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DEPARTMENT OF JUSTICE GUIDANCE CONCERNING ENVIRONMENTAL JUSTICE

Authority: Executive Order No. 12898 (59 Fed. Reg. 7629 (Feb. 16, 1994))

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I. BACKGROUND

As a result of the public's concern regarding the quality of the physical environment, the Federal and state governments have enacted legislation to safeguard the environment and protect the health and safety of the public. Through governmental enforcement of those laws, the people of the United States have made considerable progress toward the goal of a clean, safe, and healthful environment for all Americans.

However, in recent years, there has been an increasing awareness that the burdens of a polluted environment are borne disproportionately by members of minority and low-income communities. In the wake of these studies, a growing number of citizens have begun to examine the causes and effects of this distribution of environmental burdens and to advocate policies that will either cease or reduce such environmental hazards, if possible, or distribute such burdens fairly. That movement has come to be identified by the term "environmental justice."

In the course of the public debate regarding the cause or causes of this disproportionate burden, it has become clear that there is a perception in affected communities that Federal agencies may have contributed to prolonging the disparities by underenforcing laws in some communities, or by failing to take other remedial steps. The Department of Justice is committed to addressing these concerns.

II. EXECUTIVE ORDER NO. 12898

President Clinton signed Executive Order No. 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, on February 11, 1994. 59 Fed. Reg. 7629 (Feb. 16, 1994). The Executive Order is attached as Appendix A.

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Executive Order No. 12898 does not create a new legal remedy. As an internal management tool of the Executive Branch, the Order directs Federal agencies to put in place procedures and take actions to make achieving environmental justice part of their basic mission. President Clinton explained that Federal agencies have the responsibility to promote "nondiscrimination in Federal programs substantially affecting human health and the environment." Accordingly, agencies must implement actions to identify and address disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority and low- income populations and federally-recognized Indian tribes.

In a Memorandum issued contemporaneously with the Order, the President "underscore[d] certain provisions of existing law that can help ensure that all communities and persons across this Nation live in a safe and healthful environment." The Memorandum does not create or impose environmental analysis obligations on agencies beyond those contained in existing law. Rather, it directs agencies to take "appropriate and necessary steps to ensure" that existing laws are implemented "immediately" to redress disproportionate environmental harms.

Consistent with the Executive Order, the Department of Justice is analyzing how important provisions of existing environmental, civil rights, civil, and criminal laws may be used to help reduce environmental contamination in all communities and to provide a more equitable distribution of unavoidable environmental burdens. The Department's mission continues to be guided by a commitment to provide equal protection of the laws to all citizens.

The Executive Order directs the Department of Justice, as well as all other designated agencies, to develop an agency-wide Strategy to achieve these goals. As part of its Strategy, the Department has issued this Guidance on environmental justice. The Guidance includes provisions for identifying, tracking, and addressing environmental justice matters.

III. DEPARTMENT GOALS

The Department is committed to the following goals for achieving environmental justice:

- A. Protect environmental quality and human health in all communities;
- B. Use environmental, civil rights, criminal, and civil laws to achieve fair environmental protection;
- C. Promote and protect community members' rights to participate meaningfully in environmental decisionmaking that may affect them;
- D. Analyze data that will assist the Department in law enforcement, mediation, and counseling efforts involving environmental justice matters; and,
- E. Promote full and fair enforcement of the laws, increase opportunity for access to environmental benefits, and minimize activities that result in a disproportionate distribution of environmental burdens.

IV. IMPLEMENTATION

A. COORDINATION

Coordination among and within the relevant components is a fundamental aspect of successfully implementing the Executive Order. Coordination allows for an exchange of legal expertise and knowledge of varied methods of problem solving and provides an internal forum for consultation. The Office of the Associate Attorney General will be responsible for coordinating the Department's handling of environmental justice matters.

The following Divisions, Bureaus, and Offices have designated persons responsible for coordinating environmental justice litigation within their respective Components: the Executive Office of United States Attorneys; the Environment and Natural Resources, Civil Rights, and Civil Divisions; the Federal Bureau of Investigation; the Bureau of Prisons; and the Community Relations Service. All designated coordinators will:

1. Consult and assist Department attorneys and other personnel in identifying environmental justice matters;
2. Monitor the docket to ensure full compliance with the Executive Order; -
3. Brief principals and ensure that they are informed of all matters and approve of all policy documents distributed within the Department on environmental justice;
4. Coordinate with other Department of Justice components where appropriate to ensure that the Department maintains consistent positions, including litigation positions, whether the Department is enforcing or defending laws or federal actions; and,
5. Attend periodic coordination meetings chaired by the Director of Environmental Justice in the Office of the Associate Attorney General.

The Department, through the Office of the Associate Attorney General, also will respond to internal inquiries from Department personnel concerning environmental justice, Executive Order No. 12898, and this Guidance. Any Department of Justice employee who wishes to consult with Department coordinators on these topics should transmit a query via e-mail to the following address on the Eagle System: SMO02(ENVJUST).

Inquiries also may be submitted by mail to the following address:

Office of the Associate Attorney General
Department of Justice, Room 5214
Attention: Director of Environmental Justice
10th & Constitution, N.W.
Washington DC 20530

B. IDENTIFICATION OF ENVIRONMENTAL JUSTICE MATTERS

For purposes of the Justice Department, an "environmental justice" matter is any civil or criminal matter where the conduct or action at issue may involve a disproportionate and adverse environmental or human health effect on an identifiable low-income or minority community or federally-recognized tribe.

The ultimate determination whether a particular situation raises an environmental justice issue will depend on an evaluation of the totality of the circumstances. However, there are a number

of factors that should be considered in determining whether any individual situation does raise such an issue:

1. FACTORS TO BE CONSIDERED

- a. Whether individuals, certain neighborhoods, or federally recognized tribes suffer disproportionately adverse health or environmental effects from pollution or other environmental hazards;
- b. Whether individuals, certain neighborhoods, or federally recognized tribes suffer disproportionate risks or exposure to environmental hazards, or suffer disproportionately from the effects of past underenforcement of state or federal health or environmental laws;
- c. Whether individuals, certain neighborhoods, or federally recognized tribes have been denied an equal opportunity for meaningful involvement, as provided by law, in governmental decision making relating to the distribution of environmental benefits or burdens. Such decision making might involve permit processing and compliance activities.

While it is important to avoid overly narrow conceptions of possible environmental justice situations, the mere presence of environmental hazards in a particular community does not in and of itself mean that an environmental justice problem is addressable in litigation. Additional factors must be considered, such as the accumulation of a number of environmental hazards in an affected area because of the lack public participation by the community, lack of adequate protection under the laws designed to protect health and the environment, or unusual vulnerability of the community to such hazards.

Thus, each environmental justice matter must be assessed on a case-by-case basis. Listed below are examples of fact situations that have presented environmental justice issues:

2. EXAMPLES OF ENVIRONMENTAL JUSTICE MATTERS

a. Environment and Natural Resources Division

- 1) Contaminated drinking water. Plaintiffs from a predominantly low-income trailer community in Wyoming were supplied drinking water through a public water system that failed to meet minimum standards under the Safe Drinking Water Act. The district court found the risk to the aquifer posed by improper sewage disposal sufficient to support the United States' request for a preliminary injunction, and the court entered a judgment against defendants in the amount of \$1.089 million for endangering the public health and welfare.
- 2) Discrimination and participation. Plaintiffs from a predominantly minority community in West Oakland, California, filed suit against the Department of Transportation alleging both Title VI and NEPA violations. The government's activities involved the development of an Environmental Impact Statement for placement of a highway through a low-income, minority community. This suit settled.
- 3) Protection of tribal lands. The Department successfully prosecuted a federal trespass action against irrigation districts that had wrongfully discharged their wastewaters onto tribal trust lands.
- 4) Polluted air. Violations of the Clean Air Act by an operator of a municipal waste incinerator in a distressed community may develop into an environmental justice matter.

5) Natural resource damages. A complaint alleging that an oil spill harmed fish that form part of the subsistence diet of Native Americans should be examined further to determine whether it is a potential environmental justice matter.

b. Civil Rights Division

1) Storm and sewage disposal systems. Residents in a predominantly African American section of a city alleged that the city's storm sewer system did not provide adequate protection from flooding compared to storm and sewer drainage systems in predominantly white parts of the city, in possible violations of the Fair Housing Act.

2) Siting of a landfill. A minority community in New York State filed a complaint with the Environmental Protection Agency, alleging that when the New York Department of Environmental Conservation, a recipient of federal funds, decided to site a landfill adjacent to their community, such action violated Title VI of the Civil Rights Act of 1964. EPA is investigating the allegations.

c. Civil Division

1) Radiation exposure. The Civil Division administers the Radiation Compensation Program, a program which compensates on-site participants, residents living downwind of radiation sources, and uranium mine employees and/or their descendants for the burdens they have borne for the nation as a result of nuclear tests and uranium mining. Many of the recipients of compensation are members of federally recognized tribes.

d. Community Relations Service "CRS"

1) Clean-up of Superfund Site. CRS has been involved in mediating disputes between the EPA, city managers, and residents of a minority community over the clean-up of a Superfund site.

C. RESPONSE TO ENVIRONMENTAL JUSTICE MATTERS

1. PROCEDURES FOR ATTORNEYS

Assistant United States Attorneys and line attorneys in the Environment and Natural Resources, Civil Rights, and Civil Divisions will take the following steps in order to identify and address environmental justice matters:

- a. Be alert to factors indicating a possible environmental justice matter as a case develops, and consider requesting additional information from the referral agency as needed when the agency referral or complaint does not, on its face, label the case as one involving an environmental justice matter;
- b. Notify the designated Division environmental justice coordinator or AUSA for further consultation on remedial or other action when environmental justice claims have been identified;
- c. Report environmental justice matters on your docket sheets when identified, whether when opening the case, during the pendency of the case, or when closing the case;
- d. Consult with the referral agency and/or with your environmental justice coordinator if you have any questions or need more information concerning remedial or other action;

- e. Consider using available data bases to obtain relevant demographic data;
- f. Consider alternatives to litigation. Where resolution of an enforcement action might be achieved without litigation, attorneys should consider alternative dispute resolution or remedial solutions intended to directly benefit affected communities.

In this regard, note that the Department of Justice's Community Relations Service plays an important role in resolving conflicts arising from perceived environmental discrimination. CRS is the only Department of Justice component specifically tasked to prevent and resolve community conflicts arising from actions, policies, and practices perceived to be discriminatory on the basis of race, color, or national origin. Attorneys may contact CRS to inquire about its services in resolving conflicts;

g. Advise and counsel client agencies, states, and local governments. Department of Justice attorneys who work with agency clients during investigations or litigation, or in their capacity as legal advisers, may counsel agencies on environmental justice issues relevant to their respective agency programs and policies. The Department should also look for ways to assist state and local governments in their efforts to achieve environmental justice; and,

h. Attend educational and training programs provided by the Department on environmental justice. All Department of Justice employees are encouraged to take steps to ensure that the Department satisfies the directives contained in Executive Order No. 12898 and this Guidance. To facilitate this process, the Department will conduct training programs and provide materials to Department attorneys on the subject of environmental justice.

2. ADDITIONAL DEPARTMENT RESPONSES

a. Legislative review

Department attorneys who review legislative initiatives should evaluate such initiatives for their consistency with, and efficacy in enhancing, environmental justice.

b. Title VI Program Evaluation

Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, or national origin in all federally assisted programs. 42 U.S.C. § 2000d et seq. Most agencies that provide federal assistance subject to Title VI have regulations implementing Title VI. These regulations apply not only to intentional discrimination but also to policies and practices that have a discriminatory effect.

As part of the review mandated by the Executive Order, attorneys reviewing agency efforts to comply with Title VI should evaluate the programs to eliminate policies and practices that may be neutral on their face but discriminatory in their effect. A more detailed review of the Title VI enforcement obligations of the Department of Justice is provided in a "Memorandum for Heads of Departments and Agencies that Provide Federal Financial Assistance" and is attached as Appendix B.

c. Amicus

In order to support the policy and goals of the Executive Order, the Department also may file amicus curiae briefs in cases that raise environmental justice issues. Where appropriate, attorneys should advise client agencies that the Department will consider recommendations to file amicus curiae briefs.

d. Protection for Federally Recognized Tribes

The federal government has special responsibilities involving federally recognized Indian tribes. Department attorneys litigating environmental justice cases affecting such tribes will confront additional issues involving the relationship between the Department of Justice, the Department of the Interior, and tribal nations.

Environmental justice matters involving American Indian issues should be referred to the appropriate section in the Environment and Natural Resources Division and to the Division's environmental justice coordinator so that these matters can be properly coordinated within the Department and with the Department of the Interior.

V. JUDICIAL REVIEW AND ENFORCEMENT

This Guidance is intended only to improve the internal management of the Department of Justice. It shall not be deemed to create any right, benefit, or trust obligation, either substantive or procedural, enforceable by any person or entity in any court against the United States, its agencies, its officers, or any other person. Consequently, neither this Guidance nor the deliberative processes or products resulting from implementation of the Guidance shall be treated as establishing standards or criteria that constitute any basis for review of the actions of the Department of Justice or any other agency. The Department's compliance with this Guidance shall not be justiciable in any proceeding for judicial review of agency action.

DATE: January 9, 1995 SIGNED: JANET RENO, ATTORNEY GENERAL

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