

Resolving Environmental Problems Through Collaborative Decision

By: **Kenneth J. Warren**, *The Legal Intelligencer*

Established methods of decision-making employed by administrative agencies are often ill-suited to reaching results that best reconcile the interests of all stakeholders. Formal rulemaking and adjudicative procedures may afford the general public an opportunity to comment only when the agency has already reached a proposed decision, and even that avenue may be unavailable when an agency takes informal actions. Administrative agency decisions formulated and adopted without a full understanding of their effects on all stakeholders may create adverse impacts on communities or businesses that could have been avoided by earlier consultation with these stakeholders.

Recognizing these concerns, administrative agencies have explored alternative decision-making models that are less adversarial and more inclusive. For example, in the rule-making context, some agencies have employed negotiated rule-making (reg-neg) techniques by convening stakeholder representatives to negotiate the provisions of a proposed rule. The public is then invited to comment on the proposal. Similarly, agencies have established multi-stakeholder advisory committees to offer ideas on how agency actions can best meet stakeholder needs. Stakeholder dialogue during the reg-neg or advisory committee process identifies solutions that benefit all stakeholders. Even when unsuccessful in reaching consensus, stakeholder dialogue provides the agency with perspectives and information important to its final decision.

Because minority, low-income and indigenous communities at times lack the resources, information or expertise to fully participate in formal agency public processes, alternative opportunities to offer meaningful input into agency decisions may be particularly valuable to them. Not surprisingly, facilitating participation by vulnerable communities has been an important focus of EPA's Office of Environmental Justice.

EPA's environmental justice (EJ) collaborative problem-solving model emphasizes the importance of fostering partnerships and negotiations among stakeholders and building the capacity of community-based organizations to provide meaningful input. When utilizing this model, government, business and industry, communities, faith groups, academia and philanthropic organizations employ consensus building and dispute resolution techniques to develop solutions to environmental, housing, transportation or infrastructure problems that communities face.

The EJ collaborative model envisions that each stakeholder group will play an important role. For example, community input allows community needs to be identified and prioritized. Businesses contribute to solutions by offering employment, civic programs, charity, educational programs and other benefits. Government facilitates a dialogue among all stakeholders while also providing technical and financial assistance to support a scientific evaluation of risks and solutions.

Collaborative decision-making can supplement the public notice and comment procedures that agencies typically employ. As explained in EPA's promising practices for permit applicants, collaborative actions can be taken to involve a community in the permit process before formal procedures are invoked. Businesses can reach out to community members through public information meetings or other means to explain the project under consideration and listen to community concerns. They can offer community members relevant data, and together with government officials provide communities with the capacity to interpret the data. Stakeholders can discuss mitigation measures that may be taken to protect human health and the environment. When through collaborative efforts all stakeholders participate as valued community members, better decisions frequently result.

The example of successful collaboration to which EPA frequently points is the ReGenesis project in Spartanburg, South Carolina. Faced with impacts from a fertilizer plant and landfill, community members, industry and others engaged in a facilitated dialogue to identify solutions to environmental, health, housing and infrastructure challenges. Industry worked cooperatively

with the community, and government grants accelerated community revitalization. By leveraging business participation and federal and state funds, the ReGenesis project has made substantial progress in addressing community needs.

In light of the Trump administration's efforts to reduce the EPA's budget and reverse certain regulations adopted during previous administrations, doubts have arisen regarding whether EJ initiatives in general and collaborative decision-making in particular will receive Trump administration support. The EPA recently sought to dispel these concerns.

On Feb. 23, 2018, Samantha Dravis, then serving as associate administrator in the EPA's Office of Policy, issued a memorandum reaffirming the EPA's commitment. Distributed to the EPA's assistant and deputy assistant administrators and its regional and deputy regional administrators, the Dravis memorandum asserted that the "EPA's dedication to furthering environmental justice (EJ) remains strong." It then identified the EPA's current EJ goals and asserted that they align with the three priorities identified in the EPA's FY 2018-2022 strategic plan: advancing the EPA's core mission, cooperative federalism, and the rule of law. Several of the identified EJ goals furthering these three priorities recognize the value of collaboration.

The Dravis memorandum first discusses the EPA's core mission of providing for clean air and clean water, revitalizing land and preventing contamination. By producing "measurable environmental outcomes for underserved and overburdened communities in the areas of exposure to lead, access to safe drinking water, reduction of harmful air pollutants and limiting exposure to contamination from hazardous wastes," the EPA can achieve its core mission and meet its EJ goals. According to the Dravis memorandum, the EPA will also ensure "stronger consideration of vulnerable groups and communities in decisions through the EPA's rulemaking, permitting, compliance and enforcement and emergency response and recovery programs." Significantly, the EPA will continue to use its existing EJ tools developed during previous administrations such as the existing EJ technical guidance and EJ screening protocols, and will promote greater community involvement in all phases of redevelopment and

revitalization. Collaboration among stakeholders is central to coordinating revitalization activities.

The Dravis memorandum asserts that the EPA will also consider EJ when implementing the EPA's second strategic priority, cooperative federalism. Enhanced partnerships with states, tribes, local governments and other federal agencies will be used to address the needs of vulnerable communities. The National Environmental Justice Advisory Council (NEJAC) will be asked to engage with communities nationally and bring their concerns to the attention of the EPA administrator. Although the NEJAC may not have the resources to execute this task in a systematic or comprehensive manner, the Dravis memorandum likewise asks EPA regional staff to identify communities that would benefit from a coordinated approach. The EPA intends to utilize its grant programs to build the capacity of these communities to collaborate with other stakeholders, engage in the EPA's decision-making processes and develop community-driven solutions.

When implementing the third pillar of its strategic plan, support of the rule of law and fair process, the EPA intends to promote EJ. The Dravis memorandum asserts that the EPA will improve EPA science "to better understand the needs of underserved and overburdened communities," implement its existing guidance for considering EJ in NEPA reviews, and enhance coordination between EJ and civil rights programs. Improved science and outreach to communities during the NEPA process would assist collaborative efforts.

Although the EJ goals set forth in the Dravis memorandum are laudatory, questions remain whether they will be implemented. Statements that the EPA will improve scientific knowledge in the context of environmental justice runs contrary to certain EPA actions in other contexts. Some members of Congress are skeptical of the EPA's EJ commitments and continue to sponsor legislation to enact certain EJ practices into law.

On Oct. 23, 2017, Sen. Cory Booker introduced the Environmental Justice Act of 2017. This act would codify existing EJ practices to minimize disproportionate environmental and human health impacts on EJ communities, and expand the public's right to seek redress in federal court. President Bill Clinton's 1994 executive order 12,898, the establishment of the NEJAC, environmental justice grant programs and the NEPA guidance would become law. Federal agencies would be required to prepare and annually update an EJ strategy. Cumulative impacts would be considered in permitting decisions under the Clean Water Act and Clean Air Act, and a facility's compliance history would be reviewed during permit issuance or renewal. Although much of this act would codify existing practices, the enforceable legal rights that it would create may produce incentives for litigation rather than collaboration.

Collaborative decision-making offers a viable methodology for ensuring that agencies are fully informed of the information, interests and solutions that stakeholder groups can offer. It also provides a mechanism for stakeholders to develop consensus recommendations while protecting their interests. At least in the EJ context, the EPA has expressed the goals of reaching decisions through collaborative methodologies and sound science. If the EPA follows through by taking actions to pursue these goals, all stakeholders and the environment may benefit.

Kenneth J. Warren is a founding partner of Warren Environmental Counsel and has been practicing environmental law for more than 30 years. He is a former chair of the American Bar Association section of environment, energy and resources, where he led the section's 10,000 members. He can be reached at kwarren@warrenenvcounsel.com.

Reprinted with permission from the April 12, 2018 edition of The Legal Intelligencer©2018 ALM Media Properties, LLC. All rights reserved. Further duplication without permission is prohibited. For information, contact 877-257-3382, reprints@alm.com or visit www.almreprints.com.