

NATIONAL ENVIRONMENTAL JUSTICE ADVISORY COUNCIL

INCORPORATING ENVIRONMENTAL JUSTICE CONCERNS INTO PERMITS UNDER FEDERAL ENVIRONMENTAL LAWS DRAFT CHARGE JULY 27, 2010

EPA seeks advice and recommendations from the National Environmental Justice Advisory Council (NEJAC) to inform how we can better incorporate environmental justice concerns into government decisions on permits issued under the Agency's various regulatory programs.

BACKGROUND

Importance of Permits: Permits are key to delivering environmental results in communities. Federal environmental statutes rely heavily on permits to deliver the environmental protection results that are the goal of our federal environmental laws. For example, the Resource Conservation and Recovery Act (RCRA) relies on permits to ensure that hazardous waste treatment, storage, and disposal facilities take effective measures to protect the surrounding community from exposure to the hazardous waste handled at those facilities. The Clean Water Act relies on permits to control discharges of pollutants into surface waters to protect water quality and communities' health and welfare. The Clean Air Act uses permits to restrict emissions of air pollutants from facilities to ensure that air quality standards are met and public health is protected from air pollution. These permits are a key to providing effective protection of public health and the environment in communities, given their role in addressing exposure to pollution and preventing adverse environmental and public health impacts. It is also important to recognize that each permitting process is governed by regulations, which vary from program to program. Moreover, considering environmental justice issues when developing rules is essential to effectively addressing them within permits.

Prior NEJAC Advice and EPA Actions: The NEJAC has addressed the role of environmental justice in the permitting process previously. In July 2000 the NEJAC issued a report entitled "Environmental Justice in the Permitting Process." In December 2000 EPA's Office of General Counsel issued a memo entitled "EPA Statutory and Regulatory Authorities Under Which Environmental Justice Issues May be Addressed in Permitting."¹ That memo concluded that EPA has legal authority to address environmental justice concerns in the permitting processes under several programs. Building on this foundation, EPA now wants to take action to better incorporate environmental justice concerns into the government's decision-making on permits.

Role of State and Local Governments: Federal environmental laws assign EPA with the responsibility of administering permitting programs and also authorize EPA to delegate these programs to states and tribes. Most of the permits implementing the federal environmental laws are issued by states or tribal governments, once EPA approves or authorizes the state or tribal program. EPA remains responsible for oversight of federal programs that are delegated to states

¹ See: http://www.epa.gov/environmentaljustice/resources/policy/ej_permitting_authorities_memo_120100.pdf

and also has limited authority to review, comment, or object to state-issued permits. There are practical implementation constraints. For example, the volume of permits is much too high to enable EPA to be actively engaged in reviewing every state permit. In addition, many environmental permits, or other relevant decisions such as siting, that are important to communities are authorized under state law and issued by state or local authorities, with little or no federal involvement. Ultimately, EPA seeks to provide oversight of state programs in a manner that advances shared responsibility with states in order to fulfill Congressional mandates. This joint federal and state role, with local involvement in some cases, requires that EPA and states or tribes work together to exercise their authorities to ensure that environmental justice is taken into consideration into permitting processes as much as possible.

Role of Other Federal Agencies: Some of the federal permits that can affect the environment and the health of communities are issued by federal agencies other than EPA. While EPA has authority to review some permits issued by other agencies, the primary responsibility for reviewing applications and deciding whether to grant a permit and on what terms and conditions lies with the lead federal agency. For example, Clean Water Act permits for filling wetlands or waters, which can affect communities in some areas, are issued by the U.S. Army Corps of Engineers (e.g., in Appalachia).

Role of Tribal Government: Some of the permits implementing the federal environmental laws can be issued by tribes, once EPA approves or authorizes the tribal program. Most environmental permits on tribal lands are currently issued by EPA. EPA retains some ability to review, comment, or object to tribal-issued permits, but this ability is limited both by law and by practical implementation constraints. In addition, some of the environmental permits that are important to communities are authorized under tribal environmental codes, with little or no federal involvement.

EPA's Goals: EPA wants to improve the government's ability to take environmental justice concerns into consideration in environmental permitting processes, whether permits are issued by EPA, other federal agencies, states, or tribal governments. One important way that EPA is working toward this goal is by incorporating environmental justice into federal regulations, which provide the foundation for permitting decisions. We also want to ensure that environmental justice concerns have received full consideration in the government's final decisions on the issuance and terms of the permits that implement federal environmental laws. To achieve its goals, EPA recognizes the importance of giving full consideration to environmental justice as soon as possible in government's permitting process prior to its final decision (e.g., draft permit phase, general permit issuance). We also want to ensure that communities have meaningful opportunities to obtain and provide information and to have their voices heard in the permitting process at the earliest point possible.

Opportunities and Challenges: EPA recognizes that the opportunities to consider environmental justice concerns in permitting decisions vary with the statutes and regulations underlying each permitting program. Based on these authorities, the range of opportunities is related to the types of permit decisions being considered. For example, there may be different opportunities to incorporate environmental justice concerns into a permit reflecting a technology-based performance standard as compared to a permit reflecting a harm-based standard. Or, opportunities may differ based on whether a permit addresses a specialized jurisdiction (e.g., wetlands) or a concentration of pollutants (e.g., non-attainment area). Finally, there could be differences based on whether a permit is to begin a new activity (e.g., construction of a new

source of emissions) or to continue engaging in an ongoing activity (e.g., operation permit for an existing facility).

We are mindful that some programs may pose more challenges than others in this respect. One of the most difficult challenges, but one of the most important opportunities to reduce pollution in overburdened communities, is determining how to consider and address cumulative impacts where a number of different pollution sources affect a community. In light of the potential benefit from addressing cumulative impacts more effectively, we believe that our efforts to incorporate environmental justice concerns into permitting should focus first on those permit regulations and programs that are most conducive to considering environmental justice issues and cumulative impacts.

NEJAC's Role: We would like the NEJAC's advice on identifying the permit programs that we should address first in our efforts to incorporate environmental justice concerns. We think we can make the most progress by working simultaneously on two fronts: 1) identifying permit processes that provide the best current opportunities for taking environmental justice concerns into consideration within EPA-issued permits; and 2) working with states, the advocacy community, businesses and others to create a structure where cumulative impacts are routinely considered in permits issued by various levels of government that have the greatest potential to affect human health. We expect that trying to make progress on EPA-issued permits that have an immediate on-the-ground effect will help inform the necessary policy discussions about how to make institutional changes.

The two charges reflect this two-pronged approach. The first question seeks input on the types of permits we should work on under the first approach – EPA-issued permits. The second question invites your recommendations on types of permits that we should address with states and others to make more far reaching institutional change that includes consideration of cumulative impacts.

Next Steps: Our next steps will include reaching out to the states and Indian tribes, as well as federal agencies, who implement federal environmental laws. State environmental programs have long grappled with issues of environmental justice in permitting, and many have given considerable thought to the issues that we face. We are eager to begin sharing ideas and experience to improve our collective understanding, effectiveness, and consistency in taking action on this important issue.

CHARGE

EPA requests that the NEJAC provide advice and recommendations in response to the two questions below.

Question #1: What types of EPA-issued permits should we focus on now, to work on incorporating environmental justice concerns into EPA's permits?

We would like to focus on EPA-issued permits that are important to the public health and welfare of overburdened communities, and that have criteria and permit processes that provide the best current opportunities for taking environmental justice concerns into consideration in the

permit decision-making process. We believe this approach will provide our best opportunity for making short-term progress and providing valuable lessons for further efforts.

In providing your advice and recommendations, please consider:

- (a) EPA permit types that are of the greatest concern and interest to communities with environmental justice challenges and environmental justice stakeholders;
- (b) EPA permit types that are of the greatest importance in protecting the health and welfare of minority, low-income, and tribal communities; and
- (c) EPA permit types that seem best able, based on the nature of the activity being permitted, how its impacts are distributed, how permits can be used to manage those impacts, and other considerations, to incorporate environmental justice concerns into permit decision-making in the near term.

Question #2: What types of permits issued pursuant to federal environmental laws, whether they are federal, state, or tribal permits, are best suited for exploring and addressing the complex issue of cumulative impacts from exposure to multiple sources and existing conditions that are critical to the effective consideration of environmental justice in permitting?

We recognize that a number of complex and challenging issues must be resolved to achieve our goal of meaningfully and consistently considering environmental justice in permit decision-making. Perhaps most critical is the issue of whether and how cumulative impacts from many sources should be taken into consideration in a permitting process. Permit decision-making typically focuses on individual sources of pollution, e.g., air emissions from a certain facility.

Yet, overburdened communities often experience cumulative impacts on their health and welfare from pollution from many sources at the same time, in addition to the existing stresses on health and welfare from other factors affecting these communities, such as poverty or health disparities. It is a challenge to understand whether and how these factors can be taken into consideration in deciding whether to issue a permit or what conditions to put in a permit for an individual source. For this part of the permitting work, we would like to identify permit types that best allow consideration of cumulative impacts, and that also help us design an approach for including consideration of cumulative impacts in programs for which states have primacy.

To begin our work on this issue, we would like to identify the federally authorized environmental permitting programs that provide the best opportunities for considering cumulative impacts in the decision-making process. We would like your advice and recommendations for identifying those programs.

Time Frame for Response: We would appreciate the NEJAC's response to the above questions within 60-90 days. As the Agency continues to work on the issue of environmental justice in permitting and other issues, we expect to bring additional requests to the NEJAC for advice and recommendations.