

# COMMUNITY ENGAGEMENT: ONE POINT OF VIEW ON THE EPA'S NEWLY RE- DEFINED ENVIRONMENTAL JUSTICE INITIATIVE & PATH FORWARD STRATEGIES FOR COUNSEL AND INDUSTRY

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“Common sense is not so common.” *Voltaire*

## INTRODUCTION

This paper is both a departure and an arrival. A departure in that as I began my career as a journalist I tried to avoid dabbling in the first person . . . and yet I find that perhaps my account of the journey along the environmental justice pathway is best told from my point of view since there are other papers in this collection that may certainly touch more on the mechanics of environmental justice. The arrival is the realization as I pen this Paper of how very far we have come and yet how much road there is yet to travel.

Full disclaimer—I am a consultant working for both counsel and industry. My discipline is helping communicate sensitive environmental issues to publics that in most of my work have already been polarized by the very process that in part is designed to create dialog not discord. Environmental justice has been a significant factor in much of my work over the last twenty years.

## I. THE ROOTS

Back in the early 1980s when the Superfund process was beginning to steamroll across the country, there did not seem at that time to be an understanding of most of those involved in the process—from the EPA to the local regulators to the potentially

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responsible parties and defense and plaintiffs' counsel alike—how seriously Superfund could damage a community. Early on, the standing axiom seemed to be along the lines of “We have found evidence of triple ethyl death next to your elementary school . . . we will be back in six months when we know the results and tell you more then.” An exaggeration for sure; but not that far off from what I heard time and again in the first public meeting presentations at Superfund sites.

From my point of view as a former reporter, I witnessed the media promoting the story, not promoting understanding. Facts never play as well as fear and concern. And at that time public involvement meant holding massive public meetings with large gaps of time between them. It is easy to understand the disconnect between a parent's genuine concern about their child's health and the agency's need to ensure that all the information to be provided must be complete and vetted before it is released.

So in the early 1980s it really did not matter that much the color of your skin, or your economic standing, because no one seemed to be able to get information about environmental issues. The environmental “injustice” story had already begun, but was not recognized for what it was at that time.

As Superfund sites began to be identified, ranked, and catalogued, it became apparent that a pattern was developing. These sites of significant environmental concern tended to map across the country either encapsulated within or adjacent to minority and low-income neighborhoods. Much is written on this; my role then and now concentrates on the public involvement and therefore the information flow to and from these minority and low income neighborhoods. This is where much was, and is, needed to be learned, and it was the concept of environmental injustice that drove this process.

## II. CASE STUDY: THE REICHHOLD CHEMICALS SUPERFUND SITE, COLUMBIA, MISSISSIPPI.

Much has been written about this site since it indeed did seem to fit the stereotypical description of a Superfund site where environmental injustice was dominant. The truth is completely opposite of this legend, but even those directly involved in the process were not aware of it at the time—it seemed cut and dry. A

decades old “stump juice” plant located in the middle of a small southern Mississippi town—and adjacent to a low income minority neighborhood—closed down and was abandoned after a fire and explosion. It eventually was listed on the National Priorities List, scored, and became a Superfund site.

A few public meetings were held as required by the process. Misunderstandings and serious gaps in the information process led to genuine concern and division. Then lawsuits were filed and settled. But, polarization and stigma remained.

Looking back, Columbia was certainly not the only Superfund site playing out that scenario; unfortunately it was the rule and not the exception. But it did not stay that way.

It turned out fortuitous for Columbia that, although the Superfund process did initially divide the community, Columbia is a very small town and people traditionally interacted and supported each other regardless of what side of the town they lived on or the color of their skin. The residents had gone to school together, their children played together, but something was wrong in Columbia.

It took some time to see the trees while standing in the forest, but we eventually did. Because the community talked to each other, we began to understand from the community that the public process that was required by Superfund completely missed the mark in Columbia (and other communities as well). The standard operating procedure of placing an advertisement in the local paper announcing a public meeting by government officials who would be coming in from out of town and would share the Superfund process and information with the community sounded great, but fell short on several critical issues. It assumed the citizens of Columbia all would read the paper, understand the importance of the meeting, and come to hear out-of-town folks explain what was going on in their community. It also assumed that everyone in the town would feel comfortable attending a public meeting put on by outside public officials. As one lady in Columbia told me, opening my eyes to this error, “You know in my mother’s day, if you were black and attended a public meeting you might not be seen again.” We cannot change history, but we can learn from it.

Long story short—Columbia’s leadership, black and white, wealthy and poor, pulled together to defeat the stigma of the Superfund site and, through the charrette process supported by winning an EPA Brownfield’s grant, got the Superfund site delisted and pulled the community back together under a common vision. That process continues today.

Fast forward to today—Nothing underlines a change in identifying an actionable path forward to help effectively address environmental justice issues more than the EPA’s “new” definition of environmental justice—now community engagement. Community engagement is not just a repackaging of the old ways of public involvement; the key and significant difference is active and aggressive outreach and inclusion. One prime key to understanding the “new” environmental justice is encapsulated within the EPA’s interim guidance document.<sup>1</sup> The guidance document openly challenges agency staff to incorporate environmental justice into the agency’s rulemaking process. Accordingly, EPA Administrator Lisa P. Jackson has set as her personal priority a commitment for all EPA regions to work for environmental justice and protect the health and safety of communities who have been disproportionately impacted by pollution. This may on the surface sound like the standard environmental justice language to date, but it is not.

The key to the new environmental justice (community engagement) was underlined by EPA Administrator Lisa P. Jackson:

Historically, the low-income and minority communities that carry the greatest environmental burdens haven’t had a voice in our policy development or rulemaking. We want to *expand the conversation* to the places where EPA’s work can make a real difference for health and the economy . . . . This plan is part of my ongoing commitment to give all communities a seat at the decision-making table. Making environmental justice a consideration in our rulemaking changes both the perception

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<sup>1</sup> U.S. ENVTL. PROT. AGENCY, EPA’S ACTION DEVELOPMENT PROCESS—INTERIM GUIDANCE ON CONSIDERING ENVIRONMENTAL JUSTICE DURING THE DEVELOPMENT OF AN ACTION (2010), *available at* <http://www.epa.gov/compliance/ej/resources/policy/considering-ej-in-rulemaking-guide-07-2010.pdf>.

and practice of how we work with *overburdened communities*, and opens this conversation up to new voices.<sup>2</sup>

Thus the new environmental justice is no longer simply defined as a component of racial percentages or income divisions. Environmental justice now means real and meaningful community engagement throughout the defined process. No longer are the traditional “we talk, you listen” public meetings the safe harbors they once were in meeting community involvement and outreach standards. And arguably, that would include the public availability meeting format if there was not a real effort behind the planning and execution to actively work so that all factions within the community are represented and have a real opportunity to make a difference.

This commitment is built on an earlier EPA document which set a standard that the primary focus of environmental justice should be: “ensuring that all communities are empowered through information dissemination and education to have a better understanding of the environment and the impact it may have on their health.”<sup>3</sup>

The EPA has taken a leadership role in environmental justice; setting a goal for itself to become an advocate and—where regulations permit—an enforcer of these principles. In so doing, the agency has assisted the auditing of potential environmental justice deficiencies by helping to set definitions and guidelines by which methodologies can be developed to research and audit environmental justice impacts, if any, emanating from an action that requires environmental regulatory review and approval. This is unmistakably underlined by the EPA’s proposal to list environmental justice as a first-time enforcement priority in fiscal years 2011 to 2013.<sup>4</sup>

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<sup>2</sup> Press Release, U.S. Env’tl. Prot. Agency, EPA Releases Rulemaking Guidance on Environmental Justice (July 26, 2010) (emphasis added) (internal quotation marks omitted), available at [http://www.epa.gov/agingepa/press/epanews/2010/2010\\_0726\\_1.htm](http://www.epa.gov/agingepa/press/epanews/2010/2010_0726_1.htm).

<sup>3</sup> U.S. ENVTL. PROT. AGENCY, TOOLKIT FOR ASSESSING POTENTIAL ALLEGATIONS OF ENVIRONMENTAL INJUSTICE (Nov. 2004), available at <http://www.epa.gov/compliance/ej/resources/policy/ej-toolkit.pdf>.

<sup>4</sup> See U.S. ENVTL. PROT. AGENCY, FISCAL YEAR 2011-2015 EPA STRATEGIC PLAN: ACHIEVING OUR VISION (Sept. 2010), available at <http://nepis.epa.gov/Exe/ZyNET.exe/P1008YOS.TXT?ZyActionD=ZyDocument&Client=EPA&Index=2006+Thru+2010&Doc>

For the purposes of this Paper I will focus on what I suggest are the two key and defining public involvement principles of environmental justice; meaningful involvement and equal access to the decision-making process by all people, regardless of race, color, national origin, or income.

### III. WHAT DEFINES “MEANINGFUL INVOLVEMENT AND EQUAL ACCESS?”

For the purposes of discussion I believe the following four defining questions represent the basic underpinnings of the new EPA environmental justice guidance for proof of meaningful involvement and equal access:

- (1) Have all the publics involved had an opportunity to participate in decisions about activities that may affect their environment and/or health by the proposal?;
- (2) Did the public contribution have an opportunity to influence the regulatory agency’s decision process?;
- (3) Were public contributions and their concerns considered in the decision-making process?;
- (4) Did the decision makers seek out and facilitate the involvement of those potentially affected publics?

In a speech before the American Bar Association’s Conference on Environmental Law in March 2011, the EPA’s general counsel, Scott Fulton, further defined what he was directing the EPA regions to accomplish in the realm of the new environmental justice / community engagement guidance:

- Dramatically Expand Public Participation. Not just words—the public has a responsibility to participate in

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the process in a meaningful, observable, and accountable means.

- EPA has the responsibility to see that the public participation is real and measurable—pre-decision, and post-decision.
- The entity involved in an EPA regulated process, such as permitting an expansion or new sighting, must actively seek and then document changes that have taken place in the process due directly to input from the public through the public engagement process.

Considering the above, what are the possible take-aways from these points and what strategies might assist in meeting these guidance standards? I suggest there are three core steps for counsel and industry to consider:

The first core step is based on the “aim before firing” approach. Some of the most effective strategies I have seen that are addressing these guidance standards have begun with gathering objective “intelligence from the front.”

This first step deals with some form of benchmarking, e.g., something akin to a communications and environmental justice audit. This audit, or research sweep, is a benchmarking initiative working to document all past and present communications and outreach strategies employed to date by an industry or facility. But the key to these successful benchmarking audits is a bit different from a file dive and data dump. The genius in a good audit is that it serves to document all past and present communications and outreach strategies *from the community’s point of view*. It is not what was said, it was what was heard.

The initial audit process also works to document all the attributes and census considerations in play in the potentially impacted community with particular consideration to those above outlined environmental justice triggers. Effective audits also seek to identify trusted paths of communication within the community. This is more critical today due to the influences of social media and cable news. The factor here is that all publics/communities are not homogeneous and thus trusted paths of communication tend to vary substantially by segment.

The methodology of this audit process generally includes:

- A thorough review of all public project documents and past media coverage.
- Developing a written methodology and conducting on-site, in-person, one-on-one interviews in the potentially impacted communities and with local key audiences to include a “windshield survey” of the potentially impacted neighborhoods. This approach was specifically employed in an effort to benchmark and better define the demographics in the potentially impacted area often missed by just referencing available U.S. Census data.<sup>5</sup>
- This research should also be designed to assist in determining other subtleties that may act as obstructions to information dissemination and involvement (e.g., language or cultural trust deficits that inhibit publics from attending official meetings or participating in a dialog with authority officials).
- If this work is in support of a permitting process, a review of all technical materials prepared in support of permitting (say a proposed facility) focusing on determining the potential for disproportionate environmental impacts. Question: if there are expected to be health and/or environmental impacts, will low income and/or minority communities be disproportionately impacted?
- An *objective and honest* evaluation and assessment of the public involvement strategies used to date. How does the community become informed about and participate in the public elements of this process including inputs to the decision-making process. Is information about the outcomes of these meetings and outreach initiatives made available to the community and how are potential language and technical understanding barriers addressed?

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<sup>5</sup> Another potential driving factor for on-the-ground research was the possible existence of shadow demographics, sometimes in play in areas of high residential turnover or in areas that include large tracts of open spaces.

- Access positioning factors such as the communication of the benefits and burdens associated with the proposed action to all potentially impacted communities.

The second core step is planning: specifically Strategic Community Engagement Planning. The above described benchmarking research tends to support a strategic planning process with both an objective outline of the positives and gaps in the current communications process, as well as demonstrates due diligence in seeking to meet EPA environmental justice criteria. I suggest considering that one key of this planning process is to document all that has been done consistent with the EPA's intent to meaningfully engage the community and, moving forward, provide specific direction to the communications process to keep it within the compliance parameters as outlined by the EPA. Thus, the strategy works to satisfy the EPA requirements and guidance directives, and to avoid triggers and missteps.

The final core step would be to proactively demonstrate due diligence of this process to the regulators and *all publics and stakeholders involved*. By entering this process "eyes wide open" I have found that counsel and clients have traditionally been able to maintain a positive position with the EPA by pre-satisfying the environmental justice process before it is deployed as a requirement by the agency. But perhaps the real co-beneficiaries of this proactive community engagement process are the industry and the community.

Working through this process mirrors the lessons we learned in Columbia, Mississippi. The journey and risks are shared. By inviting everyone to the table—ensuring that they could get to the table and that their input was listened to and respected—opened the door for a very successful outcome in Columbia. It seems that the EPA is setting that standard for future actions to emulate.

Thus, the EPA guidance documents on environmental justice underline that the agency is working to incorporate commonsense into how they approach actions and community engagement moving forward. It is now up to counsel and industry to recognize the importance of this shift from passive to active community engagement, and to take leadership of this process moving forward.

