ENVIRONMENTAL JUSTICE AND THE CONVERGENCE OF SOCIAL AWARENESS AND CLIMATE CHANGE

IMLA ENVIRONMENT SECTION MEETING

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1. INTRODUCTION

The United States Environmental Protection Agency (EPA) defines environmental justice (EJ) 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." EJ arises in communities that often bear a disproportionate number of hazardous waste sites, suffer poor air quality due to fossil fuel infrastructure and traffic, and face elevated lead and other contaminants in drinking water.

The intense and polarized debates about social inequities and climate change converge and frame EJ. These debates have generated policy pronouncements, legislation, and litigation. This presentation will discuss federal and state EJ initiatives, and how they may impact your municipalities. Next, this analysis takes a deeper look at the EPA's lead and copper rule, which is significant for EJ communities that may have older infrastructure which is often associated with lead drinking water contamination. Finally, the discussion will consider resources available to municipal attorneys whose communities seek to address EJ.

2. FEDERAL INITIATIVES

The 2021 change in presidential administrations completely transformed the federal government's role as the Biden Administration has made EJ a top priority. On the day he was inaugurated, President Biden issued Executive Order 13985, which states: "Our country faces converging economic, health, and climate crises that have exposed and exacerbated inequities, while a historic movement for justice has highlighted the unbearable human costs of systemic racism. Our Nation deserves an ambitious whole-of-government equity agenda that matches the scale of the opportunities and challenges that we face."[1]

To that end, the United States Office of Management and Budget (OMB) issued a memorandum to all department and agency heads regarding 21 priority pilot programs to enhance benefits to disadvantaged communities. This is part of the Justice40 Initiative, an effort to make federal agencies work with states and local communities to deliver 40% of the overall benefits of federal investments in climate and clean energy to disadvantaged communities. The 21 pilot programs cover a wide range of agencies and programs, *e.g.*, Department of Homeland Security flood mitigation and building resiliency, Department of Energy solar energy, EPA drinking water state revolving fund and reducing lead in drinking water, Department of Housing and Urban Development lead reduction in homes, Department of Agriculture energy rural areas.[2]

The EPA also initiated programs to encourage settlement and enhance compliance in overburdened communities. An EPA memorandum encourages the use of various injunctive relief tools in civil enforcement settlements: (i) "advanced monitoring," which involves equipment and

[1] Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, 86 Fed. Reg. 7009 (Jan. 25, 2021), https://www.federalregister.gov/documents/2021/01/25/2021-01753/advancing-racial-equity-and-support-for-underserved-communities-through-the-federal-government.

[2] Memorandum from OMB, Council of Environmental Quality, and National Climate Advisor to Heads of Departments and Agencies (July 20, 2021), https://www.whitehouse.gov/omb/briefing-room/2021/07/20/the-path-to-achieving-justice40/.

technologies that can monitor pollutants on a real-time basis, are less expensive and easier to use, and provide data this is easier to interpret; (ii) independent third-parties to verify compliance with settlement terms; and (iii) supplemental environmental projects (SEPs) which are environmentally beneficial projects that go beyond what could be required by enforcement.[3] A follow up memorandum directed the EPA to increase the number of facility inspections in overburdened communities using compliance monitoring tools, strengthen enforcement in overburdened communities through the injunctive relief tools, and increase engagement with communities about enforcement cases.[4]

The EPA is also seeking environmental justice through criminal enforcement. These measures will strengthen detection of environmental crimes in overburdened communities (relying in part on EPA's mapping tool that identifies such communities), improve outreach to victims of environmental crimes to assure they receive the benefits to which they are entitled, and enhance the remedies sought for such crimes to achieve deterrence and obtain restitution for the victims.[5]

The EPA is also repurposing the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund) and the Resource Conservation and Recovery Act (RCRA) to protect overburdened communities. This requires early cleanup of the most dangerous contamination by responsible parties through injunctions and administrative orders, a laundry list of steps to speed cleanups, and increased oversight of enforcement with compliance reviews and monitoring.[6]

In short, the federal government is committing a broad array of benefits and enforcement activities to the EJ cause. This should result in additional funding for agencies and residents and enhanced enforcement for overburdened communities in municipalities.

3. STATE INITIATIVES

Prior to the recent shift by the federal government, state legislatures passed or were working on laws to address the impact of climate change on EJ communities. For example:

- In 2012, California passed Senate Bill 535, requiring 25% of the State's cap-and-trade program auction proceeds to be invested in projects benefitting disadvantaged communities, including projects related to energy efficiency, public transit, low-carbon transportation, and affordable housing.

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[3] Memorandum from Lawrence Starfield to Regional Counsels and Deputies, Enforcement and Compliance Assurance Division Directors and Deputies, and Office of Enforcement and Compliance Assurance Office Directors and Deputies (Apr. 26, 2021), https://www.epa.gov/sites/default/files/2021-04/documents/usingallappropriateinjunctiverelieftoolsincivilenforcementsettlement0426.pdf.

[4] Memorandum from Lawrence Starfield to Office of Enforcement and Compliance Assurance Office Directors and Deputies, Enforcement and Compliance Assurance Directors and Deputies, and Regional Counsels and Deputies (Apr. 30, 2021), https://www.epa.gov/sites/default/files/2021-04/documents/strengtheningenforcementincommunitieswithejconcerns.pdf.

[5] Memorandum from Lawrence Starfield to Senior Managers and Special Agents of the Office of Criminal Enforcement, Forensics and Training, and Regional Criminal Enforcement Counsels of the Offices of Regional Counsel (June 21, 2021), https://www.epa.gov/system/files/documents/2021-07/strengtheningejthroughcriminal062121.pdf.

[6] Memorandum from Lawrence Starfield to Office of Site Remediation Enforcement Managers, Regional Superfund Division Directors and Deputies, and Regional Counsels and Deputies (July 1, 2021), https://www.epa.gov/system/files/documents/2021-07/strengtheningenvirjustice-cleanupenfaction070121.pdf

- Since 2016, California has required each county and city to include an environmental justice element in their general plans under Senate Bill 1000. Those jurisdictions must identify disadvantaged communities, identify objectives and policies to reduce the health risks in disadvantaged communities, and prioritize improvements and programs that address the needs of disadvantaged communities.

- On July 18, 2019, New York passed the Climate Leadership and Community Protection Act (S.6599 / A.8429), which among other things, created a climate justice working group to identify disadvantaged communities for priority in greenhouse gas emissions reductions, reductions in toxic air contaminants, and allocation of investments. The Act's investment provision, seeking to direct 40% of the benefits of state investments to go towards disadvantaged communities, provided a model for the Biden Administration's Justice40 Initiative.

- New Jersey passed environmental justice legislation (S232) on September 18, 2020. It requires the Department of Environmental Protection to evaluate the environmental and public health impacts of the numerous types of facilities on overburdened communities when reviewing certain permit applications, including gas fired power plants and cogeneration facilities, resource recovery facilities or incinerators, sewage treatment plants, recycling facilities, and landfills. New Jersey's law is the first to mandate permit denials upon a finding of disproportionate negative impact to overburdened communities.

- Virginia passed the Virginia Environmental Justice Act in April 2020, which requires the Governor's Secretaries to develop a policy or strategy to promote environmental justice in ways that are tailored to the specific authority, mission, and programs under their Secretariat.

- On May 17, 2021, Washington adopted the Healthy Environment for All (HEAL) Act, E2SSB5141, which requires the State Department of Ecology to adopt environmental justice principles into its strategic planning and funding decisions, develop a community engagement plan with a focus on empowering overburdened communities and vulnerable populations, and develop metrics and reports for tracking progress toward environmental justice goals.

As an initial step, these state laws strive to identify disadvantaged communities. Thereafter, these laws affect municipalities by imposing State regulatory scrutiny on projects affecting disadvantaged communities, developing programs to address their needs, and/or providing funding to implement those programs.

4. LEAD AND COPPER RULE

Exposure to lead in drinking water can cause serious health effects in all age groups. Infants and children can have decreases in IQ and attention span. Lead exposure can lead to learning and behavior problems. Adults can have increased risks of heart disease, high blood pressure, kidney or nervous system problems.

In January 2021, EPA promulgated revised regulations governing lead and copper in drinking water (the "Lead and Copper Rule"). The effective date for the Lead and Copper Rule has been delayed until December 16, 2021 to allow for more input from the public (which closed in July 2021). If promulgated as-is, the revised Lead and Copper Rule will affect water systems, through requirements, including the following:

- New Lead and Copper Trigger Levels. The current "action" level of 15 µg/L will now see the addition of a "trigger level" of 10 µg/L. When samples exceed the trigger level, water systems will need to take certain actions, depending on the size of the system and whether the system has corrosion control treatment ("CCT") and lead service lines or lines of unknown materials, including re-optimization of the CCT, conducting a CCT study, replacing lead service lines, conducting tap sampling, and providing public notice.

- Lead Service Line ("LSL") inventory. All water systems must create a publicly accessible LSL inventory that includes the material composition of all LSLs.

- LSL Replacement ("LSLR") program. All water systems with LSLs or lines of unknown material must create and submit an LSLR plan to their state. The LSLR plan must include a prioritization strategy targeting disadvantaged consumers and sensitive populations. In the case of a lead action level exceedance, the LSLR plan must include a full LSL replacement rate of 3% annualized over a rolling 2-year period.

- Public Education. Water systems with known LSLs or unknown materials must provide notice and education materials to persons on properties served by those lines. A revised health effects statement is also included.

- Tap Sampling. The Rule includes revised tap sampling requirements that will increase the likelihood that the highest levels of lead will be captured in the samples.

EJ communities have raised concerns regarding the impacts of the Lead and Copper Rule. One concern is that the Rule treats full replacement of lead service lines as a last resort when lead levels are unacceptable rather than treating replacement as an integral part of a long-term approach. A second concern is that the mandatory replacement rate of 3% is even lower than the current rate of 7%. A third concern is that the Rule allows for partial replacements of lead service lines, which may leave individuals who cannot afford to replace private lines more vulnerable to lead exposure if their lines are disturbed but not replaced during water system replacement activities.

Local communities that own or operate water supply systems may need to plan ahead to address the increasing regulatory requirements on limited ratepayer resources and the potential disparate impacts to EJ communities which are least able to address the harms that may come from implementation of the Rule. Advanced planning may help to prioritize materials investigations and identify grant or financing opportunities.

5. ADDRESSING EJ AT THE LOCAL LEVEL

Because SB 1000 requires California cities and counties to incorporate an EJ element into their general plans, California websites provide helpful resources for municipalities which would like to address EJ:

- California Governor's Office of Planning and Research (OPR) Guidelines "include a list of scientific based tools developed by other agencies and academia that provide information relevant to EJ considerations, as well as links to EJ Elements and policies in General Plans accepted by several jurisdictions throughout the state."[7]

- California Attorney General's SB 1000 webpage includes links to EJ resources including the Attorney General's EJ-related comments on several city and county draft General Plans, links to CalEnviroScreen pollution indicator maps, and links to CalEPA's Disadvantaged Communities Mapping tool and other environmental mapping tools.[8]

- California Environmental Justice Alliance (co-sponsor of SB1000) has its SB 1000 Implementation Toolkit which covers how to introduce planning processes to the community, identify disadvantaged communities, engage the community, develop goals, objectives, and policies, and refine and adopt EJ goals, objectives, and policies.[9]

Finally, a Fourth Circuit case provides a precedent that may inform litigation to enforce the legislative and executive actions described above. In *Friends of Buckingham v. State Air Pollution Control Board*, 947 F.3d 68 (4th Cir. 2020), the court vacated permits for stations that compress natural gas for transmission located in a minority EJ community. The court pinpointed the Virginia Air Pollution Control Board's failure to make a finding whether the local community was a "minority" EJ community, which helps determine whether "information about 'African American populations hav[ing] a greater prevalence of asthma' and other health issues is an important consideration." *Id.* at 88 (brackets in original).

Instead, the Board relied on data that air pollutants in the county were below state and national air quality standards to dismiss EJ concerns. *Id.* at 90-91. Consequently, "the Board failed to grapple with the likelihood that those living closest to the Compressor Station – an overwhelmingly minority population according to the Friends of Buckingham Survey – will be affected more than those living in other parts of the same county." *Id.* at 91-92.

Friends of Buckingham provides a clear roadmap for potential plaintiffs. First, establish that the affected community is an EJ community. Then present evidence of the elevated health risks suffered by the affected minority group. Finally, connect the increased health risks to the contaminants of concern released by the business operations. Under *Friends of Buckingham,*

[7] Michele A. Staples, *Environmental Justice in General Plans: Strategic Considerations for Planning and Land Use Professionals*, 1 Environmental, Energy, & Climate Change Reporter 122 (Jan. 2021); OPR Guidelines, https://opr.ca.gov/docs/20200706-GPG_Chapter_4_EJ.pdf.
[8] Staples, *supra* note 7, at 121-122; Cal. Atty. Gen. SB 1000 webpage, https://oag.ca.gov/environment/sb1000.
[9] Staples, *supra* note 7, at 122; CEJA SB 1000 Implementation Toolkit, https://caleja.org/2017/09/sb-1000-toolkit-release/.

regulatory standards or health risk assessments that fail to account for the location of the EJ community or its residents' elevated health risks will not withstand scrutiny. From the defense side, the resources for municipalities described above allow planners to better identify the EJ communities, their health risks, and the existing pollution that may be exacerbated by new sources.

6. CONCLUSION

The confluence of political pressures regarding social, economic and legal inequities, and the growing impacts of climate change have propelled EJ to the forefront, and make it a rapidly emerging area of law. Municipal lawyers will likely be directly affected by these developments.