice, *Toxic Wastes And Race in The United States* (1987). Some commentators suggest that disparate siting patterns are simply a byproduct of market forces rather than racial discrimination, or that low-income minorities “come to the nuisance” because of jobs and inexpensive real estate. See, e.g., Lynn E. Blais, “Environmental Justice Reconsidered,” 75 *N.C. L. Rev.* 75 (1996); Vicki Been, “Locally Undesirable Land Uses in Minority Neighborhoods: Disproportionate Siting or Market Dynamics?,” 103 *Yale L.J.* 1383 (1994).

facilities, and commencement of construction and operations at new facilities require permits, renewal permits, and other approvals from a number of state and federal regulatory agencies. The key here is that environmental justice issues can provide another way for communities to try to obstruct or invalidate permits, or to have permits issued with burdensome conditions.

Moreover, environmental justice concerns have already had significant real world impacts. On at least three occasions in the last few years, U.S. companies that had announced plans to locate new facilities ultimately withdrew those plans in the face of environmental justice issues raised by the local communities. One was a hazardous waste facility planned for Chester, Pennsylvania, and another was a steel recycling plant planned for Flint, Michigan.⁸ A third facility was a polyvinyl chloride production plant planned for Convent, Louisiana.⁹ The companies that planned to construct these operations were not denied permits on the merits. They merely decided not to go forward with their plans, apparently because they decided that the cost of doing so was too high, either financially, or in public or community relations. Problems like these may be avoidable, as we will discuss in more detail below.

Section 4.01 of this chapter addresses the legal basis for environmental justice claims involving facilities located in the United States, as well as attempts to use U.S. courts to create customary international law standards on environmental protection and apply them to facilities in developing countries. In Section 4.02, we discuss how environmental justice claims might be relevant to the mining and energy industries. Section 4.03 concludes with ideas on how companies might seek to address and resolve environmental justice concerns directed at planned or existing facilities.

⁸ David Mastio, "EPA Race Policy Costs Flint a Plant;" "Lansing Gains from Environmental Justice Controversy," *Det. News*, Mar 2, 1999, at A1; *Chester Residents Concerned for Quality Living v. Seif*, 524 U.S. 947 (1998), *vacating as moot*, 132 F.3d 925 (3d Cir. 1997); Channing J. Martin, "Supreme Court Strikes Down Environmental Justice Case," 6 *Va. Envtl. Compliance Update*, No. 3 (October 1998).

⁹ "Company Evades 'Environmental Racism' Test," *N.Y. Times*, Sept. 20, 1998, at A42.