

## Environmental

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### EPA Environmental Justice 'Toolkit' Presents a New Challenge for Businesses Seeking to Relocate or Expand

For over a decade the federal Environmental Protection Agency ("EPA") has been focusing on whether business activities create environmental consequences that have disproportional impact on minority or low-income communities. Claims of environmental injustice have been raised in order to stop construction or renovation of a wide variety of business activities, ranging from aluminum manufacturing businesses to water handling facilities. On November 5, 2003, the EPA added a new dimension to environmental justice claims when it published a 157-page draft "Toolkit for Assessing Potential Allegations of Environmental Injustice" ("Toolkit"). 68 FR Vol. 214 (Nov. 5, 2003).

To underscore the significance of this, on December 10, 2003, the EPA Office of Enforcement and Compliance Assurance announced its proposal to make Environmental Justice a priority in its 2005-2007 strategic enforcement plan. Comments on this proposal are due by January 12, 2004.

The Toolkit creates a structure in which the EPA will evaluate whether business activities have an adverse or disproportionate environmental impact on any identifiable group of people. This is not limited to businesses traditionally regulated by the EPA, such as manufacturing facilities or waste handling facilities. Nor is it limited to businesses that require a permit. It could also apply to retail establishments, like shopping centers, financial institutions, and road projects where automobile traffic has a potential environmental impact. It could be applied to almost any business

activity at any time. The full text of the draft Toolkit can be found at [http://www.epa.gov/Compliance/resources/publications/ej/ej\\_toolkit.pdf](http://www.epa.gov/Compliance/resources/publications/ej/ej_toolkit.pdf).

This proposal raises a number of serious questions that the regulatory community should consider, including:

- What will be the impact of this new process on local development and planning initiatives and time frames?
- Will these assessments and the information collected in connection with them be used in other proceedings such as toxic tort and nuisance lawsuits?
- How will this new assessment process impact efforts to redevelop urban (and rural) "brownfields" that are often near low or minority income areas?
- Does the EPA have the legal authority to create this new process?
- Will an environmental assessment that concludes that an activity does result in environmental injustice be reviewable by any court?

#### ENVIRONMENTAL JUSTICE ASSESSMENTS - AN OVERVIEW

In the past decade, EPA has increasingly performed *ad hoc* evaluations in response to allegations of "environmental injustice" lodged by representatives of low-income or minority communities. The "environmental injustice" claim usually centers on concerns regarding the cumulative effect of "exposure" from multiple sources of environmental contamination

(e.g., air emissions, water discharges or contaminated soil or groundwater), which adversely and disproportionately impact residents. These communities often assert claims to prevent the approval of new or expanded business activities, based on concerns regarding additional sources of potential contamination.

However, claims are often also based on community displeasure with unregulated nuisance conditions, such as noise, odors, and truck traffic, or even the nature of the business (biotech or other seemingly “mysterious” businesses). Residents in urban and rural communities alike have begun to seize on regulatory approvals under a variety of environmental laws such as the Clean Air Act and the Clean Water Act to assert an environmental injustice claim associated with a pending approval as a way to obtain relief from regulatory agencies on a much wider range of perceived problems, including unregulated activities and conditions, or other community needs.

#### **THE PROPOSED “TOOLKIT”**

The Toolkit not only proposes to create a “process” for responding to claims of potential environmental injustice, but also proposes to proactively address concerns over environmental injustice. Under the proposal, this new process for developing environmental injustice assessments apparently can be triggered by the Agency itself, even though no complaint has been filed and no permit is being considered.

The proposal presents a several-step process for conducting an assessment. Assessments begin with delineation of the community affected or potentially affected, and a reference community for comparison. After consulting with the affected community (again, whether or not a complaint has been filed), a problem statement of the conditions causing any potential environmental injustice is formulated. Then appropriate indicators are selected to measure existing environmental, health, social and economic conditions in the community against which additional impacts being contemplated can be measured.

Many of the indicators suggested in the Toolkit present interesting questions. For example, the Toolkit suggests that a factor in favor of finding environmental injustice caused by a proposed or ongoing activity is whether individuals living near the facility are more susceptible to contamination from the facility because they choose to smoke cigarettes, drink alcohol or use drugs. A number of other significant issues are presented by the use, and potential misuse, of assessments, including their use where the Agency’s jurisdiction or authority is questionable.

*Will the assessment be used to evaluate impacts of nonregulated activities and conditions?*

The Toolkit portends an expansive use of environmental injustice assessments. For instance, an assessment could be conducted using the Toolkit to resolve allegations of environmental injustice based upon noise, odors or other nuisance conditions and matters over which the EPA has no jurisdiction. Assessments also could be conducted at the request of a community to review historical and existing conditions. Further, assessments prompted by allegations of environmental injustice are not necessarily limited to low-income or minority areas, but could be conducted in any community, regardless of demographic composition, according to the Toolkit. The EPA contemplates conducting assessments using the Toolkit in connection with the preparation of Environmental Impact Statements under the National Environmental Policy Act (“NEPA”) (for all federally funded projects, for example), rulemakings, priority setting and enforcement targeting. This is particularly significant in light the agency’s proposal that Environmental Justice be an enforcement priority beginning in 2005.

*Will the results of the assessment be used in collateral proceedings?*

There seems to be no limit on the use of an assessment conducted in response to an environmental injustice allegation or administrative initiative. Information collected and findings made by the EPA following an assessment under the Toolkit appear to be public and may be available for use as evidence in any subsequent legal proceedings, including nuisance or toxic tort

actions. The formality associated with assessments under the Toolkit may add credibility to the conclusions reached by the EPA, whether or not merited, in another context.

*Does the Agency have the statutory authority to create these procedures and conduct these assessments?*

The source and scope of the Agency's authority to conduct environmental injustice assessments is unclear. The EPA has no specific substantive statutory authority to undertake environmental justice assessments as part of determining the environmental impact of particular activity under laws that it administers. Instead, the Agency's asserted authority to conduct environmental injustice assessments purports to be based on its authority under various statutes to develop information relevant and necessary to review a permit or to implement another statutory function. But the EPA does not limit its use of this Toolkit to actual permit proceedings under these statutes. The soundness of this premise is open to question.

*Will decisions made using the Toolkit that harm a business activity be subject to review by a court?*

The Toolkit suggests that many critical decisions about the formulation of an assessment and the conclusions reached following an assessment are determined by Agency employees, who are directed to consult with the affected community and "other stakeholders." But the Toolkit does not ensure that directly affected parties that become the subject of an environmental injustice allegation have an opportunity to participate in or even comment on these decisions.

The Toolkit states that the adequacy of an environmental injustice assessment may be appealed to the Environmental Appeals Board (a non-statutory entity that is created in the EPA Administrator's office), presumably by the third party that sought or prompted the assessment. However, the Toolkit does not indicate who else would have standing to appeal such decisions.

Nor does it specify whether or how a record (if any) would be created for purposes of administrative or judicial review. Further, it is unclear whether this proceeding may be used to stall an otherwise timely permit or other regulatory proceeding.

There are many other questions raised by this 157-page proposal. Its implementation potentially impacts the regulated community in profound ways. It is important that potentially affected persons and entities review it carefully and, where appropriate, submit comments on the draft to make sure that this important principle does not become just another way to raise "NIMBY" issues.

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