

AEHS—33rd Spring Conference—Panel 5b- Environmental Justice

By Norman A. Dupont

Presentation: Regulatory Policy and Environmental Justice: Is EJ Much Ado about Nothing?

With apologies to Shakespeare for adopting the title of one of his plays, *Much Ado About Nothing*. The play deals with communication and deception, and one summary describes the main message as: “Proper communication would have prevented many conflicts in the play, and deception is used for both good and evil by various characters.”

This summary fits the regulatory policy of Environmental Justice at both the federal and at least California state levels.

1. Policy and Deception—Or at least the lack of Clear Communication

*Regulatory policy at the federal level—Sounds like the President, through an Executive Order, and EPA all support strongly EJ. . . BUT beware of a potential deception

President’s Executive Order No. 12898 issued by President William Clinton in 1994---30 years ago.

*Federal Actions to Address EJ in Minority Populations and Low-Income Populations

*BUT-deception lurks in the very last section:

Section 6-609: Judicial Review. . . READ

Same with President Biden's more recent Executive Order No. 13990—focused on climate change but referencing the need to “prioritize environmental justice.”

2. Real Life Example: California sues EPA for failure to address GHG Emissions by aircraft flying to various airports including airports located in many low-income/minority populated communities.

*EPA's “Aircraft Rule”

*Cal. sues and EPA tells the DC Circuit—those Executive Orders are simply unenforceable.

3. Real life example: What happened to EJ concerns in locating a new airport cargo facility in a disadvantaged community in San Bernardino, CA? They got lost

Center for Community Action & Environmental Justice v. FAA, 61 F.4th 633 (9th Cir. 2023)

FAA under NEPA approves new Amazon cargo facility's construction (with federal funding assistance) in San Bernardino, CA.

*Judge Rawlinson in dissent put it this way:

“I do not say this lightly, but it must be said. This case reeks of environmental racism, defined as the ‘creation, construction, and enforcement of environmental laws that have a disproportionate and disparate impact upon a particular race[.]’ [citation]

“San Bernardino County, California, is one of the most polluted corridors in the entire United States.”

61 F.4th at 655.

4. Real life example: What happened in City of Glendale to expansion of power plant under CEQA when challenged as to EJ impacts.

“Grayson Repowering Project”

Sierra Club challenges based in part on lack of EIR’s consideration of EJ communities surrounding the City

The Court: “However, Sierra Club does not cite to any provision in CEQA that requires an analysis of impacts on environmental justice communities. . . . Courts may not interpret CEQA ‘in a manner which imposes procedural or substantive requirements beyond those explicitly stated in this division or in the state guidelines.’”

Sierra Club v. City of Glendale (2023 Cal. Sup. Ct.—LA County) 2023 Cal. Super. LEXIS 63982 at *27-*28.

5. Takeaways:

a. Despite much trumpeting of EJ policies, these policies often lack clear communication (or deception) about whether they are enforceable.

b. If a policy is not enforceable in a Court of law, then it doesn't really count as a "law."

c. Brownfield buyer beware: EVEN IF it's not a formal law, consider the lengthy court battles over such issues.

*Short battle—Just seventeen months (Sierra Club v. City of Glendale—writ filed in March 2022, decision in August 28, 2023).

*Longer battle—Amazon terminal (initial panel decision in 2021 amended in Feb. 2023).

*Consultant's job: to advise client on how to steer through this bog.