



# Environmental Justice on the Move

## This edition of *The Federal Lawyer* focuses on federal

transportation law, and this month's *At Sidebar* addresses its intersection with "environmental justice."

### What is "environmental justice" and its related federal policy?

Environmental justice, at its core, envisions that (1) all persons, regardless of whether they are part of a low-income or minority community, be provided with an equal opportunity to be heard before consequential environmental decisions are made or actions taken and (2) all persons, regardless of their low-income, minority, or tribal status, bear an equal share of associated burdens of pollution.<sup>1</sup> We, as a society, have not achieved environmental justice. As President Barack Obama recently summarized: "Two decades ago ... [l]ow-income neighborhoods, communities of color, and tribal areas disproportionately bore environmental burdens like contamination from industrial plants or landfills. ... While the past two decades witnessed great progress, much work remains."<sup>2</sup>

Federal policy regarding environmental justice began in earnest in 1994, when President William J. Clinton signed Executive Order 12898.<sup>3</sup> That order directed federal agencies to "make achieving environmental justice part of [their] mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of [their] programs, policies, and activities on minority populations and low-income populations in the United States."<sup>4</sup> Executive Order 12898 also called for "greater public participation" and access to information.<sup>5</sup>

Executive Order 12898 remained on the books, unchanged, ever since. President George W. Bush's first administrator of the Environmental Protection Agency (EPA), a lead agency on environmental justice, expressed a "firm commitment to the issue of environmental justice" and explained that "[e]nvironmental justice is achieved when everyone, regardless of race, culture, or income, enjoys the same degree of protection from environmental and health hazards *and* equal access to the decision-making process to have a healthy environment in which to live, learn, and work."<sup>6</sup> The current administration has similarly stated that it is "committed to ensuring that communities overburdened by pollution—particularly minority, low-income and indigenous communities—have

the opportunity to enjoy the health and economic benefits of a clean environment."<sup>7</sup>

In 2011, the heads of 17 federal agencies executed a memorandum of understanding on environmental justice (EJ MOU).<sup>8</sup> The EJ MOU "declare[d] the continued importance of identifying and addressing environmental justice considerations in agency programs, policies, and activities as provided in Executive Order 12898."<sup>9</sup> The EJ MOU also called for agencies to share their "environmental justice strategies and implementation progress reports."<sup>10</sup> In particular, each agency agreed to: (1) post on its Web page its environmental justice strategy and annual implementation progress reports, (2) provide the public with "meaningful opportunities ... to submit comments and recommendations" on the agency's strategy and progress, and (3) respond to comments and recommendations in the next report.<sup>11</sup>

### How does the Department of Transportation consider environmental justice?

Executive Order 12898 and the EJ MOU, by their terms, apply to the U.S. Department of Transportation (DOT),<sup>12</sup> a large agency that encompasses the Federal Aviation Administration (FAA), Federal Highway Administration (FHWA), Federal Transit Administration (FTA), and other components.<sup>13</sup> Indeed, the EJ MOU identified as a particular area for focus "impacts from commercial transportations and supporting infrastructure."<sup>14</sup>

The DOT promotes federal environmental justice policy through an intra-agency directive, DOT Order 5610.2(a), which essentially mirrors Executive Order 12898.<sup>15</sup> The agency's environmental justice strategy includes considering environmental justice in the context of its obligations under the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370h. NEPA generally "imposes ... procedural requirements on federal agencies with a particular focus on requiring agencies to undertake analyses of the environmental impact of their proposals and actions."<sup>16</sup> In 2011, the DOT issued an intra-agency memorandum entitled "Guidance on Environmental Justice and NEPA."<sup>17</sup> It explains that agencies should, *inter alia*: (1) identify low income or minority populations in the path of the proposed action, (2) determine whether a disproportionately high and adverse impact on one or more of those populations would occur if the proposed action were taken, and (3)

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decline to take the proposed action unless there is no “further practicable mitigation measure or practicable alternative that would avoid or reduce the disproportionately high and adverse effect(s).”<sup>18</sup>

Furthermore, in accordance with the EJ MOU, the DOT posts on its web page its environmental justice strategy and implementation progress reports.<sup>19</sup> Other initiatives include training provided by the FTA “for practitioners, reviewers, and grantees on effective ways for integrating the consideration of [e]nvironmental [j]ustice impacts throughout the transportation planning and project development/NEPA processes.”<sup>20</sup>

### How have federal courts addressed environmental justice in transportation cases?

No federal court has found Executive Order 12898 or its prodigy (including the EJ MOU or DOT Order 5610.2(a)) enforceable in its own right. This is not surprising; Executive Order 12898 provides that it “is intended only to improve the internal management of the executive branch and is not intended to, nor does it, create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies, its officers, or any person.”<sup>21</sup>

Circuits appear to be split, however, regarding whether the DOT’s (or other federal agencies) consideration of environmental justice is reviewable under any circumstance. More than 10 years ago, the D.C. Circuit, in resolving challenges to the FAA’s approval of an airport expansion, held that an environmental justice claim can be reviewed if: (1) the agency considered environmental justice as part of its NEPA analysis of the action’s environmental impact, and (2) the challenging party has properly invoked the Administrative Procedure Act (APA) or similar provision governing review of the agency’s action.<sup>22</sup> The court of appeals, “in agreement with the FAA,” explained that where the agency “exercises its discretion to include the environmental justice analysis in its NEPA evaluation, [t]hat analysis . . . is properly subject to ‘arbitrary and capricious’ review under the APA.”<sup>23</sup> The Fifth Circuit later followed this approach.<sup>24</sup>

A few years before the foregoing decisions, the Ninth Circuit declined to review any aspect of an agency’s consideration of environmental justice—even in the context of a claim under NEPA and the APA challenging the FAA’s approval of an arrival enhancement project. The court of appeals reasoned that Executive Order 12898 and the predecessor version of DOT Order 5610.2(a) “specifically state that they do not create any right to judicial review for alleged noncompliance.”<sup>25</sup> The

First Circuit later followed this approach.<sup>26</sup>

Just last year, another circuit identified—but sidestepped—the same question of reviewability, i.e., “whether an environmental justice claim can be asserted as a NEPA violation under the APA’s ‘arbitrary and capricious’ standard.”<sup>27</sup> In the context of a challenge to the FHWA’s approval of a new bridge and associated infrastructure connecting Detroit with Windsor, Ontario, Canada, the Sixth Circuit found no need to resolve the question, “assum[ed] for purposes of [its] analysis only that the [challengers] have a right to bring an environmental justice challenge,” and found that the FHWA had “satisfied its environmental justice obligations.”<sup>28</sup>

The Sixth Circuit’s decision also illustrates the kind of record-specific environmental justice issues that can arise in transportation cases. No party disputed that the bridge in that particular location could result in disproportionately high and adverse environmental impacts on the residents of Delray, a low-income, minority neighborhood in Detroit. But the record also indicated that, before approving the bridge, the FHWA and other project proponents engaged with residents and “developed a community and mitigation enhancement plan to avoid or minimize those effects.”<sup>29</sup>

The parties advocating on behalf of Delray contended that the FHWA violated Executive Order 12898 and its prodigy by “improperly eliminat[ing] due to political pressures” alternative locations for the bridge consisting of “predominantly affluent white neighborhoods.”<sup>30</sup> The Sixth Circuit disagreed, finding that the agency rejected those locations as impracticable “for a variety of reasons, including the presence of old mining sites, poor performance in regional mobility rankings, and significant community impacts on both sides of the [Detroit] [R]iver.”<sup>31</sup> The court of appeals also noted that “other crossing alternatives considered by the FHWA had higher concentrations of low income and minority populations than Delray.”<sup>32</sup>

Following the Sixth Circuit’s decision to uphold the FHWA’s approval, the private owner of the Ambassador Bridge—the only existing bridge that connects Detroit with Windsor—petitioned the U.S. Supreme Court for certiorari on issues seemingly unrelated to environmental justice.<sup>33</sup> But a public interest group, as amicus curiae, filed a brief urging review of the FHWA’s decision as contrary to Executive Order 12898, NEPA, and the APA; it argued, *inter alia*, that “[e]nvironmental [j]ustice concerns were circumvented and were never a serious consideration.”<sup>34</sup> Earlier this year, the Supreme Court denied certiorari.<sup>35</sup>

## What is the future of federal policy regarding environmental justice?

Federal policy regarding environmental justice, by all reasonable accounts, is here to stay. Executive Order 12898 turned 21 earlier this year. Slowly but surely, federal agencies, including the DOT, have developed the practice of considering environmental justice in conjunction with their NEPA obligations. In 2011, the EPA issued written guidance on how it can address environmental justice when exercising discretion under more substantive statutes.<sup>36</sup> Other agencies may elect to offer similar guidance. Regardless, as environmental justice becomes more familiar to agencies and ingrained in their operations, the chances of a future administration changing course diminish.

Of course, Congress could decide to intervene. But such action seems unlikely, not only given the current state of gridlock, but also because of historic legislative failure on the subject of environmental justice.<sup>37</sup>

On the judicial front, in light of the circuit split, it is conceivable that the Supreme Court could eventually resolve whether and to what extent an agency's consideration of environmental justice is reviewable. But it is more likely that the circuits themselves, in future cases, will clear up the conflict and follow the D.C. and Fifth Circuits' decade long approach of reviewing an agency's consideration of environmental justice under NEPA and the APA. The "no review whatsoever" approach of the Ninth and First Circuits lacks cogency.

Meanwhile, communities with low-income, minority, or tribal populations should become increasingly aware of the DOT's (and other federal agencies') commitment to environmental justice, including the administrative practice of submitting for public comment environmen-

tal justice strategies and implementation progress reports. Greater accountability should ensue as more opportunity for public involvement becomes the norm. In addition, as agencies become more attuned to federal policy regarding environmental justice and their obligations under Executive Order 12898, communities should find it easier to be meaningfully heard—on a decision-by-decision basis and even on a more programmatic level.

More critically, as federal policy regarding environmental justice continues to move forward at the DOT and elsewhere, we should see more on-the-ground results—in particular, more communities, regardless of their low-income, minority, or tribal composition, living, working, and playing in a proportionately safe environment. Equal justice under the law contemplates nothing less. ☺

### Endnotes

<sup>1</sup>See, e.g., [www.epa.gov/compliance/environmentaljustice/index.html](http://www.epa.gov/compliance/environmentaljustice/index.html) ("Environmental Justice ... will be achieved when everyone enjoys the same degree of protection from environmental and health hazards and equal access to the decision-making process to have a healthy environment in which to live, learn, and work."), (last visited Mar. 10, 2015).

<sup>2</sup>*Proclamation 9082: 20th Anniversary of Executive Order 12898 on Environmental Justice*, 79 Fed. Reg. 8,821, 8,821 (Feb. 10, 2014). See also, e.g., *Reilly*, 1 TOXIC TORTS PRAC. GUIDE § 10:7 (2014) ("There is no disagreement that some neighborhoods have been adversely affected by past pollution and that residents have health concerns.").

<sup>3</sup>*Executive Order 12898: Federal Actions to Address*

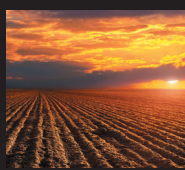
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*Environmental Justice in Minority Populations and Low-Income Populations*, 59 Fed. Reg. 7,629 (Feb. 11, 1994).

<sup>4</sup>59 Fed. Reg. at 7,629. When issued, Executive Order 12898 applied to 11 agencies: Department of Agriculture, Department of Commerce, Department of Defense, Department of Energy, Department of Health and Human Services, Department of Housing and Urban Development, Department of the Interior, Department of Justice, Department of Labor, Department of Transportation, and Environmental Protection Agency. *Id.* at 7,629 and 7,632. In addition, it applied to certain offices within the Executive Office of the President, *Id.*, and other agencies and offices that the President may designate in the future. *Id.*

<sup>5</sup>59 Fed. Reg. at 7,630 and 7,632.

<sup>6</sup>Memorandum from Christine Todd Whitman to the EPA's assistant administrators, general counsel, inspector general, chief financial officer, associate administrators, regional administrators, and office directors, at 1 (Aug. 9, 2001) (emphasis in original).

<sup>7</sup>[www.whitehouse.gov/energy/our-environment](http://www.whitehouse.gov/energy/our-environment) (last visited Mar. 10, 2015).

<sup>8</sup>[www.epa.gov/environmentaljustice/resources/publications/interagency/ej-mou-2011-08.pdf](http://www.epa.gov/environmentaljustice/resources/publications/interagency/ej-mou-2011-08.pdf) (last visited Mar. 10, 2015). Listed in the order of the signature blocks, the 17 agencies were: Department of Justice, Department of the Interior, Department of Agriculture, Department of Labor, Department of Health and Human Services, Department of Housing and Urban Development, Department of Transportation, Department of Energy, Environmental Protection Agency, Department of Commerce, Department of Defense, Department of Education, Department of Veterans Affairs, Department of Homeland Security, Council on Environmental Quality, General Services Administration, and Small Business Administration. EJ MOU at 5-6.

<sup>9</sup>EJ MOU at 2.

<sup>10</sup>*Id.*

<sup>11</sup>*Id.* at 3.

<sup>12</sup>59 Fed. Reg. at 7,630 and 7,632; EJ MOU at 5.

<sup>13</sup>[www.dot.gov/administrations](http://www.dot.gov/administrations) (last visited Mar. 11, 2015).

<sup>14</sup>EJ MOU at 2-3.

<sup>15</sup>*Department of Transportation Updated Environmental Justice Order 5610.2(a)*, 77 Fed. Reg. 27,534 (May 10, 2012). The DOT issued the directive's predecessor version in 1997, within a few years of Executive Order 12898. *Department of Transportation (DOT) Order to Address Environmental Justice in Minority Populations and Low-Income Populations*, 62 Fed. Reg. 18,377 (Apr. 15, 1997).

<sup>16</sup>*Department of Transportation v. Public Citizen*, 541 U.S. 752, 756 (2004) (citation omitted).

<sup>17</sup>[environment.fhwa.dot.gov/projdev/guidance\\_ej\\_nepa.asp](http://environment.fhwa.dot.gov/projdev/guidance_ej_nepa.asp) (last visited Mar. 29, 2015). See also *id.* (explaining that the agency "will approve the proposed action only if it determines no such practicable measures exist," and that "[t]he NEPA document needs to describe how the impacted populations/communities were involved in the decision-making process" and "what practicable mitigation commitments have been made").

<sup>18</sup>*Id.* The memorandum also explains that the agency "will approve the proposed action only if it determines no such practicable measures exist." *Id.* In addition, according to the memorandum, "the NEPA document needs to describe how the impacted populations/communities were involved in the decision-making process" and "what practicable mitigation commitments have been made." *Id.*

<sup>19</sup>[www.fhwa.dot.gov/environment/environmental\\_justice/ej\\_at\\_dot](http://www.fhwa.dot.gov/environment/environmental_justice/ej_at_dot)

(last visited Apr. 5, 2015).

<sup>20</sup>[www.fta.gov/12347\\_14823.html](http://www.fta.gov/12347_14823.html) (last visited Apr. 5, 2015).

<sup>21</sup>59 Fed. Reg. at 7,632.

<sup>22</sup>Generally, under the APA, "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. Review is deferential to the agency. See, e.g., *Dickinson v. Zurko*, 527 U.S. 150, 164 (1999) ("A reviewing court reviews an agency's reasoning to determine whether it is 'arbitrary' or 'capricious,' or, if bound up with a record-based factual conclusion, to determine whether it is supported by 'substantial evidence.'" (citation omitted)).

<sup>23</sup>*Communities Against Runway Expansion Inc. v. FAA*, 355 F.3d 678, 688-89 (D.C. Cir. 2004). Although the Eighth Circuit had followed a similar approach the previous year, no party appears to have argued that Executive Order 12898 limited review, and the court did not address any question of reviewability. See *Mid States Coalition for Progress v. Surface Transportation Board*, 345 F.3d 520, 541 (8th Cir. 2003).

<sup>24</sup>See *Coliseum Square Ass'n Inc. v. Jackson*, 465 F.3d 215, 232 (5th Cir. 2006) (reviewing the Department of Housing and Urban Development's consideration of environmental justice in conjunction with its decision to fund a housing project) (citing *Communities Against Runway Expansion*, 355 F.3d at 688).

<sup>25</sup>*Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 575 (9th Cir. 1998).

<sup>26</sup>*Sur Contra La Contaminacion v. EPA*, 202 F.3d 443, 449-50 (1st Cir. 2000) (declining to review the EPA's consideration of environmental justice as part of the agency's analysis of the air quality implications of a permitted facility) (citing *Morongo*, 161 F.3d at 575).

<sup>27</sup>*Latin Americans for Social and Economic Development v. Administrator, FHWA*, 756 F.3d 447, 465 (6th Cir. 2014), cert. denied sub nom., *Detroit Int'l Bridge Co. v. Nadeau*, 135 S. Ct. 1411 (2015).

<sup>28</sup>*Latin Americans*, 756 F.3d at 476-77.

<sup>29</sup>Answering Brief of Federal Defendants, 2013 WL 773151, at \*47-48 (Feb. 25, 2013).

<sup>30</sup>*Latin Americans*, 756 F.3d at 475-76.

<sup>31</sup>*Id.* at 476.

<sup>32</sup>*Id.*

<sup>33</sup>Petition for a Writ of Certiorari by Detroit International Bridge Company, 2014 WL 6807601 (Dec. 1, 2014). These issues included the contention that the FHWA had effectively (and unlawfully) delegated its decision-making to Canadian authorities. See *id.* The FHWA elected not to respond to the petition. See [www.supremecourt.gov/search.aspx?filename=/docketfiles/14-657.htm](http://www.supremecourt.gov/search.aspx?filename=/docketfiles/14-657.htm) (last visited Mar. 16, 2015).

<sup>34</sup>*Amicus Curiae* Brief of the Hispanic Bar Association of Michigan in Support of Petitioner, 2015 WL 108404, at \*4 (Jan. 5, 2015). See also *id.* at \*9 (arguing that federal policy regarding environmental justice required the FHWA "to avoid placing the [new bridge] in a poor, Latino neighborhood like Delay, if possible, or, that at minimum, the prospect of placing the [new bridge] somewhere else had to be given a hard look").

<sup>35</sup>*Detroit Int'l Bridge Co. v. Nadeau*, 135 S. Ct. 1411 (2015).

<sup>36</sup>[www.epa.gov/environmentaljustice/plan-ej/law.html](http://www.epa.gov/environmentaljustice/plan-ej/law.html) (last visited Apr. 5, 2015).

<sup>37</sup>[www.gpo.gov/fdsys/pkg/CRPT-110srpt498.htm](http://www.gpo.gov/fdsys/pkg/CRPT-110srpt498.htm) (last visited Apr. 5, 2015).