
Environmental Justice: Merging Environmental Law and Ethics

Julia C. Rinne and Carol E. Dinkins

The environmental justice movement seeks to create equal access to ecological resources and equal protection from environmental hazards for all persons. Given these objectives, many view environmental justice as merely an attempt to provide equitable distribution of environmental burdens and benefits. This characterization fails to recognize that the principles of environmental justice are grounded in the realm of ethics. Because the merger of ethics and environmental law forms the foundation of environmental justice, as new environmental justice laws and policies are developed at the local, state, and federal levels, many ethical considerations must be addressed. Who should bear the burden of environmental hazards? How should the burdened community participate in the environmental decision-making process? What values should be considered when completing an environmental project? What environmental sites are worthy of enforcement? How should enforcement be undertaken and how should violators be penalized?

The environmental justice movement began building momentum in the early 1980s, when civil rights and political leaders joined residents of Afton, North Carolina, a predominantly rural, poor, and African-American community in Warren County, to protest the proposed siting of a landfill in their neighborhood. The landfill was to contain polychlorinated-biphenyl- (PCB) contaminated soil that had been illegally dumped along rural highways in central and eastern North Carolina in 1978. Residents felt that the landfill location was selected based on the high percentage of African Americans and the low economic status of the community's residents. Massive protests and demonstrations ensued; nonetheless, in 1982 the state began hauling approximately 60,000 tons of contaminated soil to the landfill.

Although ultimately unsuccessful, the Warren County landfill protests prompted former-Congressman Walter Fauntroy of the District of Columbia to request that the U.S. General Accounting Office (GAO) investigate whether the siting of hazardous waste landfills in Environmental Protection Agency (EPA) Region IV was, in fact, tied to the racial composition and socioeconomic level of the nearby communities. In 1983, the GAO reported its findings: three of the four hazardous waste landfills in EPA Region IV were located in communities whose

residents were largely poor and African American. U.S. GEN. ACCOUNTING OFFICE, *Siting of Hazardous Waste Landfills and Their Correlation with Racial and Economic Status of Surrounding Communities*, GAO/RCED-83-168 (June 1, 1983), available at <http://archive.gao.gov/d48t13/121648.pdf>. In all four communities surveyed by the GAO, at least 26 percent of the residents had incomes below the poverty level.

The events in Warren County and the GAO findings prompted the United Church of Christ's Commission for Racial Justice to publish its 1987 study *Toxic Wastes and Race in the United States*, which provided statistical evidence that minority and low-income communities were afflicted with a disproportionate amount of the nation's pollution. UNITED CHURCH OF CHRIST, COMMISSION FOR RACIAL JUSTICE, *TOXIC WASTE AND RACE IN THE UNITED STATES: A NATIONAL REPORT ON THE RACIAL AND SOCIO-ECONOMIC CHARACTERISTICS OF COMMUNITIES WITH HAZARDOUS WASTE SITES* (1987), available at <http://urbanhabitat.org/files/toxics-racerace87.pdf>. The United Church of Christ study concluded that, although socioeconomic status appeared to play an important role, race was the most significant factor associated with the location of commercial hazardous waste facilities. Three out of every five African Americans and Hispanic Americans and approximately half of all Asian/Pacific Islanders and American Indians reportedly lived in communities with uncontrolled toxic waste. The United Church of Christ study also suggested that in communities with two or more facilities or one of the nation's five largest landfills the average minority percentage of the population was more than three times that of communities without facilities. According to the report, three out of five of the largest commercial landfills in the nation were located in predominantly African-American or Hispanic communities. These three landfills accounted for 40 percent of the total estimated commercial landfill capacity in the nation.

In 1990 former EPA Administrator William K. Reilly created EPA's Environmental Equity Workgroup to assess evidence indicating that minority and poor communities were at a greater risk of exposure to environmental contamination than was the population at large and to audit EPA's programs for any disparate impact on persons of certain races or income levels. The Workgroup's report, *Environmental Equity Reducing Risk for All Communities*, found that racial minority and low-income populations experienced higher-than-average exposures to selected air pollutants, hazardous waste facilities, contaminated fish, and agricultural pesticides in the workplace

Ms. Rinne is an associate and Ms. Dinkins is a partner in the Houston office of Vinson & Elkins L.L.P. They may be reached at jrinne@velaw.com and cdinkins@velaw.com.

and that great opportunity existed for EPA and other government agencies to improve communication about environmental problems with members of low-income and racial minority groups. U.S. EPA, ENVIRONMENTAL EQUITY REDUCING RISK FOR ALL COMMUNITIES VOLUME I: WORKGROUP REPORT TO THE ADMINISTRATOR, EPA230-R-92-008 (June 1992), available at www.epa.gov/compliance/ej/resources/reports/annual-project-reports/reducing_risk_com_vol1.pdf.

EPA subsequently established additional environmental justice initiatives. For example, in 1992, EPA created the Office of Environmental Justice to handle environmental justice matters and to provide oversight to EPA in general. In 1993, EPA established the National Environmental Justice Advisory Counsel (NEJAC) to advise EPA on environmental justice matters and to promote communication concerning environmental justice issues. NEJAC's membership includes representatives from various communities, academia, industry, environmental and indigenous groups, and state, local, and tribal governments. EPA's Office of Solid Waste and Emergency Response Environmental Justice Task Force, also created in 1993, examined various environmental justice concerns relating to the Resource Conservation and Recovery Act (RCRA), the Superfund program, the Oil Pollution Act, the cleanup and regulation of underground storage tanks, and other programs.

Members of Congress also recognized the growing need to address environmental injustices. In June 1992, then-Senator Al Gore (D-TN) and Representative John Lewis (D-GA) jointly sponsored the Environmental Justice Act, which would have made it more difficult to site industrial facilities in African-American areas. The proposed Act would have required not only that EPA survey every county nationwide in order to identify the 100 most-polluted counties (to be known as "Environmental High Impact Areas") but also that EPA survey the health of residents in these areas. Additionally, the proposed Act would have levied taxes on uncontrolled emissions in Environmental High Impact Areas, even if the emissions were below EPA compliance standards. Although the Senate took no action on the Gore proposal, in July 1993, Representative John Lewis introduced similar legislation, the Environmental Justice Act of 1993, to establish a program to ensure nondiscriminatory compliance with environmental, health, and safety laws, as well as equal protection of public health. As with the earlier proposal, 100 "Environmental High Impact Areas" were to have been identified and targeted for further study, and increased cleanup assistance with strict regulations was to apply to hazardous chemical facilities in these counties. In February 1994, then-Senator Paul Wellstone (D-MN) introduced legislation that incorporated Civil Rights Act language and prohibited discrimination in federally funded programs directed toward protecting the public health from toxic chemicals.

Although these legislative efforts were unsuccessful, the need for environmental justice received formal recognition in early 1994. On February 11, 1994, President Clinton issued Executive Order (EO) 12,898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations," calling on all federal agencies to reverse

and prohibit environmental inequities. EO 12,898 resulted in the formation of the Interagency Working Group (IWG) on Environmental Justice, which is currently composed of representatives from a dozen different federal departments and agencies. The IWG's focus is to integrate environmental justice into federal agency programs, to ensure opportunities for collaboration to provide for environmental justice, and to share lessons learned in addressing environmental justice concerns. In 1995, EPA refined its strategy for implementing EO 12,898 to focus on five major environmental justice missions, including public participation and outreach, health and environmental research, data collection and analysis, American Indian and indigenous environmental protection, and enforcement, compliance assurance, and regulatory review. Thereafter, EPA created the Environmental Justice Small Grants Program and the Environmental Justice Achievement Awards program and then began preparing Environmental Justice Action Plans to establish measurable commitments that address the agency's national environmental justice priorities.

EPA defines environmental justice as "the fair treatment and meaningful involvement of all people regardless of race, color, national origin, culture, education, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies." According to EPA, fair treatment means that no group of people, including racial, ethnic, or socioeconomic groups, should bear a disproportionate share of the negative environmental consequences resulting from industrial, municipal, and commercial operations or the execution of federal, state, local, and tribal environmental programs and policies. Meaningful involvement means that (1) potentially affected community residents have an appropriate opportunity to participate in decisions about a proposed activity that will affect their environment and/or health; (2) the public's contribution can influence the regulatory agency's decision; (3) the concerns of all participants involved will be considered in the decision-making process; and (4) the decision makers seek out and facilitate the involvement of those potentially affected.

Environmental Issues Facing America's Communities

Race and socioeconomic status play the largest role in environmental justice issues. In 2007, the United Church of Christ published a follow up study, which asserted that significant racial and socioeconomic disparities persist in the distribution of the nation's commercial hazardous waste facilities. UNITED CHURCH OF CHRIST, TOXIC WASTE AND RACE AT TWENTY 1987–2007: A REPORT PREPARED FOR THE UNITED CHURCH OF CHRIST JUSTICE & WITNESS MINISTRIES (Mar. 2007), available at www.ucc.org/assets/pdfs/toxic20.pdf. Communities where environmental justice issues exist frequently contend with problems involving water quality, air quality, and contamination from brownfields sites, Superfund sites, and landfills. Many communities are adversely affected by the cumulative impacts caused by more than one environmental hazard.

There are numerous poor and minority communities in the nation where environmental hazards impact the health and well-being of residents. Bayview Hunters Point is a predominantly African-American, Asian-American, and Latino neighborhood in San Francisco. The neighborhood is home to numerous contaminated sites, a former power plant that emitted substantial amounts of particulate matter during its operations, and a sewage treatment plant that handles a large majority of the city of San Francisco's solid wastes. The treatment plant is located near Yosemite Slough, a large inlet of the San Francisco Bay plagued with water-quality problems. During periods of heavy rainfall, when demand exceeds the capacity of the sewage treatment plant, stormwater runoff mixes with sewage and is released directly into the Yosemite Slough. Bayview Hunters Point residents are afflicted with high rates of asthma, respiratory disease, cancer, and diabetes.

Southern Louisiana is home to numerous oil refineries, petrochemical plants, and factories located in and around communities that are primarily poor and African American. One such community, Mossville, is located in Calcasieu Parish in southwestern Louisiana. The town is located in an area containing one of the highest concentrations of polyvinyl chloride chemical plants in the nation, as well as a coal-fired power plant, chemical production facilities, and oil refineries. Elevated levels of vinyl chloride have been detected in the ambient air in the community, and contamination has impacted fish in the nearby bayous. Residents, some of whom live directly across the street from these facilities, are afflicted with elevated dioxin levels in blood and breast milk, high cancer mortality rates, and a variety of other health problems.

Chester, Pennsylvania, located just southwest of Philadelphia, has one of the highest minority populations and poverty rates in Delaware County. The town is home to one of the nation's largest trash incinerators, which burns a majority of Delaware County's municipal waste and accepts waste from surrounding states. Residents are subjected to excessive levels of air pollution, noise, traffic, and other environmental hazards, and dioxin and mercury are emitted from the thousands of tons of trash that the incinerator burns every day. The community of Chester is also burdened with a sewage plant, a sludge incinerator, and gas-fired power plants. The area's residents are afflicted with asthma, high infant mortality and cancer rates, and other ailments.

These are just three of the many sites throughout the nation where minority and low-income communities suffer from the adverse effects of hazardous environmental activities.

The Ethical Path Forward

Recently, Administrator Lisa Jackson confirmed EPA's commitment to environmental justice. In her testimony to the U.S. Senate Committee on Environment and Public Works on EPA's 2010 budget proposal, Administrator Jackson said the agency plans to enhance efforts to integrate environmental justice considerations into its programs and policies. Recent federal initiatives include EPA Region IX's announce-

ment that it will investigate its actions at a California landfill, agency review of the environmental justice impacts of its definition of solid waste under RCRA, and its plan to develop a "cumulative impact" metric to help the agency target groups of facilities causing significant harm to vulnerable communities.

Critics of EPA's position claim that the agency is setting the bar too high for when and how it must address environmental equity. Many call for the agency to develop guidance for how and when to conduct environmental justice evaluations in order to define accurately a true disparate impact. Additionally, critics assail EPA's methodology for assessing the environmental justice impacts of regulations, claiming that it downplays the impacts of the rules on poor and minority communities.

Regardless of whether it is a result of deliberate intent to discriminate or business decisions, poor and minority communities appear to bear a disproportionate burden of environmental hazards associated with landfills and other land pollution.

EPA appears to recognize critics' concerns. In July 2010, the agency released Plan EJ 2014, a draft four-year plan to strengthen efforts to promote and integrate environmental justice into its programs. Additionally, EPA recently developed guidance for considering environmental justice in the agency's rulemaking process. To successfully implement EPA's promise to make environmental justice a priority, the agency must be prepared to address the fundamental ethical dilemmas raised by environmental justice issues. Many state and local laws and policies address such ethical dilemmas, and EPA itself already has a framework of statutes, regulations, and policies that may serve to promote environmental justice principles.

The primary ethical dilemma in environmental justice matters involves who should bear the burden of environmental hazards. Regardless of whether it is a result of deliberate intent to discriminate or decisions related to business economics (i.e., the land in a certain area is less costly than other locations), poor and minority communities appear to bear a disproportionate burden of the environmental hazards associated with landfills and other polluting land uses. Many states already recognize this dilemma. For example, the preamble to Florida's

Brownfield Redevelopment Act explicitly states that minority and low-income communities are disproportionately impacted by environmental hazards and that the existence of a brown-field site may contribute to the overall decline of the community, including impacts on human disease, crime, educational and employment opportunities, and infrastructure decay. FLA. STAT. §§ 376.78(6) and (8).

Various tools can be used to determine who should bear the burden of environmental hazards. Anticoncentration laws may be implemented to limit the number of polluting facilities to be located in one community. For example, Alabama's Hazardous Waste Management and Minimization Act mandates that only one commercial hazardous waste treatment facility or disposal site may be situated within a single county. ALA. CODE § 22-30-5.1(c). Siting requirements may also be imposed to prevent unfair environmental burdens from being forced on communities. In Georgia, municipal solid waste disposal facilities cannot be located in any city or county if any part of the site is within one-half mile of an adjoining city or county border without first receiving the adjoining entity's permission. GA. CODE ANN. § 12-8-25. Additionally, in California and other states, environmental justice factors are taken into consideration during agency review of applications for the siting of new power plants and other facilities. Permitting conditions can also be utilized to control the burdens that are placed on certain communities. Pennsylvania's Environmental Justice Work Group completed a report in June 2001 recommending implementation of a ten-step procedure for the permitting of certain activities in minority and low-income communities that would require enhanced public participation and assessments of cumulative and disparate impacts.

Once the decision is made to burden a certain community with an environmental hazard, the ethical analysis shifts to how the community should participate in the decision-making process. Low-income and minority citizens are often underrepresented in environmental decision making. Additionally, members of affected communities often lack the technical or legal resources that may be required to participate effectively in environmental projects. Community and neighborhood groups, educational institutions, environmental organizations, governmental agencies, industry and business, the medical community, nongovernmental organizations, and religious and spiritual communities should all be involved in the decision-making process.

Rules relating to public notice-and-comment periods can be implemented to assure adequate opportunity for interested parties to participate in environmental decisions. For example, Section 309 of the Clean Air Act gives EPA the authority and responsibility to review and comment in writing on certain actions proposed by other federal agencies that affect the quality of the environment. These written comments must be made public at the conclusion of any review. The Oklahoma Uniform Environmental Permitting Act includes a tiered permitting scheme. OKLA. STAT. tit. 27A, § 2-14-103. Based on certain factors, including potential environmental impact and degree of public concern, permit applications are assigned into tiers and the highest-risk-tiered applications must go through additional

public notice and hearing requirements. OKLA. STAT. tit. 27A, § 2-14-201. In Washington, permit applications for new energy facilities must document efforts conducted by the applicant to communicate with potentially impacted parties. WASH. ADMIN. CODE § 463-60-101. Agencies can undertake certain administrative steps to assure adequate opportunity for participation. For example, Illinois Environmental Protection Agency's (IEPA) environmental justice policy requires the designation of an environmental justice officer, who facilitates public participation. Additionally, IEPA publishes its environmental justice policies in both English and Spanish.

The next core ethical consideration that must be addressed in an environmental justice matter involves the identification of values to be considered when completing environmental projects. How the impacts of a project are valued will vary depending on the needs of the community and the types of environmental harm that may be caused. For example, under the regulations implementing the National Environmental Policy Act, agencies must analyze ecological, aesthetic, historical, cultural, economic, or health impacts, whether direct, indirect, or cumulative, when preparing environmental assessments and environmental impact statements required by the law. Section 2(c) of the Toxic Substances Control Act explicitly instructs the EPA administrator to carry out the law by considering the environmental, economic, and social impact of any action taken. State and local governments also must identify which values to consider in the implementation of environmental policies. Often the values are identified based on geography and other site-specific environmental conditions. For example, the New Mexico Environment Department works with border communities in southern New Mexico and with Mexican environmental officials on environmental justice issues that focus on reducing air pollution, providing safe drinking water, and reducing the risk of exposure to hazardous waste.

In environmental justice matters involving enforcement and compliance, the threshold ethical question to be addressed by a regulating entity is which environmental sites are worthy of enforcement. Communities with little political power may be subject to lax enforcement of environmental laws and regulations. To identify environmental justice communities and to prevent uneven enforcement of environmental laws, regulatory agencies commonly use mapping. For example, the Environmental Justice Strategic Enforcement Assessment Tool was developed by EPA to assist the EPA Office of Enforcement and Compliance Assurance in consistently identifying areas with potentially disproportionately high and adverse environmental and public health burdens. The tool was recently upgraded by EPA and made available to the public to allow users to choose and map demographic, environmental, and health data. States also utilize mapping tools to identify environmental justice communities. The New York State Department of Conservation's Environmental Navigator consists of a series of interactive maps identifying the location of regulated activities and facilities in the state. Administrative staffing is also important in an agency's ability to properly identify sites that are worthy of environmental enforcement. Connecticut's Environmental Justice Complaint Investigator is specifically tasked with

answering and investigating complaints related to environmental justice. IEPA's environmental justice policy requires the designation of an Environmental Justice Officer who responds to environmental justice complaints.

Once the decision to enforce has been made, the regulating agency must determine how enforcement should be undertaken and how the alleged violators should be penalized. Because most environmental enforcement actions against individuals or businesses result in settlement, EPA and some states permit an alleged violator to undertake an environmentally beneficial project related to the violation in exchange for a lower penalty. These are generally known as Supplemental Environmental Projects (SEPs). SEPs acceptable to EPA may include the examination of residents in a community to determine if anyone has experienced any health problems because of a facility's violations or the purchase of computers and/or software, communication systems, chemical emission detection and inactivation equipment, HAZMAT equipment, or training. The Virginia Code authorizes the Virginia Department of Environmental Quality to allow permit violators to abate their penalties by completing SEPs. VA. CODE ANN. § 10.1-1186.2. In order for a SEP to be approved, the appropriateness and value of the project must be taken into account. VA. CODE ANN. § 10.1-1186.2(C). In doing so, the law requires consideration of the impact on minority or low-income populations. Some states have become creative in undertaking environmental enforcement. For example, the New Jersey Department of Environmental Protection (NJDEP) occasionally utilizes enforcement sweeps, which entail sending a large NJDEP enforcement team into urban areas, conducting broad inspections, and undertaking outreach and compliance activities. NJDEP has conducted these enforcement sweeps to address various issues, including diesel engine idling, waterway and wetland protection, and worker safety.

Even in light of the statutory, regulatory, and policy

framework in place on the federal, state, and local levels, the struggle to address environmental justice continues. Challenges to EPA enforcement of equity guidelines are increasing. Sixteen equity complaints were filed against Region IV in October 2009. Of these, the inspector general (IG) determined that five warranted further review. On June 15, 2010 EPA's acting IG issued a report finding no agency wrongdoing in a number of environmental justice complaints filed against EPA Region IV. The report noted that EO 12,898 is designed only to improve the internal management of the executive branch and does not create any right enforceable against the U.S. government. U.S. EPA, OFFICE OF THE INSPECTOR GENERAL, INVESTIGATION OF ALLEGATIONS CONCERNING ENVIRONMENTAL JUSTICE ISSUES IN EPA REGION 4 (June 14, 2010), available at www.epa.gov/oig/reports/2010/20100614-10-N-0145.pdf.

It is unclear whether environmental hazards are initially sited in economically depressed and minority neighborhoods or whether the burdened community grows up around these environmentally hazardous facilities. On one hand, land values are often lower in poor and minority communities, encouraging the siting and development of hazardous facilities in such neighborhoods. On the other hand, low-income communities may develop around these facilities based on the lower cost of living in the area and the proximity to employment, perhaps at the polluting facility itself. While it is difficult to pinpoint the initial development of an environmental justice community, these communities exist throughout our nation. Whether anticoncentration or siting laws, permitting rules, public notice-and-comment requirements, administrative staffing policies, mapping, or enforcement strategies are utilized to curb the impacts of environmental justice issues, it is imperative that regulatory agencies be prepared to address the ethical issues noted above in order to develop successful environmental justice law and policy. 🌳