

D I A L O G U E

# The State of Environmental Justice: An Obama Administration Retrospective

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## Summary

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Environmental justice has officially been a federal priority since 1994, when President Bill Clinton signed Executive Order No. 12898 directing federal agencies to include consideration of health and environmental conditions in minority, tribal, and low-income communities into agency decisionmaking. In President Barack Obama's 2008 campaign, he promised to strengthen the EPA Office of Environmental Justice, expand the environmental justice small grants program, and empower minority communities to respond to health threats. In 2011, the Federal Interagency Working Group on Environmental Justice signed the Memorandum of Understanding on Environmental Justice and Executive Order No. 12898, and in May 2016, EPA released its EJ 2020 Action Agenda. However, significant challenges remain, as shown by high-profile incidents such as the Flint water crisis. On December 1, 2016, ELI hosted a panel of experts to look at the Obama Administration's legacy on environmental justice and discuss opportunities for the future. Below we present a transcript of the discussion, which has been edited for style, clarity, and space considerations.

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**Benjamin Wilson** (moderator) is Managing Principal of Beveridge & Diamond, P.C.

**Barry Hill** is a Visiting Scholar at the Environmental Law Institute, and formerly Senior Counsel for Environmental Governance of the Office of International and Tribal Affairs at the U.S. Environmental Protection Agency (EPA).

**Quentin Pair** was a Senior Trial Attorney at the U.S. Department of Justice's Environmental and Natural Resources Division (ret.), and is an adjunct professor at Howard University.

**Suzi Ruhl** is a Senior Attorney Advisor at the EPA's Office of Environmental Justice, and Co-Chair of the NEPA Committee and the Rural Communities Engagement Committee of the Federal Interagency Working Group on Environmental Justice (IWG).

**Benjamin Wilson:** Thank you to ELI for organizing this program, and to all attendees. We have eight or nine questions that we want to ask of our panelists, and certainly on an issue like our topic there are far more than eight or nine questions that one could ask.

We're going to start with a pretty fundamental question, which is how one would define environmental justice (EJ) and how do we legally define EJ?

**Barry Hill:** EPA defines EJ as the fair treatment and meaningful involvement of all people and of all communities. But that's the legal definition, if you will. The practical definition is that no community should be exposed disproportionately to environmental harms and risks. It's the responsibility of the agencies and it's the responsibility of government; it's the responsibility of the private sector, as well as communities, to try to make sure that it's not going to be "equal distribution"—we're talking about "fair distribution." That's one way of defining it or looking at it from a practical matter.

**Suzi Ruhl:** Building on what Barry said, as the historical definition has carried us forward, I think one of the major accomplishments of this [Obama] Administration is moving that definition into more meaningful practice. I like to think of the definition as a concept over time in a trajectory. Key points for moving forward include the recognition that while EJ is absolutely about reducing and minimizing the risk of exposure to pollution and those bad impacts, it's also about equal access to the good, to services and amenities. Under the Obama Administration, we've really seen that progress. The lack of access to those amenities, whether it's drinking water or health care, is also a disproportionate environmental impact.

**Quentin Pair:** Basically, I agree with Barry. I would just tweak it a bit in saying—and ask if anybody on the panel agrees with me—that there's really not a legal definition of EJ. There is no EJ law, which many people don't realize. There's Executive Order No. 12898,<sup>1</sup> signed by then-President Clinton on February 11, 1994. A presidential Executive Order means simply that it's instruction from the president on how he wants those

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1. Exec. Order No. 12898, 59 Fed. Reg. 7629 (Feb. 11, 1994).

who are serving in the executive branch of the government to conduct their business.

If you look at the last paragraph of Executive Order No. 12898, you will find that it says “this doesn’t give any rights to any citizens, legal or otherwise.” It’s really a management tool for our government. And I’ve had people say to me over the course of time: well, it’s just an Executive Order; it really doesn’t have any legal standing. But if your boss told you how he wanted you to dress for work, which would be a blue suit and a red tie, and you decided you wanted to wear a t-shirt and shorts to work, how long do you think you would be in your position?

An Executive Order is meant to give direction and has the authority of the president, but it is not a law. I would submit, however, that the success of EJ in the federal government in particular has been extensive without a law, and real action is occurring in the states. Very few states have laws, but many of them have their regulations, their commissions, their guidances, etc., and that’s really where the action is.

**Benjamin Wilson:** It’s interesting, Quentin, because you talk about an Executive Order. As usual, you anticipate me because there are certainly limitations to what an Executive Order can do. But now we have a president who has suggested that he might in fact overrule or alter certain Executive Orders. How do you see the prospect of that, Barry?

**Barry Hill:** I’m thinking about what happened years ago when I was in the Clinton Administration as the Director of the Office of Environmental Justice and then the Bush Administration came in. There was a real concern, as Quentin pointed out. It is an Executive Order—it could be changed or eliminated by a president. That’s why it was more important to look at the environmental laws that EPA administers and to try to argue that EJ is embedded in each and every law that the Agency administers and its implementing regulations.

So, in many respects, yes, we can rely on the Executive Order and Quentin was absolutely correct. At the federal level, there is no EJ law, but there are a number of EJ laws at the state level. There is a concern, no question about it, and communities and others should be very concerned about what might happen to the Executive Order. But one of the first things I did when I was asked to speak with the EPA administrator and the deputy administrator was to ask that question: will the Executive Order be eliminated by President Bush? And the answer was “No.” The next question was: well, what should we do? And so I said, well, what the Administration should do is to come out with a memorandum from the administrator supporting the concept of EJ consistent with what the Clinton Administration had done, and that’s what they did in 2001.

**Benjamin Wilson:** Suzi, let me give you a little bit of a curveball if I might. We’ve heard President Donald Trump

talk about urban blight. Is there any indication in your view that he will in fact consider withdrawing or overruling or changing the Executive Order?

**Suzi Ruhl:** I was doing EJ before the term was coined and I was relying, like Barry said, on the environmental statutes, which can be very effective at addressing the concerns that people have. Now that I work for the government, I’m not allowed to give projections about the next president. But I do want to go back to this question I think everybody’s talking about, the legal definition, and how are we going to navigate moving forward.

It really is the recognition that when a department is talking about urban blight, whether it’s the Department of Housing and Urban Development, whether it’s the U.S. Department of Transportation (DOT), there are multiple authorities (e.g. department orders) that address EJ. EPA’s definition is not cited. Rather, the concept of EJ is addressed according to the mission objectives of the department. There have been additional terms that we can also cite, whether a community is “overburdened and underserved,” which again is about access to essential services as well as addressing contamination.

So, I think that moving forward, whether we have a legal background or a technical background, there are a lot of facts to work with, there are a lot of road maps to the statutes that would help us get to EJ concerns. Because I’ve been doing this work since before there was an Executive Order, whether one exists or not really doesn’t have to change the outcome in terms of getting help to those people who are of greatest need, and who have not had access to the benefits that the government at large is designed to provide.

**Benjamin Wilson:** You talk about how EJ might be read into various statutes, but according to the U.S. Commission on Civil Rights, EPA is not doing so well. At least that was their evaluation. Quentin, what do you think about that?

**Quentin Pair:** I would take some issue with their report. It wouldn’t be the first time. It was quite a damning report on EPA, but I’m a big champion of EPA. Thirty-five years I was with DOJ and they were my client and we lived through a lot of changes in administrations. But EPA has been a lead on EJ. A lot of the federal agencies kind of hid behind EPA as the Agency would take it on the chin with criticisms from all over the place. It’s true, it was slow-growing, and there were difficulties and not everybody in EPA was on board and it was a long struggle, but not as long a struggle as it was in certain other agencies.

I remember a couple years ago when Ignacia Moreno, who was the Assistant Attorney General for the environment division at DOJ (and my boss), was talking about her committee, her Environmental Justice Committee, and I had to look around at first. I didn’t know that I was a committee. There was one person doing EJ at DOJ—

*moi*. We now have “we.” The department and the division have almost 300 lawyers that take mandatory training on EJ.

One of the accomplishments of the Obama Administration was the memorandum of understanding signed by the IWG. Executive Order No. 12898 is where our legal authority comes from basically to assign us at the 17-18 executive agencies that form the IWG. I sat on that particular body and one of the things they did was have a memorandum of understanding signed by all of the secretaries and offices of those listed on the IWG. If you want to know anything about EJ, just go online. Each agency has to publish its strategic plan for EJ. They have to take comments from the public and publish those comments and responses to those comments every year. Now that’s a memorandum of understanding that the next administration could come out and tell the secretaries, “You don’t need to do that.”

But as Barry pointed out, when the Bush Administration came in, allegedly industry was supposed to have been consulted on that and they thought it would be best to let sleeping dogs lie. Executive Order No. 12898 has now survived six administrations and five presidents. And I know that it’s been quoted in the news that President Trump said he wants to reduce EPA’s budget by 70% to 80%. He has said a lot of things. Unlike Suzi, I have no more restrictions. He has nominated someone who is known to want to substantially reduce, if not eliminate, EPA, which would be a grave mistake. But like every president that comes into office, you find out there are a whole lot of things that you have to attend to.

And EJ is not a threat. What I keep reminding people is that EJ is non-partisan. It’s not even bipartisan. It’s about how this country keeps its promise to the poor and those who have been taken advantage of. All of us with our pretty watches and our tablets and our bling-bling. When we bought these things, did we not realize how much toxic waste it took to make them? Anyway, my point simply is that that’s the basis of EJ. All those toxic things find their way to minority communities and low-income communities.

**Benjamin Wilson:** Quentin, I want to press our panel a little bit more, and according to the U.S. Commission on Civil Rights, they found that EPA had largely failed in providing relief to communities of color impacted by pollution and that the Agency does not take action when facing EJ concerns until forced to act. Barry, what’s your view of that?

**Barry Hill:** I’m like Quentin; I’m retired now and I’m not under any restrictions, so I can say what I want. If you look at the title of the Commission’s work, *Environmental Justice: Examining the EPA’s Compliance and Enforcement of Title VI and Executive Order 12898*,<sup>2</sup> it’s bifurcated. It’s

a two-legged animal, if you will. That report talks about enforcement *and* compliance with Title VI of the Civil Rights Act of 1964.<sup>3</sup> That’s the Office of Civil Rights. That’s their responsibility, to issue decisions when an EJ or injustice issue arises.

And it’s true. The Agency has not issued a decision favorable to communities since the 1964 Act was passed. But then there’s Executive Order No. 12898 and that’s under the jurisdiction of the Office of Environmental Justice. As Quentin and Suzi said, so much has been done over the years in incorporating EJ into the way in which the Agency acts on a daily basis, whether it’s rulemaking or permitting or whatever the case may be.

As Quentin said, there is more than one person at DOJ involved in the issue of EJ. So, a lot has been done as it relates to Executive Order No. 12898. Is it perfect? No, not at all. So, the Commission was right to a certain extent as it related to Title VI, but it did not go far enough in looking at the accomplishments of the Agency with respect to the Executive Order. That’s how I look at it.

**Quentin Pair:** If I could piggyback on what Barry was saying, I agree with him in terms of that survey done by the Commission, which I heartily endorse because it needs to be publicized generally. You do have to look at Title VI and you have to look at the EJ Executive Order. There is no doubt that EPA has been sorely lacking in enforcing compliance on Title VI, which basically requires that any funds being given by any federal agency to individuals, nongovernmental organizations, states, or other recipients cannot be used in a discriminatory matter. But it’s done all the time.

I served for a year at the administrator’s office, on loan from DOJ, to head up a team working on how to put together a compliance program for Title VI, because here is the deal—your money is being given to states and others and nobody checks on them. It’s like if I give money to my good friend, George, sitting here in the audience, and I said, “George, here is \$1,000,” and you think I would not ask for a signed note or something even if he is a friend of mine? We give billions of dollars away to states.

We all know the history of civil rights; states did not always treat all of their citizens equally. I’ve been to some of those places in certain states. You walk into a part of town where all African Americans live, and you’d have garbage floating down the middle of the street, dilapidated houses. You go to the affluent side of town and there are parks, lights, etc. We have not always been good about keeping track of the money that we dole out. So, the idea was, how do you do it? If you have a Title VI complaint, it’s very technical in terms of the things you have to work at. But as Barry mentioned, it’s been about 40 years since the Act was established?

2. U.S. COMMISSION ON CIVIL RIGHTS, ENVIRONMENTAL JUSTICE: EXAMINING THE ENVIRONMENTAL PROTECTION AGENCY’S COMPLIANCE AND ENFORCEMENT OF TITLE VI AND EXECUTIVE ORDER 12898 (Sept.

2016), available at [http://www.usccr.gov/pubs/Statutory\\_Enforcement\\_Report2016.pdf](http://www.usccr.gov/pubs/Statutory_Enforcement_Report2016.pdf).

3. 42 U.S.C. §§2000D et seq.

**Benjamin Wilson:** Actually, it's 52 years.

**Quentin Pair:** Thank you for the correction, but it beggars belief that EPA's Office of Civil Rights could not find discrimination in any of the administrative complaints filed during this entire period. I find that at least statistically implausible and unrealistic. One of the things I discovered was by talking to people who issued permits; EPA alone puts out tens of thousands of permits every year. So, if you have a complaint, and they have to do a study as to whether or not that complaint is valid, it takes a long time, but the average time I've been told that it's about a year to 18 months for a permit to be approved. If you have a long study process and panels and analysis and litigation and that permit is not approved, business will go crazy and they will all be up on the U.S. Congress, and EPA thinks it's got a bad time now with the Congress, but you're going to be stopping industry.

It's a very complicated issue, but the bottom line is, I think, that EPA has not appropriately applied Title VI to discrimination complaints filed by the EJ communities. Moreover, compliance enforcement has been virtually non-existent, and this is vital because taxpayers deserve to know that the funds granted to Title VI recipients are spent in a fair manner. We need people like those, like Barry, myself, Suzi, Ben, others—lawyers or non-lawyers—to actually come to the understanding that EJ is a civil rights issue. And Ben and I teach at Howard University together with another colleague, and when we went to the dean to say we wanted to establish this course, we said, “Environmental justice is the civil rights of the 21st century,” and I still heartily believe that to this day, and that leads us to supporting Title VI.

**Benjamin Wilson:** Let me say this briefly as a matter of fairness: some environmental justice advocates have in fact lauded EPA for incorporating EJ into the Clean Power Plan. The Obama Administration did reconvene the IWG for the first time in more than a decade, and they obtained a commitment from federal agencies to develop EJ strategies and release annual implementation reports. I recall making a presentation about 20 years ago suggesting that that's precisely what needed to be done and they've never gotten around to it. We do have the EJ 2020 Action Agenda,<sup>4</sup> which is the Agency's strategic plan ensuring that minority, low-income, and indigenous communities are not suffering disparate environmental and public health impacts. And I think it's generally recognized that EJ 2020 advances the ball significantly and is a hallmark of the Obama Administration's EJ work.

But there's another question I have, Suzi. Prof. Richard Lazarus always writes articles about how EJ should be incorporated into the ongoing interpretation of statutes, arguing that when the government exercises its discretion it should take EJ issues into consideration. Obviously, you've

already done that. Can you give us one or two practical examples of how that works and how it's done?

**Suzi Ruhl:** That's a great question. I think that, again, the hallmark, starting with the legacy when Barry was with the Office of Environmental Justice, is the totality of statutes that address environmental justice, from Title VI to NEPA<sup>5</sup> and other water, land, and air environmental statutes. I want to make one comment about the civil rights report. It brought up excellent information, but some of the frustration was about confusion as to what should've been addressed under Title VI versus EJ, not just the Executive Order, but the environmental statutes.

There's an excellent case in Corpus Christi where Title VI was integrated with NEPA to really help meet the needs of communities who appeared to have been bifurcated by transportation routes with the raising of a bridge. So, that leads me to some examples of what we have been doing at the Agency.

First, I want to remind people again that under Scott Fulton, the President of ELI who was former EPA general counsel, the Agency produced *Plan EJ2014 Legal Tools*,<sup>6</sup> which is an excellent compendium that highlights authorities that can cut to the chase on helping communities with their environmental and public health needs. Second, I want to highlight *Promising Practices for EJ Methodologies in NEPA Reviews*,<sup>7</sup> produced by the NEPA Committee of the IWG. The NEPA Committee comprises over 100 NEPA practitioners across the federal family who worked for four years to identify practices that foster efficient, effective, and consistent consideration of environmental justice in the NEPA review process. The Report was adopted by 10 Cabinet-level departments, three independent agencies, and the White House Office of Environmental Quality, which indicates the commitment to environmental justice through NEPA, a statutory authority.

Overall, there are many opportunities to advance environmental justice through environmental statutes, from decisionmaking platforms to resources for addressing challenges. We also have incredible in-depth vision across the federal family of people who understand how to do this from the programmatic perspective and not just from the EJ perspective. I'm actually very optimistic that we're going to get better answers and better solutions if again we bear down and apply those laws as they were meant to be applied, for all people including overburdened and underserved communities.

4. EJ 2020 Action Agenda: EPA's Environmental Justice Strategy, <https://www.epa.gov/environmentaljustice/ej-2020-action-agenda-epas-environmental-justice-strategy> (last updated Jan. 5, 2017).

5. 42 U.S.C. §§4321-4370h; ELR STAT. NEPA §§2-209.

6. U.S. ENVIRONMENTAL PROTECTION AGENCY, OFFICE OF GENERAL COUNSEL, *PLAN EJ 2014: LEGAL TOOLS* (2011), available at <https://www.epa.gov/sites/production/files/2015-04/documents/planej2014legaltools.pdf>.

7. U.S. ENVIRONMENTAL PROTECTION AGENCY, *PROMISING PRACTICES FOR EJ METHODOLOGIES IN NEPA REVIEWS: REPORT OF THE FEDERAL INTERAGENCY WORKING GROUP ON ENVIRONMENTAL JUSTICE & NEPA COMMITTEE* (2016), available at <https://www.epa.gov/sites/production/files/2015-04/documents/planej2014legaltools.pdf>.

**Benjamin Wilson:** Let's talk a little bit about the training. As we learned in the last presidential election, there's a lot that the Beltway thinks it knows, but there's a lot that the rest of the country thinks it doesn't know. So, talk to us about how this gets applied, say, on tribal land, how it gets applied in the Midwest, or how it gets applied in the Southwest, 1,000-2,000 miles from Washington, D.C.

**Suzi Ruhl:** That's an excellent point. We've stayed too much inside the Beltway and need to advance environmental justice from headquarters to regions to states, tribal and local government. And going back to the NEPA Committee as an example, we are engaging with headquarter staff of departments as well as regions. To date, we have trained more than 1,000 departmental staff across the federal family, from headquarters to field staff in the regions as well as contractors. Soon we will be releasing a community guide on "Promising Practices," so that all relevant stakeholders can understand and apply effective and efficient approaches. So, there are a lot of good ideas and approaches under the umbrella of the NEPA Committee.

**Benjamin Wilson:** Barry, no one understands the history of EJ better than you, and certainly the role of the federal government in that regard. Give us a brief history lesson, if you will, about how this concept of EJ developed in the federal branch. And we just heard about the training of federal lawyers and non-lawyers, that there's a lot that's going to happen at the state level, that EJ is not limited to the federal branch, of course. Could you take a minute to talk about those different points?

**Barry Hill:** Sure. Ben, you have to look at this whole thing as a continuum of where things were at back in 1994, when the Executive Order was issued; but the question is, should you rely on the Executive Order as compared to existing environmental laws and civil rights laws? That was the choice very early when I arrived at the Agency in 1998. And everyone knows in Washington that you can't do anything in the federal agencies unless you have statutory authority. So, there was an effort every year since 1992 for an EJ act on the federal level to be introduced and to be passed, but it never went further than the committees. It always died in the committees. So, as a lawyer, you must be creative and think about different ways of doing it. That's where the concept of EJ being embedded into every existing environmental law and statute that EPA administers came up.

You have Richard Lazarus, as you mentioned a few minutes ago. In 1999, Richard wrote a law review article<sup>8</sup> saying that you could integrate EJ through EPA permitting. As Quentin talked about, no one is absolutely entitled to a permit. Why don't you as the permitting authority put forth some conditions on the permit? That's how you can integrate EJ into each and every situation. Then you had ELI doing its work as far as the oppor-

tunities for environmental justice, they have looked at every EPA statute.<sup>9</sup> So, you had a law professor, you had a think-tank saying "Yes, this can be done," but you didn't have EPA's general counsel saying that. That's what we did. We asked Gary Guzy, who was general counsel of EPA, to issue a memorandum in November, I think, of 2000. That's when Gary said for the first time that EPA has the authority to integrate environmental justice into the way in which we do business.<sup>10</sup> That was at the end of the Clinton Administration.

Then you have the Bush Administration in 2001. As I mentioned earlier, Christine Todd Whitman, the EPA administrator, said, well, what should we do? Issue a memo.<sup>11</sup> And so, what I purposely did was repeat some of the things that were in the Executive Order that she put in her memo, such as "use existing environmental and civil rights laws." So, we had the Bush Administration on board. Then going to EPA General Counsel Scott Fulton's memo in 2011, the comprehensive guidance document, "EJ Legal Tools," where the same idea, the same concept was advanced using existing environmental laws to address environmental justice issues.<sup>12</sup>

One could argue that it may not be so problematic if the Executive Order is eliminated, because the toothpaste is out of the tube with respect to using existing environmental laws to address environmental justice issues. It's there. It's not going to be put back into the tube. So, if agencies continue to do that, then the federal government will be fine.

But if you look at what's happening in the states, you have community-based organizations bringing lawsuits in California, in Missouri, in all these places using the same concept: this is what the law says, whether it's federal law or state law, let's say the Resource Conservation and Recovery Act (RCRA). We, as EJ advocates, want there to be a permit with appropriate conditions that you, as the government, will have to issue. Integrate EJ into that particular permit. So, that's what's being done on a daily basis. If we can continue to push this idea, move this idea forward, there is a chance that the public health and environmental concerns in these communities can be addressed.

**Benjamin Wilson:** I think it is fair to say that under the Obama Administration there's always been this ability to use the existing laws, not to say that they were always used, but it seems to me that the Obama Administration took to this idea of how the law could be used.

8. Richard Lazarus & Stephanie Tai, *Integrating Environmental Justice Into EPA Permitting Authority*, 18 *ECOLOGICAL L.Q.* 617 (1999).

9. Environmental Law Institute, *Opportunities for Advancing Environmental Justice: An Analysis of U.S. EPA Statutory Authorities* (2001), available at <https://www.eli.org/research-report/opportunities-advancing-environmental-justice-analysis-us-epa-statutory-authorities>.

10. Memorandum From Gary S. Guzy on EPA Statutory and Regulatory Authorities Under Which Environmental Justice Issues May Be Addressed in Permitting (Dec. 1, 2000), available at [https://www.epa.gov/sites/production/files/2015-02/documents/ej\\_permitting\\_authorities\\_memo\\_120100.pdf](https://www.epa.gov/sites/production/files/2015-02/documents/ej_permitting_authorities_memo_120100.pdf).

11. Memorandum From Christine Todd Whitman on EPA's Commitment to Environmental Justice (Aug. 9, 2001).

12. PLAN EJ 2014: LEGAL TOOLS, *supra* note 6.

**Barry Hill:** Absolutely, Ben. The Obama Administration went much further than anyone can imagine as it relates to the progress that has been made in integrating EJ into the way the Agency and other federal agencies do business. We have concerns obviously with the incoming administration, whether or not it will have the same desire, wherewithal, and knowledge to do that same type of thing. But the communities and others and their legal counsel must continue to fight. We have to redouble our efforts at this particular point in order to continue to make a difference as far as the way in which people live.

You look at the situation in Flint, Michigan, what's going on there with the Clean Water Act (CWA).<sup>13</sup> How can that be used? That's an environmental racism, environmental injustice situation. They're using existing environmental laws to address that concern. It's not going to be perfect, but we have to redouble our efforts.

**Suzi Ruhl:** Building our base and our toolbox, there's another accomplishment under this [Obama] Administration, which will get us to what Barry and all of us are saying. Prior to the Obama Administration, there was a general principle that a rising tide lifts all boats. If you come up with a rule and that rule will result in reduction in pollution, there is no environmental justice concern.

Under this Administration, there is now the recognition that the rising tide lifts all boats if you have a boat, and that the minority, low-income, tribal, and indigenous populations may not be benefitting to the necessary level to meet the statute if their specific circumstances of exposure and cumulative impacts are not considered. For example, the economic analysis guideline,<sup>14</sup> produced under the Obama Administration, discusses the reality that if an analysis that doesn't consider special subpopulations like minority, low-income, and tribal, it is not sufficient. We have a lot of tools to work with even if they are not under the label of EJ.

**Quentin Pair:** I'd like to make a couple of points. One, at the beginning of the Obama administration, I got invited to a meeting with Hillary Clinton at the White House between grassroots communities and the heads of these agencies. I walked in the room and I looked around. I was absolutely amazed. The room was full of top-level secretaries. We had people from different departments, state parties, international representatives, and a number of them were officers from the White House. I've been involved 10 years, through the lean years of the environmental Executive Order, the IWG when maybe three or four people met. And here was this roomful of top-level people.

I said, "I want to congratulate everyone for coming. The problem is I don't know any of you. That means you have not been doing anything in environmental justice. You

better go back to the agencies and find the people who have been working for the last 10 years, the ones in the trenches who know something. Because if you go and do these meetings with these community people, your secretaries are going to get embarrassed." But the Obama Administration has done very well in terms of supporting those people who want to do EJ.

I was approached one time when I was over at EPA by a young career person just starting off and she said to me, "You know, I don't know what to do. My manager is telling me that there's no future in EJ if I want a career here." And I said, "Well, how about telling him he's wrong." I saw her years later and I asked, "So, how do you like EJ now?" Because the one thing that has been done in this administration is it made agencies legitimize EJ; it's not some theoretical concept. This is something that has been supported not only by the people, but lawyers and educators.

I remember years ago under Ben's tutelage in his firm, Beveridge & Diamond, we held a conference for corporate lawyers, and we preached this thing called EJ. They looked at us kind of cross-eyed. But today, many of the Fortune 500 lawyers, they know what EJ is and they know it can save their clients money—beside being the right thing to do.

Also, when we were chairing the Environmental Justice Committee for the American Bar Association (ABA), under the auspices of our co-chair, Nicholas Targ, we got the Hastings College of Law to do a survey of the states on EJ,<sup>15</sup> and they did an excellent job. It's worth seeing what your state is doing on EJ. Some of them have laws, or incorporate EJ law, as I said earlier, into their regulations. Most of the states have some kind of study or law having to do with EJ. That's where the action is, down in the states, and you'll find that there's a reference there that will be very helpful to you.

The last point I want to make is that the EJ I learned is really from the bottom up, particularly in the government. You don't get instructions from the top down having a brilliant idea on EJ. Rather, it is from going out into the field, into the communities, and letting them tell you what they think. And they have a lot to tell you, even if most of it's not pertinent. But one of the things the IWG did was have 22 or 23 meetings across the country taking people's comments. I wish more had been done, but as Barry has pointed out, the history of EJ has seen a slow, but steady pace of pushing this idea.

I think, as Barry has suggested, that the next administration may plan to cut budgets and they may plan to reduce authorities, but EJ is so well ensconced, I will say, in the career people in the federal government. There's nothing written—Barry, correct me if I'm wrong, but I don't recall any statute actually giving EJ authority per se. It's the discretionary power in those statutes that allows the administrator the authority to create the conditions that

13. 33 U.S.C. §§1251-1387, ELR STAT. FWPCA §§101-607.

14. Guidelines for Preparing Economic Analyses—Chapter 10: Environmental Justice, Children's Environmental Health and Other Distributional Considerations, <https://www.epa.gov/children/guidelines-preparing-economic-analyses-chapter-10-environmental-justice-childrens> (last updated Feb. 18, 2017).

15. UNIVERSITY OF CALIFORNIA HASTINGS COLLEGE OF LAW, ENVIRONMENTAL JUSTICE FOR ALL: A FIFTY STATE SURVEY OF LEGISLATION, POLICIES AND CASES (Feb. 2015), available at <http://gov.uchastings.edu/public-law/docs/ejreport-fourthedition1.pdf>.

you suggested on permits or other things. So, it's not a law thing as much as it is a social thing.

**Barry Hill:** How you interpret the law, how you apply the law in each and every situation, that's the beauty of EJ being a goal to be achieved for every community. So, since it's for every community, why couldn't it happen for this minority or this low-income community?

**Benjamin Wilson:** I have a question myself here. How has the Obama Administration's support of EJ been viewed by the private sector? And what I would say for our clients, most of them are quite enlightened. They sometimes have issues not dissimilar from the "town and gown" disputes universities can have with their neighbors. For example, there can be a company facility that the neighboring community finds undesirable. The company and the community may have had little interaction with each other. EJ gives you an opportunity to commence that discussion, with EJ being one of many issues that the community and the company may have with each other. There are many companies now that have developed EJ policies, and I think this idea of engaging your neighbors and seeking to find some common ground is one that the private sector understands.

**Quentin Pair:** I'd like to point out that the reason many of them are so enlightened is because Ben is their lawyer. One of the real advantages of teaching young lawyers with Ben is that someone as successful as him has incorporated EJ into his practice of law. Ben has told students, as well as me, you don't hire him because he's a nice guy, it's because the firm wins. But he does educate his clients, I think it's fair to say, about the positive things.

It used to be, and we talked about this all the time, you hear about EJ, and there's always something negative, there's always some problem. Ben has incorporated that into his practice of law representing corporations who are usually the villains by some community standard, and has them appreciate the positive effects of being involved. That's why we get involved in these kind of discussions, particularly educating lawyers on the importance of this issue to their clients and why the message has been: you don't have to agree with me on EJ, but you need to understand what EJ is.

**Benjamin Wilson:** I think what happens in the real world is that when you finish a case you return to Washington, or wherever you happen to live, but many of the people who live in that community are still dealing with that environmental issue. So, the point is: have you really done your job if you've not actually addressed the fundamental environmental issue that's there? From my personal perspective, that's something that we attempt to do in our cases.

**Suzi Ruhl:** To build on that, we have to remember that EJ really is about the triple bottom line. In my past life,

when I was suing EPA, I was also suing the private sector, and I was representing the people who had to live government policies and decisions. But the communities wanted their jobs, they wanted to have a healthy environment, safe drinking water, and they wanted to have their health. And we're able to sit down at the table, do problem solving, and really negotiate those solutions with the impacted communities, private sector, and government.

And knowing that EJ is not theory, it's practice—it's not a noun, it's a verb—I'm going to conclude my remarks with an example of what's been working very successfully over multiple presidents and administrations, what we call the "brownfields to healthfields" strategy.<sup>16</sup>

Quite simply it's about taking something that's bad in a community, contamination, leveraging resources from EPA to get the contamination remediated, then working with the community to reuse the site to address health and economic needs, working with a range of government, private, academic, and other stakeholders. This can be the U.S. Department of Health and Human Services that funds health centers, the U.S. Department of Agriculture that funds access to healthy food, academic institutions that provide mental health and vision health services, or the private sector that would like to put its supplemental environmental project funding into that community. Brownfields to healthfields sets a table where we can all come together to reverse-engineer the prize of healthy, equitable, resilient, and sustainable communities, using a full range of tools, both legal and nonlegal, to get us to the right place.

**Benjamin Wilson:** One of my other arguments in the EJ context is that oftentimes with supplemental environmental projects, companies are not given dollar-for-dollar value. But if those dollars are being spent to address issues in the EJ community, that might allow you to have a bigger bang for the buck and have a direct impact on those people who are disproportionately affected by the environment.

This is a good time to entertain questions and comments. And if you feel in violent disagreement, please express that vocally.

**Audience Member:** My question goes to how you've seen EJ incorporated into various settlement policies and consent decrees, and have these had the effect of educating industry on EJ to a broader extent and really changing standards and practices?

**Quentin Pair:** If you want to get businesses' attention, you sue them, which is what DOJ does. Part of its strategy and policy is now, where appropriate, to talk to settling defendants about whatever the EJ issue is in the affected community. At DOJ, new lawyers are taught in the EJ

16. EJ IWG Webinars, *Brownfields to Healthfields: Championing the Triple Bottom Line for Community Infrastructure* (Dec. 8, 2016), <https://www.epa.gov/environmentaljustice/federal-interagency-working-group-environmental-justice-ej-iwg>.

training program that not every problem in a case has an EJ component or issue; and not every EJ issue identified in a referred matter can be satisfactorily addressed with available resources, legal tools, or technical support. Nevertheless, it is important to at least identify the problem. The private sector is very inventive and innovative if they're given the opportunity with these supplemental environmental projects, which is a way of reducing or modifying the fines that may be involved.

In the big case down in the Gulf, the BP oil spill, there was an EJ component in that settlement about certain communities that were more affected than the general public, the minority communities or low-income communities. That was incorporated into the settlement discussions. You can go online and see settlements that DOJ has entered into on behalf of EPA and see the kinds of settlements and EJ issues that have been incorporated there, too. But the idea is now managers think in terms of EJ. The important thing in DOJ's policy is we now involve the community much earlier.

Before, we didn't want to talk to anybody outside of the lawyers, because only lawyers know "the right thing to do." But now it is instruction to attorneys when you're preparing your cases: make sure you have an understanding of the community and also the ideas that are being discussed. We don't bring them into the settlement discussion in the room, but to get some sense of how those would play in the community.

One of the real things this administration has done is it realizes that you have to have the community involved. In whatever project the feds are doing, too often we have been patriarchal in our terms of we "know what's best for the community." You don't know how many Ph.D.s live in these communities and are very smart people. They know what the 411 is and you don't. And so, there's been much more involvement going into the communities.

Let me give you an example with Flint, as Barry made reference to. The problem with Flint is the state had no EJ policy, plan, or otherwise. The prior governor had issued a directive for an EJ program, modeled on what EPA had done, and it was signed off on and ready to go. The present governor chose not to do it. So, when the Flint situation broke, they were scrambling. They had no community contact. They didn't know anybody in the community. They had no representation. This was a plan that had been put together by a statewide committee of community people, and they just chose to ignore it. EPA came to the rescue, sort of, by having its EJ coordinators brought in from all over the country to meet with the community members and find out what they needed and what they thought, and the state is still floundering, which is why they're in a bunch of lawsuits right now.

**Barry Hill:** The best education tool for the private sector is when a permit is going to be denied or delayed as a result of EJ issues being raised. Let me give you an example. Let's say that you are working on a project to construct a pipeline to

deliver gas from Canada all the way to New York City. You have to go through a number of states—Massachusetts, Rhode Island, and so forth. Investors have put out some money and they want a return on the investment, because this pipeline has to be constructed in a timely manner and before the winter comes and the ground gets hard and they can't do any construction.

Now let's say, for example, that in Rhode Island an EJ issue was raised at a time that's not good for the company and the community is adamant that they want their concerns addressed. That's when the private sector, that's when the investors and others, will begin to really understand the impact of EJ and they will learn that if they don't do a study, if they don't take into consideration the concerns of the people, that permit is going to be denied or delayed for EJ reasons. So, that's what I mean when I say the best educational tool is, let's say in the permitting situation, leveraging the power of the community to stop that permit from being issued or to delay it. No one is entitled to a permit. It's not absolute that the government must give it to you. They will give it to you provided that certain conditions are met. And if one of those conditions is EJ, well, fine, so be it. That's how it's going to be impacted.

**Benjamin Wilson:** I have some involvement in a couple of matters, one in the Ninth Ward of New Orleans where we entered into a supplemental environmental project that restored wetlands on Lincoln Beach, which historically had been the African-American beach.

We have another case involving Valero in Port Arthur, Texas, one of the largest refineries in the United States. The surrounding communities are poor and black, and there's a food desert. There are also no hospitals or clinics nearby. Well, one of the supplemental environmental projects allowed the company to pay for the construction of a health clinic and also provide money that allowed for ongoing maintenance and cost of running the clinic.

So, with proper representation, as Suzi alluded to earlier, there are things that a community can negotiate that are helpful to that community.

**Audience Member:** My question is how much weight are EJ considerations given when you're looking at permits or federal actions? So, with a NEPA review, you're required to do EJ considerations in the scoping process, but that doesn't necessarily preclude the continuation of a project. Or how often in allocating permits are EJ concerns stopping the issuance of a permit?

**Suzi Ruhl:** Great question. Putting aside the question of an Executive Order on Environmental Justice, we need to work with the facts and the law to get to the best decision possible, considering the people impacted by the decision. And if we go back to the example of NEPA, it's not decisional. Even if we cannot guarantee the best decision, we can work for the most informed decision.

And building on what Ben, Barry, and Quentin said, the power of the EJ organizations is not necessarily to win in court. I think the status is 0-16-1 in terms of NEPA cases before the U.S. Supreme Court, where the environmental organizations have never prevailed. The power of the environmental challenge must be considered in terms of time, and time is money, if the challenge is slowing down a project or stopping a project. The value of NEPA is really as a front-end tool, not a back-end tool. The goal of the EJ analysis pursuant to NEPA, to help all of the players, from the community to the government to the proponent of a project, know how to get from start to finish in the most effective, efficient, and consistent way possible considering the players.

You can apply that same sort of philosophy to the permitting decision, because all too often the facts that government has access to are not the facts that are consistent with what's happening on the ground. A quick story from one of my cases in the 1990s in Georgia involved a permitting process for a pulp and paper mill on a stream, and the government was relying on data from the U.S. Geological Survey. Well, guess what they didn't account for? They didn't account for a beaver dam slowing the flow of the water, so when the community brought forth the information on the beaver dam, that completely changed the formula for what would be allowed to be discharged, and that impacted whether that permit was issued or denied. But again, it's people getting outside the theory, diving into the practice, using the law as a platform and applying real-time, real place data and coming up with that best decision.

**Benjamin Wilson:** Right, great answer. Time is money. And controversy can stop a project with NEPA if you have a community that's organized and loud and vocal and politically active and strong. Then again, Suzi has come up with another point: what if you were in an EJ community, but you could somehow invoke the Endangered Species Act (ESA)? The goal, from their perspective: they don't care how they win. They just want to stop the so-and-so, right? And so, you can call it EJ, you can call it ESA, you can call it cumulative impacts analysis, but you can invoke traditional environmental law arguments to advance EJ goals.

**Quentin Pair:** That is the lawyer's response to almost everything that is applicable—it depends. In terms of how much weight's given, it depends on the education of the person; are they savvy with EJ, what are their instructions in terms of management, do they have lawyers involved representing the community, giving them hell? There are a lot of factors.

But for someone like yourself, it really depends on how much you want to give; if I get a report of an EJ problem that's two sentences, I think the person making that report is really not that interested or there's really not a problem. If I've got a 5- or 10-page report that's footnoted and documented by first-person testimonials, I'm going to

pay more attention to it. Then it goes up to your boss and it depends on what kind of boss you've got. Is that boss sensitive? What have you done to educate your boss in terms of the report? And that's where EJ really means something in government; it is not the people at the top, but those who are going to speak out and inform their management for the right reasons and the right way.

**Audience Member:** In the process of educating a business about the importance of EJ, as Mr. Hill described earlier, it seems to me that the lesson that business may take away will be that EJ is just one more hurdle that they need to get through in order to realize their profits. Wouldn't that be the wrong kind of message to send instead of sending out the message about justice being done to fulfill this country's obligations and the promise of equality for people?

**Barry Hill:** Justice is a fleeting term. It all depends on how you want to define it and in what situation. From the point of view of the community group, it's not absolutely necessary that the businessperson becomes an individual that embraces the concept of EJ. They're more concerned about the impacts that it's having on their community. Now whether that person embraces it entirely or doesn't, that's irrelevant.

What's more important are the actions that have to take place in order to protect the community. So, if there are conditions that are placed on a permit, let's say to install a \$2 million scrubber on the chimney of the industrial facility as a condition for the permit or whatever the case may be, the community is not necessarily concerned and the lawyers are not necessarily concerned about whether or not this person is totally fixed on this whole notion of EJ. They just want actions to take place so that they could be protected. In the real world, you're not going to get a lot of people to necessarily accept the concept. They may see it as affirmative action—that's a negative point of view—but the important thing is to secure what the community needs in order to protect themselves.

**Benjamin Wilson:** I also think that it is important to listen to what your client wants. And I don't care who you represent. It could be the wealthiest company in the world, it could be the poorest person in the world. The client will change his or her mind throughout the process—it's a continuous dialogue—and so make certain you understand how they define victory, not how you define victory as the advocate, but how they define victory as the client. There are some circumstances I can imagine in the EJ context that are non-negotiable, and there are other things that are negotiable. That is a judgment call and it's a call that's made on a case-by-case, matter-by-matter basis.

We have a question from a member of our online audience about giving voice to communities through meaningful involvement, and asking that the panel speak to how giving voice to residents might relate to the grassroots nature of the presidential election results. In general, is the

future of EJ stronger because it gives the public another way to reach government officials?

Then, we have a question from a member who lives in a small city in southern Indiana, who reflected on how there is great distrust for EPA, as small farms view themselves as being restricted by EPA regulations. So, how can EJ be used to engage different communities?

**Quentin Pair:** If I can just untangle them. At the bottom of the EJ well is trust. I remember when I got active in EJ issues, if you didn't have somebody in the community who knew you or would vouch for you, you weren't getting squat. You have to spend time and relate to people and sit down and, as Ben said earlier, you've got to listen to them. Looking through the EJ lens, it's about taking your talents or gifts and applying them to the needs of the community. It's Malcolm X, it's by any means necessary. I want to take away the pain of the community, but they don't care if you believe in this philosophy or not; it's can you stop my children from dying from inhaling this air?

But more directly to the question, you need to find the people who will listen to you and actually work with you. And that's a lot of people across the government and particularly in EPA. I mean, EPA has its sins and had its problems in the past, but there's a whole cadre of technical people, career people, who really believe in this stuff and the hoops that they have to jump through to try to promote EJ or get aid to the communities. This is done on a daily basis and you need to find those people.

**Suzi Ruhl:** I think the two questions are connected and it gets to that issue of trust. I think trust and meaningful engagement are important, because trust is built when those people who have an issue and have a concern are heard. Generally, everyone can agree that democracy is great, meaningful engagement is great, but the translation is how are we trying to change our behavior to bring those voices to the table so that they have a seat? I hate to keep going back to our NEPA Committee, but we've delved greatly into that particular topic and concluded that, no, it's not enough just to have a public hearing in the middle of downtown when it's 100 miles from the community experiencing proposed federal action.

You have to have those meeting opportunities in the place where the affected people are located. And you have to realize that some of them speak English, some of them do not. How do you provide translations? Look at the different cultural exchanges. So, you've got to take the theory into practice.

There's been a tremendous amount of work across the IWG on trying to do a better job of making sure that each person who's impacted by a particular pollution item is addressed. That goes back to the point about being a farmer. Farmers have conditions, farmers have needs. Those points need to be brought to the table, to be part of that conversation whether it's a permit, or whether it's a NEPA review process. It's recognizing that meaningful engagement is a prerequisite to trust.

**Benjamin Wilson:** I get it. We want to have a meeting at a time and a location that's convenient for the community, we want to hear them out. But there is an element, and I think you saw some of it in the presidential election, where people are "sick and tired of being sick and tired." So, what do you say to that person who's just mad as hell, and can't take it anymore? Barry, talk to that frustrated farmer, that frustrated citizen, that frustrated community member who's heard it all and seen it all.

**Barry Hill:** The thing is, Ben, we're all frustrated in one way or another. Those who work inside EPA, outside EPA, who are affected by EPA. And the bottom line is that if you don't do anything as far as your issues are concerned, it's not going to happen. As we were talking, I was thinking about that water expert in Region 5 who was dealing with the Flint issue and how he said, "I'm not going to allow this to go forward. These are real people that are being adversely affected." He got mad. He got angry. And obviously at some point people within the Agency began to listen because people are getting sick from drinking the lead that's in the water.

So, we are all frustrated one way or another, but the bottom line is that if you don't do anything, the proverbial Mississippi River is going to "keep on rolling" over these communities. You can't stop it, you can't delay it, but you can make your voice heard. That's what it's all about. And hopefully someone in a position of power will listen and they will respond, but you've got to say something, you've got to do something, and you just can't be angry.

**Benjamin Wilson:** I think that's a great message.

**Audience Member:** My question goes back to the discussion we've had on NEPA. My recollection of the Executive Order is that President Clinton directed the Council on Environmental Quality (CEQ) to implement NEPA by regulation or EJ through its NEPA regulations. I don't believe that has ever been done.

But where I see the disconnect is that EPA has gone through great pains to stake out the position that it's exempted from NEPA. And except for the national pollutant discharge elimination system program and wastewater construction grant program, NEPA doesn't apply. I think it may also apply to the Superfund program, but it doesn't generally apply to EPA. It may apply at the state permitting level, but it definitely doesn't apply at the rulemaking level. For EPA to be speaking with one voice, perhaps it needs to voluntarily take the position that it will comply with NEPA, notwithstanding the couple of statutory exemptions and court cases that exempt EPA from NEPA, because I think that creates an inconsistent message, a divided message, especially with the program people within EPA.

**Suzi Ruhl:** Permits issued under the Safe Drinking Water Act<sup>17</sup> or the Resource Conservation and Recovery Act<sup>18</sup> or the CWA are considered the functional equivalent of a NEPA review process and that is why they're exempted. Again, I think your point is so well taken in the sense of the approach, the methodology, and the depth that should be taking place. The presidential memorandum accompanying the Executive Order highlighted NEPA and Title VI as the two primary statutes for achieving EJ. That's why, like I said, we've seen NEPA historically not used effectively to address EJ. Now there is a commitment from so many departments; 10 Cabinet-level departments, three independent agencies, and CEQ came forward to ask: how can we use NEPA to do a better job of allocating federal resources to benefit as many people as possible? So, it's a start, but it's only going to work if we can have all the players apply this new way of doing it.

**Audience Member:** But there's another key difference, because if you have to comply with NEPA, and CEQ does what it's supposed to do, then groups would have standing on EJ issues, but I don't think they have it today.

**Suzi Ruhl:** Right. That is another really interesting point, because generally we've said the Executive Order doesn't create judicially enforceable rights, but if anybody does an EJ analysis according to NEPA, then the Administrative Procedure Act takes hold and it is judicially reviewable.

**Quentin Pair:** It's taken a long time to get where we are today. Your point is well taken and there are a lot of criticisms that can be made across the board. But looking at the broad landscape whence we have come in terms of EJ to where we are today, that's been a struggle. There are a lot of specific criticisms that could be leveled, but I don't think we should lose sight of the overall progress that we make.

**Barry Hill:** I recall seeing a book that was issued years ago and it had to do with taking EJ into consideration in the NEPA process, and I think it came out of CEQ during the Clinton Administration.<sup>19</sup> But one way that I would address this issue is with the "little NEPAs" that many, many states have. I'm thinking about California, in particular. There are so many cases where EJ was taken into consideration with the California equivalent of NEPA, and the community has won many cases and it doesn't have to say "EJ."

It just so happens that that was the concern they were trying to address. It has been taken into consideration by the California Energy Commission and all these other regulatory authorities. But it's how you use the little NEPA in order to address the environmental and public health

concerns. I wouldn't be so concerned about what's happening at the federal level, but, as Quentin said, in the states is where we have the rubber meeting the road. There's so much activity on the state level.

**Audience Member:** This question is about EJ in relation to brownfields. We all know that the vast majority of brownfields are located in EJ communities. We also know that most of them stay mothballed for decades. And lately there has been an Enron-like move by corporations to spin off their environmental liabilities and sort of package them in new ways. Then, when that company goes bankrupt, the funds to clean up the brownfields are no longer there. Peabody Coal is a current example and Kerr-McGee is another one in Mississippi that had a major issue like that. So, I wonder not only from the enforcement and federal government side, but also from the private-sector side, if a corporation came in to you and was suggesting "let's do what Kerr-McGee did," how would you respond to that? And from the federal side, what are we doing to curb that activity and to create some sort of barrier to offloading these liabilities and leaving these communities with the effects and no solutions?

**Quentin Pair:** If a corporation asked my advice (as an attorney in private practice) as to whether or not it would be a good idea to do "what Kerr-McGee did," I would say probably not. But, it would really depend on the specific facts of the enforcement action being brought against the corporation. Kerr-McGee's efforts to escape liability for its pollution of the environment by creating a company that would shield the assets of the corporation were in contravention of existing law, so as a general proposition, it would be a bad idea. Any specific laws designed to be more restrictive on a company's liabilities for activities that pollute the environment and/or threaten human health would have to be legislated by Congress (for violations of federal laws). But there are sufficient laws to address such violations, provided there is the determination and resources to proceed with such prosecution, which is what happened with Kerr-McGee.

My own involvement in the Kerr-McGee settlement was to talk to one of the affected environmental justice communities that felt very upset with the settlement. The affected communities only received a few million dollars of the \$14-\$15 billion settlement approved by the Court (to be applied to all the affected communities across the county that had tort claims against Kerr-McGee). The vast amount of the settlement funds were to be spent on Superfund cleanup costs that the federal government had or would incur in the cleanup of pollution left by the corporation in those communities.

I and other DOJ colleagues were at a community meeting to explain that this was money taken as a result of the federal claims under Superfund for the company's violations, and the money had to be spent for the cleanup of the polluted environment in those communities. The private

17. 42 U.S.C. §300f.

18. 42 U.S.C. ch. 82 §§6901 et seq.

19. COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL JUSTICE: GUIDANCE UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT (1997), available at <https://www.epa.gov/sites/production/files/2015-04/documents/ej-guidance-nepa.pdf>.

tort actions against the company were handled by private law firms, and the federal government was not authorized to represent the communities or individuals in those respective tort claims.

**Benjamin Wilson:** I don't think I represent Kerr-McGee, but I would need to check to make certain that no one else at my firm does. So, I won't comment on that case or assume your characterization of their behavior, but suffice it to say as a general matter, we never, ever counsel our clients to break the law, and indeed we counsel our clients to comply not only with the letter, but with the spirit of the law. You see, environmental law, in my view, is different than any other practice of law. If you're in litigation, your goal is to beat the brains out of the other guy. But with environmental law, what we're talking about are legacy issues, right? If you cut that redwood down, it's not coming back for 2,000 years, yes? If you pollute that river, people, farmers, and animals that depend on that water are not going to have access to it. So, the decisions that we make are a little different and we're looking to solve a problem, not simply resolve a lawsuit.

Most of my clients probably don't have one issue with EPA, they may have multiple issues. In that instance, where one has perhaps played a little fast and loose, you may get away with it that time, but my recollection is that federal and state enforcers don't forget.

Finally, for most of corporate America, there's very few black-and-white hats anymore, in my view. There are a lot of gray hats. And people, businesses, like countries, act in their self-interest. Protection of the environment is good business. The one thing taxpayers say they will pay more for is environmental protection. That's one of the few things they'll say, "tax me for that." Again, I'd like to believe that what you're describing hypothetically is the exception and

not the rule, and I certainly would not counsel that kind of thing.

**Suzi Ruhl:** Thank you for the question. My response is going to be kind of a back-door solution. Let the litigating lawyers handle the first part of your question, but with our brownfields to healthfields approach, we are working to replicate and scale up our one-by-one success stories. Our very first success story with brownfields to healthfields was a community health center on a petroleum brownfields on former gas stations with underground storage tanks. Now, we are applying the approach to health care, rural physical infrastructure, renewables, education and workforce training, and goods movement. We've made great strides in working with the private sector and others to come up with systemic solutions. I think there are some exciting things underway, including some of those that you're working on.

**Benjamin Wilson:** I will say this, when it comes to EJ, what about those uranium sites, for example, on Navajo lands? It seems to me that it is an example of a long-neglected issue.

A final thing I wanted to say about ELI, we are non-partisan. We want to not only identify environmental issues, but come up with solutions to them. What I'm hoping from a corporate perspective is that enlightened companies will want to understand what the best practices are and figure out how to get better at addressing EJ issues and engaging communities. At one point, I brought a number of companies to meet with the then-assistant attorney general for the environment to talk about just how to do that. I think there's much that the government can learn from companies who are in fact doing this and addressing these issues in a positive way.