



What chemical manufacturers need to know about environmental justice

Chemical manufacturers are uniquely exposed to liability grounded in environmental justice - and that liability is often outside the scope of what they expect, say Megan R Nishikawa and Amber Trincado at Hogan Lovells

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While not a new concept, environmental justice increasingly serves as the basis for investigations and litigation that seek to hold industry accountable for environmental and health impacts disproportionately borne by disadvantaged, underserved and overburdened communities. These include low income communities, communities predominantly of colour, or other marginalised groups.

President Biden's sweeping and historic environmental justice initiative, Executive Order 14906, issued in April 2023, targets not only current and future projects, facilities and products that may disproportionately impact traditionally overburdened and disadvantaged communities, it explicitly seeks to "clean up legacy pollution" impacting those communities.

This focus on legacy pollution, and the legacy products that allegedly caused that pollution, is not unique to the executive branch. Increasingly, state attorneys general and private plaintiffs are targeting pollution and contamination resulting from products used, and facilities operated, long before environmental justice liability was widely recognised.

Chemical manufacturers should be aware of these developments and the liability they potentially face related to

products and facilities that have not been on the market or operational for decades - or even a century.

What is environmental justice?

Environmental justice began as a social movement in the 1960s. Communities of colour fought back against industry using their neighborhoods as locations for facilities known to cause pollution and other contamination, such as landfills and sanitation facilities.

In its current iteration, environmental justice has no set definition. Rather, its definition depends on who you ask. But governmental agencies, non-profits and individuals alike agree on a few key elements: fair treatment and meaningful involvement of all people in the development and enforcement of environmental rules and regulations. By guaranteeing traditionally disadvantaged communities a seat at the table, the goal of environmental justice is to level the playing field - requiring all people, regardless of race, colour, national origin or income, to bear the burden of our shared environment equally.

Environmental justice rules, regulations and statutes continue to develop. But, notably, no statute of limitations

exists for environmental justice-related harm. At least not yet. And the absence of any temporal requirement has resulted, and will continue to result, in investigations and litigation relating to products, activities and facilities that have been off a company's books for decades.

Environmental justice in the news

In April 2023, a Honeywell International shareholder demanded the company describe its efforts to mitigate environmental justice risks, arguing that failure to do so "often results in litigation, project delays and significant fines". The shareholder requested that Honeywell investigate past disproportionate environmental and health impacts on disadvantaged communities in addition to any present or future impacts.

This was not the first time Honeywell had faced environmental justice criticisms related to products, facilities and conduct from decades earlier. In April 2022, although admitting no liability, Honeywell agreed to pay to abate areas in South Bend, Indiana, where it had dumped trash nearly a century prior. The community is predominately African American and testing showed lead contamination in the soil.

In June 2023, the Biden administration announced a "first-of-its-kind environmental justice agreement" between the Alabama Department of Health and the US Department of Justice (DOJ). The agreement was the result of a DOJ investigation in to failing septic systems in Lowndes County Alabama, a predominantly low income African American community and federal grant recipient. The failing septic systems exposed residents to raw sewage and many suffered from intestinal parasites.

The DOJ, for the first time, used Title VI of the US Civil Rights Act of 1964 to find that Alabama health officials knew residents were "disproportionately hit by failing septic systems but took no action to stop [it]". Under Title VI, "local governments and other entities that receive federal grants are prohibited from discriminating on the basis of race, color or national origin". The Lowndes County investigation was the first ever Title VI environmental justice probe into a Justice Department grant recipient.

On 31 October 2023, The DC Office of the Attorney General (OAG) announced that Potomac Electric Power Company (PEPCO) would pay \$47m in abatement costs and an additional \$10m in penalties relating to pollution of the Anacostia River. The OAG claimed that the predominantly low income African American residents in the area suffered disproportionate and "multi-generational health impacts" because of a facility opened in 1906 and decommissioned in 2012. The OAG alleged that PEPCO had, for decades,

dumped water contaminated by petroleum byproducts into the sewers, onto the land and into the groundwater, which then polluted communities closest to the riverbank. The result, according to the OAG, was health impacts suffered by disadvantaged communities for nearly a century.

What now?

Chemical manufacturers are uniquely exposed to liability grounded in environmental justice - and that liability is often outside the scope of what they expect. Legacy products and decommissioned facilities can make a chemical manufacturer the target of an environmental justice action alleging pollution or contamination, if that pollution or contamination disproportionately impacts disadvantaged or overburdened communities.

Recent focus on multigenerational harm caused by products or facilities long forgotten, coupled with a new legislative landscape and developing case law, poses risks that chemical manufacturers should seek to evaluate and understand - risks that are heightened by the current lack of a statute of limitations for environmental justice-related harm.

Environmental justice legislation and case law is relatively new and rapidly developing. Environmental justice's definition changes depending on who you ask - the federal government, states, private citizens, and non-profit organisations each focus on different elements. Chemical manufacturers should carefully investigate what risks they may have based on their respective businesses and consult counsel when necessary to mitigate those risks.

FURTHER INFORMATION

[Press Release, Office of the Attorney General for the District of Columbia, The Largest Environmental Settlement in DC History \(31 October 2023\) →](#)

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