

Office of Environmental Justice

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# Environmental Justice in The Permitting Process:

A Report from the Public Meeting on Environmental  
Permitting Convened by the National Environmental  
Justice Advisory Council, Arlington, Virginia –  
November 30-December 2, 1999



**National Environmental Justice Advisory Council**

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A Federal Advisory Committee to the U.S. Environmental Protection Agency



**NATIONAL  
ENVIRONMENTAL JUSTICE  
ADVISORY COUNCIL**



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August 3, 2000

Administrator Carol M. Browner  
U. S. Environmental Protection Agency  
1200 Pennsylvania Avenue, NW  
Washington, DC 20460

Dear Administrator Browner:

Please find attached a copy of the report entitled "*Environmental Justice in the Permitting Process: A Report on the Public Meeting Convened by the National Environmental Justice Advisory Council, November 30-December 2, 1999.*"

The U.S. Environmental Protection Agency (EPA), through its Office of Environmental Justice, asked the National Environmental Justice Advisory Council (NEJAC) to provide advice and recommendations on the following question:

"In order to secure protection from environmental degradation for all citizens, what factors should be considered by a federal permitting authority, as well as state or local agencies with delegated permitting responsibilities, in the decision-making process prior to allowing a new pollution-generating facility to operate in a minority and/or low income community that may already have a number of such facilities?"

Clearly, this is a question that the Agency has wrestled with for some time. To address this question, NEJAC scheduled a three day public meeting of industry, government (federal, tribal, state, and local), academic, and community stakeholders to explore whether and how the issue of environmental justice could be integrated into the permitting process.

This report sets forth approximately eighty (80) policy proposals that were presented by representatives from various stakeholder groups. The breath of the discussions were exemplified by individuals and/or organizations that either provided comments, suggestions or recommendations on what EPA could and/or should consider in the permit review application process. The NEJAC has considered these policy proposals and has formulated the following recommendations. Consequently, NEJAC recommends that the Administrator undertake the following actions:

- § Request the Office of General Counsel to clarify legal authority and provide guidance on, the extent to which, permit writers (including delegated state, tribal, and local governments) have a mandatory and/or discretionary authority to deny an environmental permit, condition a permit, or require additional permit procedures on environmental justice grounds.
- § As delineated in EPA's 1997 Strategic Plan to ensure that all people, regardless of race, income or national origin, "are protected from significant risk to human health and the environment where they live, learn, and work," the NEJAC urges the Administrator to assert leadership in the quest to better understand the following: (1) cumulative impacts; (2) degree of risk; (3) community demographics; and (4) disproportionality of risk, and how these can be integrated into the permit review process, as appropriate.

- \$ Strengthen and highlight public participation requirements which ensure that permit writers consult with affected communities on an ongoing and continuing basis (i.e., prior to the consideration or issuance of a permit) in the decision-making process.
- \$ Ensure that federal environmental laws, policies, and guidance are fairly and equitably enforced among all communities so that environmental justice concerns can be fully integrated in federally adopted, approved, implemented or required environmental programs.
- \$ Assert leadership by providing guidance for state, regional, local, and tribal governments on the environmental justice implications of permitting and siting decisions, and on the impact of local zoning ordinances on those decisions.

During the meeting, community stakeholders identified additional issues that they believed deserved consideration as factors in the permitting process. It should also be noted that industry stakeholders shared with other stakeholders a willingness to explore a variety of approaches to environmental justice in permitting. The NEJAC believes that the Agency should explore the multitude of thoughtful suggestions and recommendations outlined throughout the entire report.

The process for developing this report included the formation of a multi-stakeholder Working Group to assist Professor Fran Dubrowski, the principal author of this report, in her efforts to capture, compile, and edit the presentations and discussions that occurred during the NEJAC meeting. Also attached is a list of the names and affiliations of all those who served on this Working Group. We are pleased to present this report to you for your review, consideration, response and action.

Sincerely,

/signed/

**Haywood Turrentine**

Haywood Turrentine  
Chair, NEJAC

/signed/

**Vernice Miller-Travis**

Vernice Miller-Travis  
Chair, NEJAC Working Group

Attachments

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## **TIPS FOR THE READER**

**The references referred to in this report are coded as follows:**

**TR** Refers to the transcript page of the NEJAC plenary sessions conducted on November 30 and December 2, 1999, which are attached with this report. Each report page contains 4 transcript pages; e.g. I-5 appears on the 2<sup>nd</sup> page of the attachment.

**R** Refers to the page number in the Pre-Meeting Report which is available as Appendix A on the EPA Web Site.

**Appendices referenced in this report are not included as part of the printed copy but are available from EPA's website:**

<http://www.epa.gov/oeca/main/ej/nejacpub.html>

**Appendix A - Pre-Meeting Report (includes Stakeholder Interviews)**

**Appendix B - December 1999 NEJAC Executive Meeting Summary**

**Appendix C - NEJAC Air & Water Subcommittee Comments on the Draft Urban Air Toxics Strategy April 6, 1999**

**Appendix D – Transcripts from NEJAC Meeting**

**I – November 30 Plenary Session is Attached**

**II – December 1 Public Comment Session on EPA Web Site**

**III – December 2 Plenary Session is Attached**

## **Disclaimer**

This report and recommendations have been written as a part of the activities of the National Environmental Justice Advisory Council, a public advisory committee providing external policy information and advice to the Administrator and other officials of the United States Environmental Protection Agency (EPA). The Council is structured to provide balanced, expert assessment of issues related to environmental justice.

This report has not been reviewed for approval by the EPA and, hence, its contents and recommendations do not necessarily represent the views and policies of the EPA, nor of other agencies in the Executive Branch of the federal government, nor does mention of trade names or commercial products constitute a recommendation for use.

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## I. BACKGROUND

EPA, through its Office of Environmental Justice, asked the National Environmental Justice Advisory Council (NEJAC) to provide advice and recommendations on the following question:

In order to secure protection from environmental degradation for all citizens, what factors should be considered by a federal permitting authority, as well as state or local agencies with delegated permitting responsibilities, in the decision-making process prior to allowing a new pollution-generating facility to operate in a minority and/or low-income community that may already have a number of such facilities?

To address this question, NEJAC scheduled a three (3) day public meeting of industry, government (federal, tribal, state, and local), academic, and community stakeholders to explore whether and how the issue of environmental justice could be integrated into the permitting process. This gathering represented NEJAC's first public meeting to focus entirely on a single issue.

As a prelude to the meeting, the Office of Environmental Justice commissioned a report summarizing interviews with a representative sampling of stakeholders scheduled to participate in the public meeting. Twenty (20) stakeholders were interviewed: eight (8) representing EPA programs, three (3) representing industrial interests, three (3) representing academia, three (3) representing state or local governments, two (2) representing community organizations, and one (1) representing a Native American tribe. The pre-meeting report presented the responses of those stakeholders to a series of questions developed by the Office of Environmental Justice, identifying both potential areas of agreement as well as fundamental differences in perspective. (The Pre-Meeting Report, including a list of interviewed stakeholders and their organizational affiliations, can be found on the EPA Web Site as Appendix A.)

In general, stakeholders agreed on the need: (1) to address the issue of incorporating environmental justice concerns in permitting, (2) to define more clearly what the permit writer should do when confronted with disparate treatment, (3) to address cumulative impacts in some fashion (whether through permitting, regulation, or cooperation with land use agencies), and (4) to involve the community in permitting decisions. Stakeholders differed in their view: (1) of the appropriate overall Agency goal in permitting, and (2) of what now transpires in the permit process. R. 6-8, 10-16, 19-21.

For example, when asked whether the permit agency should address pre-existing conditions with potential health or environmental impacts in permitting, community stakeholders reply simply and emphatically "Yes!" They cited communities where "*shelter in place*" alarms are a regular feature of community life. ("*Shelter in place*" refers to governmental strategies which seek to minimize human exposure to high air pollutant episodes by recommending residents go inside whenever an alarm whistle is sounded.) To community stakeholders, this signified that "*the system is broken.... There is no study which proves that 'shelter in place' works, that [ordinary residential] structures adequately protect people....*" They stressed the need for meaningful planning and siting so that the number of people adversely affected in a worst-case pollution scenario is minimized or eliminated. R. 10.

State, local government, tribal, and academic stakeholders agreed that permit agencies should address pre-existing conditions. One emphasized these factors "*may be more important than sporadic permit issues.*" Another added that such considerations "*should not be an afterthought, but should be raised early in the process and used as a guideline for determining whether any [siting] action should be taken at all.*" A third concluded, "*A responsible agency looking out for the community's interests should relatively level the playing field.*" R. 10.

Industry stakeholders approached this environmental justice goal more cautiously. They acknowledged *"agencies have to deal with cumulative risk in some fashion,"* but stressed the need for *"legal authority," "clear criteria for injustice," "enough information on emissions and health effects to make clear calls," "[and avoiding having] the system bog down."* They questioned whether *"agencies have the resources to have permit writers become fully conversant with these issues"* and emphasized that different perceptions on the issues may exist even within the local community, further complicating review. R. 11.

Nonetheless, industrial stakeholders shared with other stakeholders a willingness to explore approaches to environmental justice in permitting. While not endorsing any particular solution, industry stakeholders raised the following possibilities:

- (1) Permit agencies can examine, document, and help raise awareness of pre-existing conditions.
- (2) There could be further public scrutiny of zoning and land use planning for environmental justice impacts.
- (3) Agencies could publicize more information on what factors contribute to successful brownfields projects.
- (4) Rather than subject all permits -- even minor permits -- to full-blown cumulative impact analysis, agencies could screen permits to determine which merit fuller scrutiny because of the size of the source, toxicity of the emissions, or degree of public interest in the outcome.
- (5) Corporate policies on siting and acquisition could be changed so that environmental personnel are integrated into decision-making earlier in the process, before companies are so heavily invested in a particular site. (Under current practice, siting is primarily market-driven. Only after a lengthy analysis of non-environmental factors, such as access to supplies and transportation corridors, growth potential, etc., does a company look at the community, its environment and quality of life.)
- (6) Where high risks exist due to prior land use planning errors, successful relocation efforts and voluntary buy-outs could be examined. In the Netherlands, for example, when cumulative risk analysis indicated that community exposure crossed a specified threshold, the government devised a 5-10 year community relocation plan. Voluntary buy-outs to expand buffer zones around industrial facilities have also occurred in the United States. R. 11-12.

In general, EPA stakeholders agreed with the goal of addressing cumulative environmental impacts in permitting (assuming legal authority to do so). Some, however, expressed interest in limiting such analysis to major permits, "cancer alleys," or "hot spots," while others appeared to embrace it for a broader universe of permits. Several recommended greater attention to the environmental impacts of zoning and planning decisions, and other stakeholders concurred. R. 12.

Stakeholders also shared differing views as to what now transpires in the permit process. Industry stakeholders saw the current process as largely centered on technical issues of compliance with federal and state discharge regulations. Government stakeholders saw themselves addressing a somewhat broader set of issues -- still largely centered on compliance with technology requirements, but also encompassing public participation, protection of health and the environment, interagency coordination, enforcement, and state oversight. In marked contrast, tribal and community stakeholders saw the process as exceedingly narrow, ignoring treaty rights and community views -- indeed, driven toward a distinctly (from their view) biased result. One cited situations where facility construction is underway while the permit application is purportedly still being considered: *"Companies wouldn't invest this money if they didn't feel they could get their permit."* Another put it: *"The process proceeds with an eye toward*

*nothing but technical compliance with numbers and, if there is not compliance, then how can we help the facility get its permit?" At least one EPA stakeholder appeared to agree: "If the objective [of the community] is to stop the permit altogether, ... it is hard for EPA to share that goal. Our goal is to make sure these sources have permits, unless they don't comply [with applicable regulations]." R. 13.*

All stakeholders, however, agreed that, absent a stronger or more comprehensive state statute, the current permit process does not address the type of environmental justice concerns being raised by tribal and community organizations. R. 13.

With respect to potential changes in the current permit process, accord among stakeholders was greatest on issues related to better public outreach, expanded community participation in decision-making, greater assurances of industry compliance, and greater attention to cumulative risks. Stakeholders differed more sharply over a community's right to prevent siting of a facility which otherwise complies with applicable regulatory standards. However, stakeholders acknowledged that these situations represent a small percentage of permit applications and can frequently be avoided by changed industry and government behavior (such as early involvement of environmental personnel in internal corporate decision-making and community representatives in government decision-making.) In short, stakeholders were optimistic about the possibility of identifying opportunities for mutual stakeholder gain. R. 10-16, 19-24.

At the meeting itself, the Office of Environmental Justice asked NEJAC to engage in a "robust policy dialogue" aimed at identifying both deficiencies in the current permit process and remedies or alternative approaches to permitting. Tr. I-40. Participants responded by identifying eighty (80) policy recommendations for implementation by EPA, other federal agencies, states, tribes, community organizations, and permit applicants. (A complete list of policy recommendations is outlined below in Section III of this report.)

These recommendations received varying degrees of consideration by NEJAC. Some reflected extensive deliberation by NEJAC subcommittees. The recommendations for siting and operating waste transfer stations, for example, were the product of a two (2) year review by NEJAC's Waste and Facility Siting Subcommittee. The Subcommittee toured waste transfer stations in two (2) cities (New York and Washington, D.C.) and gathered public testimony from numerous stakeholders, including private sector witnesses, community groups, and federal, state, and local officials. Their review culminated in a nearly fifty (50) page technical report accompanying their policy recommendation. Tr. III-143-146. The urban air toxic strategy recommendations likewise had been amply debated. NEJAC's Air and Water Subcommittee had culled over 200 recommendations to EPA during the rulemaking process; many of the Subcommittee's final recommendations have yet to be addressed and remain relevant during the implementation stage of the strategy. Tr. III-116-118. The NEJAC public meeting offered the various subcommittees a forum to present such findings and recommendations to a larger audience.

Other recommendations illustrated substantial academic research. Professor Yale Rabin from the Massachusetts Institute of Technology reported observations gleaned from thirty-five (35) years of scrutinizing disparities in delivery of municipal services to low-income and minority communities in at least sixty (60) locations throughout the United States. Tr. I-165-169. Professor Richard Lazarus from Georgetown University Law Center appended a draft law review article to his recommendations on legal factors in permitting. Tr. I-42-59. Again, the meeting presented an opportunity to highlight the product of such scholarly investigation.

Still other recommendations emerged from Agency representatives or from other stakeholders addressing NEJAC with their ideas -- sometimes for the first time -- at this public policy meeting.

Participants had an opportunity to outline the contours of a debate on the merits of at least some of these additional recommendations;<sup>1</sup> others were merely noted for future reference.

The primary purpose of *this* public meeting was a creative, wide-ranging identification of policy options rather than a resolution of the relative merits and disadvantages of each proposal. The Office of Environmental Justice promised participants a follow-up report which would serve as an interim step in the formation of NEJAC's strategic policy advice to the Agency. Tr. III-8-16. This report, therefore, aims to cull the recommendations, identify the specific actions requested or implied of EPA or other stakeholders, and present a decision document for NEJAC's review and action.

To facilitate further review by both NEJAC and EPA, this report groups the eighty (80) policy recommendations by key themes. Five (5) key themes emerged continually in stakeholders' discussions. These themes, and the recommendations related to them, affect *all* federal permit programs, regardless of media, location, or implementing agency. Since these themes form the premise of many of the more media-specific, geographically-based, or Agency-directed policy recommendations, these proposals are presented in detail, along with background information, in Section II below.

At the public meeting, NEJAC approved several of the policy recommendations contained in this report; any such approval has been noted alongside the recommendation and a copy of the relevant NEJAC resolution can be found in the December 1999 NEJAC Executive Summary on the EPA Web Page as Appendix B. The bulk of the recommendations, however, have yet to be debated fully by NEJAC. **It is important to stress, therefore, that the policy recommendations identified in this report do not represent the views of the Office of Environmental Justice, the author, or NEJAC itself. They are merely interim (albeit often extensively researched) suggestions for NEJAC's review and approval.** Indeed, a few (primarily those pertaining to streamlined, expedited permitting and emissions trading) could, without further clarification, be interpreted as mutually exclusive.

Several recommendations pertained to a single site. For example, NEJAC heard pleas to clean up Metales y Derivados, an abandoned site in Tijuana, and Condado Prestos in Ciudad Juarez, Tr. III-89, and to conduct a site assessment of the El Gato Negro site in Matamoros Tamaulipas, bordering Brownsville, Texas. Tr. III-90. Recommendations pertaining to single sites have not been included here, although NEJAC subcommittees will address these issues separately.

Finally, for a full understanding of the policy recommendations outlined below, this report should be read in conjunction with the Pre-Meeting Report and the December 1999 Executive Meeting Summary, which are located on the EPA Web Site as Appendix A and B. The pre-meeting report outlines how important the issue of environmental justice in permitting is, defines key stakeholder goals, and critiques the current permit process. In short, it explains *why* stakeholders desire policy reforms and *what* the general nature of those reforms should be. With that backdrop, this report begins to tackle the thorny question of *how* to achieve stakeholders' shared permit goals, whatever they may be.

Several of these policy recommendations come directly from stakeholder presentations; that is, stakeholders identified problems, formulated solutions to those problems, and articulated a clear methodology for accomplishing those solutions. Others emerged in a less direct fashion; stakeholders, acting as the story-tellers for communities with little political clout, voiced their frustrations, leaving it to policy analysts to shape their experiences into recommendations for Agency action. Wherever possible, these experiences, too, have been outlined in the form of implied remedies, so that the recommendations before the Agency reflect the full range of stakeholder insights presented at the meeting.

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<sup>1</sup> See, for example, the EPA Air Program's proposal for permit flexibility in communities with proactive emission reduction programs and some stakeholders' reservations. Cf. Tr. I-140-148, III-25, 29-46 with Tr. I-145-148, 227-228, 271-272, 318, 327-332, III-41-45, 59, 62-64, 113-114, 163, 167-178.

## II. KEY POLICY RECOMMENDATIONS.

Five (5) key themes surfaced repeatedly in both stakeholder interviews and public testimony. These concerned: (1) the need to clarify what legal authority the permit writer has to address environmental justice issues in permitting; (2) substantive permit criteria (including cumulative impacts, degree of risk, community demographics, and disproportionality of risk); (3) community involvement in the decision-making process; (4) enforcement; and (5) the relationship between land use/zoning and environmental decisions. This section of this report discusses each in turn.

### A. Legal Authority to Address Environmental Justice Issues in Permitting.

#### Background:

Because permit writers implement statutes and regulations, the need to clarify the permit writer's legal authority to address environmental justice issues in permitting emerged as a primary stakeholder concern in both pre-meeting interviews and in testimony at the public meeting. See R. 20-21 and Tr. I-234-240, 247-249, 264.

In pre-meeting interviews, government stakeholders frequently cited their lack of authority to reject projects on environmental justice grounds. R. 20. At the public meeting, too, NEJAC heard repeated testimony that many permit writers believe they lack any legal authority to address environmental justice concerns in permitting decisions. Tr. I-46-47. Others believe that environmental justice concerns may form a basis for more exacting technical scrutiny of a permit, but are insufficient to deny an application which otherwise complies with media-specific technical criteria. Tr. I-205-208.

Confusion at the federal level is compounded in state and local permit agencies. When federal agencies fail to address environmental justice concerns, essential environmental decisions are left to states and local governments, which, in turn, fear tackling them because of potential "takings" lawsuits pursuant to the "just compensation" clause of the Fifth Amendment to the U.S. Constitution. Tr. I-182-183, 251-253. In addition, existing federal and/or state laws may preempt local authority to regulate. Tr. I-184. (Many states have laws prohibiting state agencies from issuing requirements more stringent than federal requirements.) Then too, in the absence of clear federal rules or guidelines, states fear being overturned in court for being "arbitrary and capricious" if they deny a permit on environmental justice grounds. Tr. I-204-208. As one state official explained: "*We are looking to EPA for the tools on how to do this.*" Tr. I-262-264, R. 8.

Industry stakeholders, too, are uncertain of their obligations (beyond the need to avoid intentional discrimination). An industry stakeholder summarized, "*On the substance, there is real intellectual bankruptcy. What are the rules of the road? What does the Executive Order forbid? What is the basis of a Title VI complaint? What is the right thing to do? Companies fear that projects will be abandoned or delayed without reason and that others will go forward where they shouldn't.... There is no coherent understanding of what we're trying to do.*" R. 20-21. In short, stakeholders from government, the private sector, academia, and community groups agree that legal clarification is a high priority.

The issue is becoming ever more prominent as permitting provisions of federal environmental laws increase in practical significance; whereas once only the Clean Water Act depended primarily on individual facility permits for implementation, now the Clean Air Act, the Resource Conservation Recovery Act, and the Safe Drinking Water Act have matured into permitting statutes. Tr. I-47.

In 1996, EPA's Office of General Counsel prepared a document identifying nine (9) federal statutes, including the Clean Air Act, Clean Water Act, Superfund, and RCRA, as providing opportunities

to incorporate environmental justice issues into permit decisions. Tr. I-48-51, 237-240 and 247-248. NEJAC responded by adopting a resolution calling upon EPA to utilize more systematically existing statutory authority to address environmental justice through permitting decisions. Tr. I-48-49. In response, EPA regional offices made sporadic efforts to reform permitting practices, but stakeholders saw little systematic effort by EPA Headquarters to develop a coherent set of guidelines promoting environmental justice permitting practices. Tr. I-49. Hence, three (3) years later, the status of the Office of General Counsel memorandum and the extent to which permit writers may honor its suggestions appears uncertain. Tr. I-247-249, 264.

Thus, permit writers face two (2) separate, seemingly unresolved questions: 1) under what circumstances, if any, does a permitting agency have a duty to deny or condition a permit on environmental justice grounds; and 2) if there is no mandatory duty, when, if ever, does an agency have discretion to act? On the latter point, several legal commentators noted that important Agency initiatives have often occurred in the statutory interstices, where EPA has discretion but no binding mandate. So not only is there precedent for such an approach, but, indeed, this is where EPA historically exerts its leadership in crafting an environmental agenda. Tr. I-50-55, 223-224, 249. Certainly, as Professor Lazarus noted, recent decisions of the EPA Environmental Appeals Board suggest there may be circumstances where EPA is called upon to exert similar leadership with respect to environmental justice concerns. Tr. I-55.

Community stakeholders criticized the Agency for not using existing statutory authority creatively. R. 20. Some also argued that the wording of EPA's question to NEJAC (i.e., "what factors should be considered ... prior to allowing a new pollution-generating facility to operate") "*presumes the permitting agency will allow a new pollution-generating facility in an already burdened community.*" Tr. I-234-235, 251-253. These advocates warned against recommendations limited solely to process (i.e., to the inclusion of community comment and consultation) rather than to substantive environmental remedies and argued that EPA's inquiry should be open to the possibility that environmental justice concerns constitute valid bases for *denying* a permit altogether. Indeed, one community representative pointed out that EPA, unlike the Nuclear Regulatory Commission, had never denied a permit on environmental justice grounds. Tr. I-235-236. The Nuclear Regulatory Commission, by contrast, found racial bias in the site selection process and reversed a staff licensing decision on that basis in the case of *In re Louisiana Energy Services, L.P.*, 24 N.R.C. 77 (1998). Tr. I-256.

Industry stakeholders found this comparison imprecise, noting that EPA and States may advise an applicant not to apply for a permit or to stop an application mid-process, thereby avoiding the need for permit denial. Tr. I-254-256. Thus, the number of permit denials, by itself, may not reflect the true impact of environmental justice concerns in permitting.

Where the applicant still wants to proceed, however, the question is a key one because it goes to the weight to be given environmental justice concerns. Are environmental justice-related factors, on the one hand, merely factors to be studied, there to contribute to the quality of decision-making and, in appropriate circumstances, to dissuade a reasoned agency or permittee from proceeding? Or do environmental justice-related factors hold somewhat greater weight, increasing the scope of required mitigation but, again, lacking sufficient weight to delay or forestall a project? Or -- and this is the ultimate test of their import -- do environmental justice-related factors have the ability to stop a project altogether? In other words, can a project which otherwise complies with all applicable environmental criteria be denied a permit solely because the project would put undue strain on an already overburdened community? At the public meeting or in pre-meeting interviews, stakeholders from virtually every interest group recommended that EPA squarely address these questions, which are subsumed within the overarching question posed by EPA's Office of Environmental Justice.

Recommendation:

The EPA Administrator should request the Office of General Counsel to provide legal guidance to federal, as well as delegated state, tribal, and local government permit writers on whether they have either a mandatory duty or discretionary authority to deny a permit, condition a permit, or require additional permit procedures on environmental justice grounds. Specifically, the Office of General Counsel should address the following questions posed, either in remarks or in prepared material, to NEJAC at the public meeting by academicians and lawyers representing community groups:

1. Does the Rio Declaration on the Environment and Development, which the United States adopted in 1992, impose a mandatory duty on EPA, or provide discretionary authority, to address the potential effects of long-term exposure to multiple low-level toxins in permitting facilities in close proximity to environmental justice communities?

Principle 15 of the Rio Declaration commits signatory governments to adopt a precautionary approach toward environmental hazards:

*“In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”* Tr. I-239-240 and attachments.

2. Does the International Convention on the Elimination of All Forms of Racial Discrimination, ratified by the United States in 1994 and made applicable to executive agencies, including EPA, by Executive Order 13107 in 1998, impose a mandatory duty on EPA, or provide discretionary authority, to address environmental justice concerns in permitting?

The International Convention requires signatory governments to:

*“take effective measures to review governmental, national, and local policies, and to amend, rescind, or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists.”*

Executive Order 13107 directs *“all executive departments and agencies [such as EPA] ...shall maintain a current awareness of United States international human rights obligations that are relevant to their functions and shall perform such functions as to respect and implement those obligations fully.”*  
Tr. I-239-240 and attachments.

3. Does the National Environmental Policy Act (NEPA) require or authorize EPA to undertake a comprehensive environmental impact review of permits in environmental justice communities? Tr. I-170-171.

NEPA and its implementing regulations require federal agencies to explain the need for any proposed project which significantly affects the quality of the human environment, analyze all reasonable alternatives to the proposal, evaluate the “no action” alternative, and assess all impacts, including cumulative, indirect, and socioeconomic impacts. Ordinarily, federal permitting must comply with NEPA, but courts have exempted most EPA permits by the “functional equivalent doctrine” (i.e., the notion that, since EPA is primarily an

environmental agency, EPA accomplishes the same analysis as NEPA-type environmental impact assessments).

The distinction is significant. The Nuclear Regulatory Commission remanded a nuclear material license where it found inadequate consideration of environmental justice concerns. In re Louisiana Energy Services, L.P., 47 N.R.C. 77 (1998) Tr. I-256. Some states, such as California, require similar NEPA-type analysis of major permit applications and these analyses can elicit information about significant health and environmental issues. Tr. I-195.

4. Does the Clean Air Act authorize or require EPA (and states administering EPA-delegated programs) to take environmental justice concerns into consideration in the permitting process? Relevant provisions cited in a law review article presented to NEJAC include:
  - National ambient air quality standards (and revisions to the standards) must protect the public health of *especially sensitive subpopulations*. See, e.g., American Lung Assn. v. EPA, 134 F.3d 388, 389 (D.C. Cir. 1998). (Environmental justice communities frequently include many individuals with heightened sensitivity to pollutants due to pre-existing physical conditions or environmental stresses from multiple sources.)
  - State implementation plans to attain and maintain national ambient air quality standards must not conflict with any provision of federal law, including, presumably, *Title VI* of the Civil Rights Act. See section 110(a)(2)(E), 42 U.S.C. 7410(a)(2)(E).
  - Permits in attainment areas must follow "careful evaluation of *all* the consequences of such a decision." Section 160, 42 U.S.C. 7470(5) (emphasis added).
  - Permits in attainment areas must follow "adequate procedural opportunities for informed public participation in the decision-making process," including a public hearing offering interested parties an opportunity to appear and comment on "*alternatives*" and "*other appropriate considerations*" in addition to air quality impacts and emission controls. Sections 160 and 165A2, 42 U.S.C. 7470 and 7475(emphasis added). Tr. I-237.
  - Sanctions for failure to attain national air quality standards include "all measures that can be feasibly implemented in the area in light of technological achievability, costs, and any *nonair quality* and other air quality-related health and environmental impacts." Section 179(d)(2), 42 U.S.C. 7509(d)(2)(emphasis added).
  - Permits for sources in nonattainment areas may only be issued if "an analysis of alternative sites, sizes production processes, and environmental control techniques for such proposed source demonstrates that benefits of the proposed source significantly outweigh the environmental *and social costs imposed as a result of its location*, construction, or modification." Section 173(a)(5), 42 U.S.C. 7503(a)(5)(emphasis added).

- Section 112(r)(7) also authorizes the EPA Administrator to consider *location and response capabilities* in establishing requirements to prevent accidental releases of hazardous air pollutants. 42 U.S.C. 7412(r)(7).
  - Requirements for the siting of solid waste incinerators must "minimize, on a *site specific* basis, to the maximum extent practicable, *potential risks* to public health or the environment." Section 129(a)(3), 42 U.S.C. 7429(a)(3)(emphasis added).
  - Penalties for noncompliance with applicable Clean Air Act provisions must reflect "such other factors as *justice* may require," including, presumably, the potentially *greater need for deterrence* in communities which have historically lacked the resources to oversee facility compliance. *See* section 113(e)(1), 42 U.S.C. 7413(e)(1)(emphasis added).
  - EPA has broad discretion to impose whatever permit conditions "are necessary to assure compliance." Section 504, 42 U.S.C. 7661c. Conceivably, permit conditions could include provisions to enhance a community's ability to oversee facility compliance.
  - Finally, state boards with responsibility for permitting and enforcement of the Act must have "at least a majority of members who represent the *public interest*." Section 128, 42 U.S.C. 7428(emphasis added). The "public interest" standard may allow EPA to require that such boards include representatives of environmental justice communities.
5. Does section 112(k) of the Clean Air Act, 42 U.S.C. 7412(k), require or authorize EPA (and delegated permit authorities) to address environmental justice concerns about cumulative burdens and their associated health risks in urban areas?

Section 112(k) addresses hazardous air pollutants from "area sources" (i.e., stationary sources that are not major) that individually *or collectively* present significant risks to public health in urban areas. The section directs EPA to monitor for a broad range of hazardous air pollutants, analyze contributing sources, and assess the public health risks they pose. EPA also must develop a comprehensive national emission control strategy, encourage and support State and local emission control strategies, and report to Congress on specific metropolitan areas that continue to experience high risks to public health from area source emissions. *See also* section 112(c)(3), 42 U.S.C. 7412(c)(3) and Tr. I-294-295.

6. Does the Resource Conservation and Recovery Act ("RCRA") require or authorize EPA (and delegated permit authorities) to address such environmental justice concerns as cumulative risk, unique exposure pathways, and sensitive populations? Tr. I-238. Relevant provisions cited in a law review article presented to NEJAC include:
- Standards applicable to generators and transporters of hazardous waste as well as hazardous waste treatment, storage, and disposal facilities must incorporate such protective requirements "*as may be necessary to protect human health and the environment*," language broad enough to encompass consideration of cumulative impacts. *See* sections 3002(a), 3003(a), and 3004(a), 42 U.S.C. 6922(a), 6923(a), and 6924(a)(emphasis added).

- Permits for hazardous waste treatment, storage, or disposal facilities "shall contain such terms and conditions as the Administrator (or the State) determines *necessary to protect human health and the environment.*" Section 3005(c)(3), 42 U.S.C. 6925(c)(3)(emphasis added). EPA's own Environmental Appeals Board has read this language to allow the Agency to "tak[e] a more refined look" at health and environmental impacts which disproportionately affect a low-income or minority population. See *In re Chemical Waste Management, Inc.*, 1995 WL 395962 (E.P.A. June 29, 1995).
  - Standards applicable to hazardous waste treatment, storage, and disposal facilities "shall specify criteria for the *acceptable location* of new and existing treatment, storage, and disposal facilities as necessary to protect human health and the environment." Section 3004(o)(7), 42 U.S.C. 6924(o)(7)(emphasis added). See also section 3004(a)(4), 42 U.S.C. 6924(a)(4). Defining an "acceptable location" from a human health perspective presumably permits the Agency to account for environmental justice concerns regarding risk aggregation.
  - Enforcement penalties must take into account the "*seriousness* of the violation." Section 3008(a)(3), 42 U.S.C. 6928(a)(3)(emphasis added). Violations can be more serious when risks are aggregated, disproportionate, or inequitable, or when risks impact an especially sensitive community.
  - Guidelines for state solid waste management plans must consider "*the political, economic, organizational, financial, and management problems* affecting comprehensive solid waste management." Section 4002 (c)(9), 42 U.S.C. 6942(c)(9) (emphasis added). These factors are sufficiently broad to encompass many environmental justice concerns.
7. Does the Clean Water Act authorize or require EPA (and delegated states) to assess cumulative risk? Relevant provisions cited in a law review article presented to NEJAC include:
- Water quality standards under the Act must protect both public health and the "designated use" of each individual waterbody. Sections 302, 303, and 304, 33 U.S.C. 1312, 1313, and 1314. "Designated uses" could include economic or cultural uses (such as subsistence fishing or uses reflecting tribal traditions).
  - The statute requires watershed protection, which, in turn, requires gathering loading data and evaluating pre-existing environmental stressors. See section 303(d), 33 U.S.C. 1313(d), and Tr. I-237, 243-244.
  - Until all implementing actions have been taken under the statute, the Act gives EPA broad authority to condition discharge permits on "*such conditions as the Administrator determines are necessary* to carry out the provisions of this chapter." See section 402(a), 33 U.S.C.

1342(a)(emphasis added). These permit conditions could include provisions promoting environmental justice.

- Finally, civil and administrative penalties for violations of the Act must be based on the seriousness of the violation and "such other matters as *justice* may require." Section 309(d) and (g), 33 U.S.C. 1319(d) and (g)(emphasis added).
8. Do the Safe Drinking Water Act, Toxic Substances Control Act, and Federal Insecticide, Fungicide, and Rodenticide Act require or authorize EPA to address environmental justice concerns in permitting? Relevant provisions cited in a law review article presented to NEJAC include:
- The Safe Drinking Water Act directs EPA to set national primary drinking water regulations after considering, among other things, "*other factors relevant* to protection of health." Section 300g-1(b)(7)(C)(1), 42 U.S.C. 1412 (b)(7)(C)(1)(emphasis added). Cumulative impacts in environmental justice communities would seem to be such a relevant factor.
  - State variances from national primary drinking water regulations for public water systems "shall be conditioned on such *monitoring and other requirements* as the Administrator may prescribe," including, presumably, enhanced public participation opportunities and resource assistance where appropriate in environmental justice communities. *See* section 300g-4(a)(1)(B), 42 U.S.C. 1415(a)(1)(B)(emphasis added).
  - Civil penalties for violations of the Safe Drinking Water Act shall consider "the seriousness of the violation" and "such other matters as *justice* may require." Section 300h-2(c)(4)(B), 42 U.S.C. 1423 (c)(4)(B)(emphasis added).
  - The Toxic Substances Control Act directs EPA to consider "*cumulative or synergistic effects*" in setting testing requirements for chemical substances and mixtures -- precisely the effects environmental justice advocates contend have been too often overlooked in considering the risks posed by toxic substances in low-income and minority communities. *See* section 4(b)(2)(A), 15 U.S.C. 2603(b)(2)(A).
  - The Toxic Substances Control Act further directs EPA to consider the "environmental, economic, and *social impact* of any action" taken under the Act. Section 2(c), 15 U.S.C. 2601(c)(emphasis added).
  - Finally, the Toxic Substances Control Act targets "*low-income persons*" for technical and grant assistance in State radon programs. Sections 305(a)(6) and 306(i)(2), 15 U.S.C. 2665(a)(6) and 2666(i)(2).
  - The Federal Insecticide, Fungicide, and Rodenticide Act gives EPA broad authority to prevent "unreasonable adverse effects" on the environment, including effects on farmworkers. *See* section 3(a), 7 U.S.C. 136a(a).

9. Finally, to what extent must states, tribes, and local governments administering delegated programs adhere to the same restrictions and, to the extent that they must, should these requirements be embodied in rulemaking? This question of rulemaking is important, not only to bind states, tribes, and local governments, but also to protect them from suits alleging that they are "arbitrary and capricious" when they deny a permit on environmental justice grounds. Tr. I-204-208.

## **B. Substantive permit criteria.**

### Background:

EPA's 1997 Strategic Plan commits the Agency to ensure that "all Americans are protected from significant risk to human health and the environment where they live, learn, and work." The same Strategic Plan binds the Agency to enforce all federal laws protecting human health and the environment "fairly and effectively." Finally, the Plan guarantees that all segments of society have access to information sufficient to participate effectively in managing health and environmental risk." Tr. I-16-17.

Despite these assurances, NEJAC heard repeated and compelling testimony from a multiplicity of low-income and minority communities that polluting sources are being located in sufficient proximity to residential areas and/or to each other to form cancer alleys, cancer hotspots, or other health risks. As Professor Lazarus explained, "*Risks that may seem acceptable in isolation may properly be seen as presenting unacceptably high risks when the broader social context, including associated health and environmental risks, is accounted for in total aggregation.*" Tr. I-45.

Where such conditions exist, permit writers remain confused as to whether they can address such risks, how to address them (assuming they have legal authority to do so), and even which of many different types of aggregate risks to consider.

### Recommendation:

The EPA Administrator should direct permit writers to issue only permits consistent with EPA's mission; namely, protecting the health of all citizens. Specifically, permit writers should ensure that any permit: a) complies with all applicable provisions of law, including state and local health, environmental, and zoning laws (where such laws are not preempted), and b) adequately protects health and the environment. Specific factors which academicians and community groups believe the Agency should consider in determining the bases for modifying or denying permits in low-income or minority communities include:

- (1) negative health risks;
- (2) racially disproportionate burdens;
- (3) cumulative and synergistic adverse impacts on human health and the environment;
- (4) high aggregation of risk from multiple sources;
- (5) community vulnerability based on the number of children, elderly, or asthmatics;
- (6) cultural practices, including Tribal and indigenous cultures and cultural reliance on land and water that may become pathways of toxic exposure;
- (7) proximity to residential areas and adequacy of buffer zones;
- (8) health and ecological risk assessment;
- (9) the economic burden of medical costs and lost productivity;
- (10) access to health care;
- (11) psychological impacts;

- (12) the risk of chemical accidents;
- (13) emergency preparedness;
- (14) community right-to-know in permitting;
- (15) the impact on the quality of life in the surrounding community; and
- (16) an applicant's compliance history. Tr. I-45-46, 195, 225-227, 234-237, 240-246, 250-251, 268, 271-272, 281-282, 293-296, 301, 318, III-20-23, 50-59, 77-85, R. 10-11, 13-14.

Business and state stakeholders emphasized that, if EPA decides to incorporate such factors in the permitting process, it must do so through rulemaking in order to ensure that the terms are clearly understood and uniformly employed. Tr. I-206-208, 218-219, R. 11, 18, and 20-21. Community groups and some academicians, by contrast, stress that EPA could use existing regulatory authority more creatively to accomplish this end. Tr. I-46-51, 169-173, 181, 187, 237, and 247-249. At least one business representative also suggested that, if EPA incorporates such factors in permitting, it screen permits to determine which merit fuller scrutiny because of the size of the source, toxicity of the emissions, or degree of public interest in the outcome. R. 12.

(Additional recommendations on appropriate substantive permit standards and siting criteria are contained in Section III below.)

### **C. Community involvement/public participation**

#### Background:

Non-Agency stakeholders agree that one of the most serious -- and easily remedied flaws -- in current permitting is the way environmental agencies fail to engage the public in permit decision-making. Tr. III-13, 22, R. 14-16. The issue is a key one because inadequate public comment processes generate community mistrust, delay or disrupt industry plans, and impair agency decision-making. Indeed, EPA Administrator Carol M. Browner stressed to NEJAC that when permit agencies succeed in engaging a local community in a meaningful manner, the quality of the Agency's environmental decision-making is dramatically improved. Tr. I-106. Stakeholders generated a wealth of suggestions for improving the public participation process, most of which centered on the concept that consultation with potentially affected communities should occur "early and often."

#### Recommendation:

The EPA Administrator should adopt binding public participation requirements which ensure that permit writers will consult with affected communities "early and often." Tr. I-87-88, 91-99, 129-130, 198-199, R. 14-16, 19-20. Specifically, these requirements should direct permit agencies to:

- a. Contact potentially affected communities as soon as an agency is aware that a permit application may be filed or that emissions from a facility may increase, but in no event later than immediately upon receipt of the permit application or notice that emissions could increase. Tr. I-91-92, 129-130, 132-133, 198-199, R. 19.
- b. Hold an initial hearing or informal meeting with the potentially affected communities immediately after receipt of a permit application. This will afford an early opportunity to apprise the community of the pendency of the application, identify community concerns, avoid the mistrust created by prolonged agency and industry negotiations outside the public eye, and establish a basis for an ongoing, credible dialogue. R. 14-16, 19-22.

- c. Identify community leaders accurately; do not rely on local government to represent environmental justice communities, because many low-income and/or minority communities do not have local visibility or political influence. Tr. I-129-130.
- d. Develop a plan for community involvement in conjunction with the community. Tr. I-91-92.
- e. Require a community outreach plan modelled on those used with success in the brownfields grants program; follow up to ensure that the plan is implemented. Tr. I-131-132, R. 12.
- f. Use broadcast media and other effective forms of communication to advertise the public participation process. Tr. I-94-95, R. 19.
- g. Require permit notices in newspapers to be printed in legible print and to be placed in spots likely to attract the attention of affected residents. Tr. I-82-83, 355. (Community stakeholders persistently criticized notices which are printed: solely in the Federal Register or state equivalent, in publications not read by the community, or in obscure legal notices and other fine print. R. 14.)
- h. In public notices of proposed permits, describe what the discharge/emission means to the community in lay, rather than technical, terms. Otherwise, comment periods end before communities learn about potential impacts. Tr. I-87-88, 101-103, 132-133, III-20, R. 14.
- i. Utilize local government resources as well by bringing local government into the process as early as possible. Tr. I-95-97, 187-189.
- j. Make technical reports accessible to the community as soon as they are available, rather than holding them internally until commencement of a 30-day comment period. Community stakeholders criticized the 30-day comment period as an inadequate time in which to obtain independent technical advice on the complicated issues involved in permitting. (Presumably, this recommendation would require agencies to establish a publicly accessible permit docket.) Tr. I-132-133, R. 14.
- k. Extend the 30-day public comment period for complicated permits. Tr. I-132-135.

(Additional recommendations on community involvement are outlined in Section III below.)

#### **D. Enforcement.**

Stakeholders recognized an integral relationship between permitting and enforcement. As several stakeholders repeatedly emphasized, permit writers need to think about how enforceable their permits will be, while enforcers need to rely on the permits to ground their prosecutions. Tr. I-359, III-25-26, 62-63.

Recommendation:

The EPA Administrator should ensure that environmental justice guidance and requirements are effectively enforced in federally adopted, approved, or required environmental programs. Specifically, the Administrator should:

1. Ensure that EPA guidance on environmental justice reaches beyond the headquarters level to each of the regional offices and, in particular, regional permit writers. Tr. I-155-160, 277.
2. Ensure that EPA guidance on environmental justice reaches beyond to state personnel, especially permit writers, administering federally approved or required programs. Tr. I-160.
3. Assess all delegated state permit programs for compliance with federal legal requirements and withdraw federal program delegation in states which fail to implement the requirements. Tr. I-84, 102.
4. Address unpermitted or underpermitted activity, since this is a major problem. Tr. I-144, III-62-63.
5. Be more assertive in exercising regulatory authority to reopen permits for grandfathered facilities, many of which would not have been approved under modern standards. Tr. I-169-170.
6. Use enforcement programs to capture the economic benefits of permit violations so that corporations cannot profit from pollution. (See the NEJAC Enforcement Subcommittee's resolution and report on "Credible Deterrence," which can be found in Appendix B on the EPA Web Site) . Tr. III-164-165.

(Additional recommendations concerning enforcement are outlined in Section III of this report.)

**E. Land use/zoning.**

Background:

The relationship of land use and zoning to environmental justice was highlighted by the presentation of Professor Yale Rabin from the Massachusetts Institute of Technology. Professor Rabin reported observations gleaned from thirty-five (35) years of scrutinizing disparities in delivery of municipal services to low income and minority communities in at least sixty (60) locations throughout the United States. He noted that many pre-existing environmental injustices in minority and low-income communities can be traced to racially discriminatory local government actions -- actions taken in *compliance* with local zoning ordinances and compounded by other government policies.

For example, racially discriminatory real estate covenants were widely used before the adoption of comprehensive zoning. These covenants restricted minorities to certain geographic locations, which were then the host sites for polluted or undesirable land uses. The rigidly controlled boundaries of these neighborhoods caused severe overcrowding. Later, comprehensive zoning (mainly but not exclusively in the south) designated existing black residential areas as the site for further industrial or commercial growth. Because these residentially incompatible but permitted uses resulted in the frequent displacement of black residents, Dr. Rabin dubbed this phenomenon "expulsive zoning." In other words,

comprehensive zoning had an *opposite* result in white and black neighborhoods. In white neighborhoods, zoning prevented intrusive traffic, noise, and pollution; in black neighborhoods, zoning induced such nuisances. These origins, though not widely understood, are important to note to the extent that current policy-makers are tempted to rely on local zoning to alleviate environmental injustice.

Compounding the zoning impact, municipalities frequently permitted substandard construction in minority neighborhoods -- in violation of town building code requirements governing adequate living space, lot size, ventilation, electricity, water supply, and sanitation. In addition, local governments, again especially in the south, often failed to provide municipal services such as paved streets, streetlights, storm and sanitary sewers, fire hydrants, and adequate water supply to black neighborhoods. Thus, although the racially discriminatory local government actions that generated these conditions have long since been mainly discontinued, the consequences remain in probably thousands of black neighborhoods. Tr. I-165-169, 185-186.

Research presented by Paula Forbis on behalf of the Environmental Health Coalition echoed Professor Rabin's findings. The Environmental Health Coalition studied historical local land use decisions in the communities of Barrio Logan, Logan Heights, Sherman Heights, and National City, California, finding that racially discriminatory past land use decisions have current and immediate health impacts. Tr. I-174-181.

More recently, in some (usually larger) cities, Professor Rabin observed that some inequitable conditions (such as substandard housing) have been improved, but only when a court ordered a town to equalize its facilities or blacks became the majority and assumed governance. In either case, improvements occurred only when outside funding was available. By analogy, Professor Rabin concluded that pre-existing conditions adversely impacting health and the environment in low- income and minority communities will only be corrected when substantial outside funding becomes available to these communities. Tr. I-165-169, 185-186.

In addition to highlighting funding issues, stakeholders also focussed on other aspects of EPA's leadership responsibilities. While stakeholders recognized that EPA cannot intrude on local land use decisions, they shared a sense that EPA has not fully explored its opportunities both to address environmental injustices caused by past local land use/zoning decisions and to assist localities in avoiding future injustices.

Recommendation:

The EPA Administrator should exert leadership and become a full partner with local government in eliminating environmental injustice. Specifically, the Administrator should:

1. (In conjunction with other federal agencies) establish a fund to remedy pre-existing environmental injustices in hard-hit low income and minority communities. Tr. I-164-169, 185-186, R. 11.
2. Consider the discriminatory impact of historical land use patterns in deciding whether to use whatever discretionary authority EPA may have to remedy environmental injustices through the state and federal permit process. Tr. I-225-266, III-64.
3. Provide land use guidance for local governments regarding the environmental justice considerations involved in permitting and siting of facilities. Tr. I-184-189, 196, III-47-48.

4. Insist that federally mandated permits to respect local zoning ordinances which protect communities against increases in pollution. (Citizens allege that one such model ordinance in Chester, Pennsylvania was given no weight in the permit process.) Tr. I-74-80.

(Additional recommendations concerning land use/zoning as well as funding are outlined in Section III of this report.)

### **III. ADDITIONAL POLICY RECOMMENDATIONS.**

This section lists all policy recommendations which emerged from the NEJAC meeting (including, for comparison purposes, those identified in Section II). The recommendations cover a wide range of issues, including, in addition to the themes already discussed above, siting criteria, data-gathering for permits, funding, concentrated animal feeding operations, urban air pollution, streamlining/trading/offsets and other alternative compliance schemes, and private sector initiatives.

While many of the general recommendations pertain to tribes among other stakeholders, six recommendations exclusively address the issue of environmental justice for tribal and indigenous peoples. These recommendations are necessary because Indian reservations present unique challenges for applying the principles of environmental justice. As defined by EPA, environmental justice means “The fair treatment and meaningful involvement of all people, regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.” The “fair treatment” component of the term means that “no group of people, including racial, ethnic, or socioeconomic group should bear a disproportionate share of the negative environmental consequences resulting from industrial, municipal and commercial operations or the execution of federal, state, local, and tribal programs and policies.” [U.S. EPA, Interim Final Guidance for Incorporating Environmental Justice Concerns in EPA’s NEPA Compliance Analyses (1997).] This definition includes Indian tribes in two ways. First, tribes are minority groups that can be disadvantaged in socioeconomic terms, and thus tribes are one of the kinds of groups that environmental justice seeks to protect from disproportionate impacts. Second, tribes are also sovereign governments, with the power and responsibility to carry out environmental protection programs. Thus, the challenges of environmental justice for Indian tribes, as outlined by tribal representatives, are two-fold.

First, the communities on Indian reservations tend to fit the definition of environmental justice communities. They are comprised of minority populations and tend to be socially and economically disadvantaged. Indian tribes are diverse, and generalizations should be taken with caution. Many reservation communities have suffered disproportionate impacts to their environments, some of which are the long-term impacts of “development” activities that occurred years or decades ago. Other reservation communities face the prospect of environmental degradation that would result from proposals intended to create jobs and generally improve socioeconomic conditions. Given the rural nature and broad geographic area of many reservations, just to carry the message of environmental justice to the people of reservations is a particular challenge. Communities tend to be far-flung, and the task of outreach when considering a particular environmental permitting issue is difficult at best. Because reservations were established as homelands where tribes could continue to live as separate, self-governing communities, tribal representatives stress that Indian people tend to see themselves as different from other minorities. To the extent that reservation Indians are even aware of the concepts of environmental justice, they may perceive it as something designed to serve the interests of minority groups other than reservation Indians. Many reservations have substantial populations of non-Indians as well as Indians who are members of other tribes. On some reservations, such groups could be considered minorities; on other reservations, the presence of such groups has rendered tribal members minorities within their own homelands.

Second, tribal governments are developing their own environmental programs. Federal environmental laws authorize tribes to operate regulatory programs similar to those administered by the states. The tribal provisions in the federal laws were not enacted, however, until a decade or two after the laws authorizing state programs. The neglect of Indian reservations by Congress in the first generation of federal environmental laws has resulted in less environmental protection infrastructure in Indian country, which can itself be seen as an environmental justice issue. In recent years, many tribes have chosen to establish regulatory programs like those of the states, but they face enormous challenges, in part because tribes generally do not have nonfederal sources of revenue for governmental operations comparable to the states. Tribes also must cope with a confusing body of Supreme Court decisions that opponents of tribal sovereignty can use to challenge tribal programs, and tribes must be prepared to defend against such challenges. Thus, tribes as governments may see environmental justice as another obstacle to the development of effective environmental protection programs. Nevertheless, tribal representatives emphasize that tribes as governments need to understand (1) the legal underpinnings of the principles of environmental justice, and (2) when tribal governments need to apply these principles. Such knowledge, they stress, will take time to develop, and tribes therefore need special consideration from EPA on the underlying issues before being expected to apply the principles of environmental justice as governmental entities. Similarly, much work is still needed on the part of EPA to educate its own staff on the principles of tribal sovereignty and federal Indian law, as well as on the importance of the environment for tribal cultures and philosophies. EPA should therefore proceed with some deliberation and should make extra efforts to ensure that tribes are well informed on the basic environmental laws and environmental justice principles prior to entering into discussions about permits in Indian country.

Unless otherwise indicated, each of the following eighty (80) recommendations is addressed to EPA.

*Reframing or expanding the nature of the inquiry:*

1. Reword EPA's inquiry as follows:

In order to secure protection from environmental degradation for all citizens, *what factors should be determinative* when a federal permitting authority (or state or local agency with delegated permitting responsibilities) makes a decision regarding a new pollution-generating facility proposing to operate in a minority and/or low-income community that already has a number of such facilities? Tr. I-235.

2. Reconvene the Interagency Task Force on Environmental Justice because environmental permitting involves a broader range of agencies than EPA (e.g., the Department of Defense, Department of Energy, Army Corps of Engineers, Bureau of Indian Affairs). Tr. I-297-327, III-223-225.
3. Address permits issued by state, regional, and local agencies as well as those required under federal law. Tr. I-64-65.
4. Ensure broader representation of environmental justice populations and community organizations on federal advisory committees, especially those developing guidelines to be applied in permits. Tr. I-214.
5. Ensure that each relevant regulatory and permitting office, at EPA and in other federal agencies, has a diverse work force. Tr. I-214-216.

### *Legal factors*

6. Find legal authority to address the potential effects of long-term exposure to multiple low-level toxins in permits issued in environmental justice communities in Principle 15 of the Rio Declaration on the Environment and Development. Tr. I-239-240 (and attached prepared statement).
7. Find legal authority to address environmental justice concerns in permitting in the International Convention on the Elimination of All Forms of Racial Discrimination, ratified by the United States in 1994 and made applicable to executive agencies, including EPA, by Executive Order 13107. Tr. I-239-240 (and attached prepared statement).
8. Find legal authority to address environmental justice concerns in permitting in the National Environmental Policy Act (NEPA). Tr. I-170-171.
9. In the alternative, since NEPA provides the best mechanism for ensuring wide-ranging consideration of needs, impacts, and alternatives, voluntarily subject more EPA permits to the NEPA process, utilizing the CEQ guidelines for cumulative impact review in the environmental justice context. Tr. I-170-171.
10. Find legal authority to address environmental justice concerns in permitting in the general provisions of the Clean Air Act. Tr. I-46-59, 237-240 (and attachments).
11. Find legal authority to address environmental justice concerns about cumulative burdens and their associated health risks in permits issued in urban areas in section 112(k) of the Clean Air Act, 42 U.S.C. 7412(k). Tr. I-293-296.
12. Find legal authority to address environmental justice concerns in permits issued under the Clean Water Act. Tr. I-46-59, 237-240 (and attachments).
13. Find legal authority to address environmental justice concerns in permits issued under the Resource Conservation and Recovery Act. Tr. I-46-59, 237-240 (and attachments).
14. Find legal authority to address environmental justice concerns in permits issued under the Safe Drinking Water, Toxic Substances Control, and Federal Insecticide, Fungicide, and Rodenticide Acts. Tr. I-46-59, 237-240 (and attachments).
15. Finally, make environmental justice criteria applicable to permitting through rulemaking so as to bind states and also protect them from suits alleging that they are arbitrary and capricious when they deny a permit on environmental justice grounds. Tr. I-204-208, 285-287.

### *Substantive permit criteria:*

16. Address the following factors as bases for denying permits: (1) negative health risks; (2) racially disproportionate burdens; (3) cumulative and synergistic adverse impacts on human health and the environment; (4) high aggregation of risk from multiple sources; (5) community vulnerability based on the number of children, elderly, or asthmatics; (6) cultural practices, including Tribal and indigenous cultures and cultural reliance on land and water that may become pathways of toxic exposure;

and (7) proximity to residential areas and adequacy of buffer zones. Tr. I-45-46, 74-80, 195, 225-227, 234-237, 240-246, 250-251, 268, 271-272, 281-282, 293-296, 301, 318, III-20-23, 77-83, R. 13, 20.

17. Explore using both a substantive alternatives analysis and a rigid sequencing approach for permitting in highly impacted communities. Begin with an alternatives analysis. Deny a permit if there is a practicable alternative to siting the facility in or near an impacted community and use regulatory incentives to facilitate permitting at the alternative site (e.g., expedited permitting, emission trades, alternative compliance requirements such as emission caps and budgets, etc.). If a facility must be sited in a highly impacted community, strive to avoid adverse impacts; then minimize adverse impacts that cannot be avoided (e.g., through specialized control technology, alternative production processes, site-specific land management practices, buffer zones, alternative traffic routes, etc.); finally, provide compensatory mitigation (such as reducing emissions from other sources in the area) for the remaining risks. Similar approaches can be found in the Clean Water Act section 404 permit program, the Endangered Species incidental takings permit program, and transferable development rights used to protect historic buildings. Tr. I-228-229 and attachment.<sup>2</sup>
18. In addition to cumulative exposure, consider: (1) health and ecological risk assessments; (2) the economic burden of medical costs and lost productivity; (3) access to health care; (4) psychological impacts; (5) the risk of chemical accidents; (6) emergency preparedness; (7) community right-to-know in permitting; and (7) an applicant's compliance history in issuing permits in low-income and minority communities. Tr. I-224-227, III-50-59, 84-85.
19. Recognize that a community's environmental concerns may be considerably broader than the media-specific technical criteria used by federal and state permit agencies. Indeed, community concerns encompass such quality-of-life issues as: (1) noise; (2) dust; (3) constant truck traffic; (4) roadway congestion; (5) blocked roadway access due to truck parking violations; (6) debris falling from trash trucks; (7) safety issues raised by trucks speeding through residential areas; (8) rats; (9) odors; (10) house vibrations; (11) sleep deprivation due to all-night traffic; (12) deteriorated property values; and (13) general neighborhood decline. EPA should clarify that federally required permits need to consider such affronts, because states administering delegated permit programs have told adjacent communities that permit writers lack jurisdiction over such problems. Tr. I-68-72, 224-227, 360-361.
20. Use health-based statistics to identify geographic areas that need to be treated more cautiously for permitting purposes; work in and around Philadelphia provides a model for such an approach. Tr. III-38-39, 53-54, 84.
21. Consider the level of franchise (i.e., access to, and ability to influence, government) of different communities in permitting and establish more preventative approaches where necessary to protect the integrity of the permit process. Tr. III-58-59. (This recommendation stems from the fact that low-income and minority communities historically have lacked the resources necessary to monitor polluting facilities in their communities and, if violations are found, either to persuade government

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<sup>2</sup> A letter dated April 18, 2000 from Eileen Gauna to NEJAC outlines this approach in more detail.

officials to take enforcement action or to bring their own citizen enforcement actions.) Tr. I-45-46.

22. Require federally mandated permits to respect local zoning ordinances which protect communities against increases in pollution; citizens allege that one such model ordinance in Chester, Pennsylvania was given no weight in the permit process. Tr. I-74-80.
23. Consider the discriminatory impact of historical land use patterns in deciding whether to use whatever discretionary authority EPA may have to remedy environmental injustices through the state and federal permit process. Tr. I-225-266, III-64.
24. Require an allocation mechanism that addresses *future* projects so that the first permit applicant does not absorb all of a neighborhood's potential for growth (e.g., traffic capacity or clean air increment). Tr. I-226, R. 11.
25. Take cognizance of whether permit applicants propose to displace older, more polluting facilities. Tr. I-169-170.
26. Expedite the permit process for facilities that have been invited into communities and enjoy widespread community support since speed and predictability offer important market advantages to permit applicants. Tr. I-171-174, R. 12.
27. Focus more attention on pollution prevention activities, both as a condition of permits and as a way to avoid toxic releases altogether. Tr. I-195-196.

*Siting criteria and land use:*

28. Adhere to the recommendations of NEJAC's Waste and Facility Siting Subcommittee as currently being detailed in a draft brochure entitled "Social Aspects of Siting RCRA Hazardous Waste Facilities." Tr. I-210-211, III-46-47.
29. Adhere to the recommendations of NEJAC's Waste and Facility Siting Subcommittee as detailed in their report and related resolution on waste transfer stations.<sup>3</sup> The report outlines the need for best management practice manuals for both facility siting and operations. In addition, the report calls for siting criteria, a planning process to assure a more equitable distribution of facilities, design and operating practice requirements, potential emission reduction requirements, increased community participation, and enhanced enforcement, among other measures. The report reflects a two (2)-year study of transfer stations demonstrating that, absent a federal baseline, there is enormous variability in the operating practices of waste transfer stations and strong community dissatisfaction, particularly where facilities were clustered as they are in New York City and Washington, D.C. Tr. III-143-152. (A copy of the Subcommittee's report and resolution can be found in the NEJAC Executive Summary Report on the EPA Web Site as Appendix B. For additional discussion of the problems associated with waste transfer stations, see Tr. I-33-34, 189-190.)

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<sup>3</sup> Waste transfer stations are facilities where municipal waste is unloaded from collection vehicles and subsequently re-loaded onto larger transport vehicles to be taken to a disposal site. Waste transfer stations allow communities to move waste economically over long distances.

30. Provide land use guidance for local governments regarding the environmental justice considerations involved in permitting and siting of facilities. Tr. I-184-189, 196, III-47-48, R. 12.

*Public participation and community involvement:*

31. Direct the Inspector General to conduct a full audit of the State of Louisiana permitting programs with particular attention to violations of EPA public participation regulations, NEJAC's public participation guidelines, and the U.S. Constitution. Tr. I-284, 344-358, 360-362, III-189-198. (A copy of the Resolution adopted by NEJAC can be found in the NEJAC Executive Summary Report on the EPA Web Site as Appendix B.) See also Tr. I-82.
32. (From the Council on Environmental Quality), convene community-level interagency meetings modelled on successful meetings in Los Angeles and New York City. The meetings would serve to apply principles of environmental justice at the community level, generate a mutually agreed upon agenda, and spotlight local environmental justice problems. Participants should include community leaders, government officials, and Congressional representatives. The meeting should endeavor to produce a series of commitments to the local community. Tr. I-29-37. (While the agenda at such a meeting probably would range well beyond permitting, the meeting could provide a forum to resolve permit issues, among other community concerns.)
33. Adopt binding public participation requirements which ensure permit writers will consult with affected communities "early and often." Tr. I-87-88, 91-99, 129-130, 198-199, R. 14-16, 19-20. Specifically:
  - a. Contact potentially affected communities as soon as an agency is aware that a permit application may be filed or that emissions from a facility may increase, but in no event later than immediately upon receipt of the permit application or notice that emissions could increase. Tr. I-91-92, 129-130, 132-133, 198-199, 272, 279, R. 19.
  - b. Hold an initial hearing or informal meeting with the potentially affected communities immediately upon receipt of a permit application. R. 14-16, 19-22.
  - c. Accurately identify community leaders; do not rely on local government to represent low-income or minority communities. Tr. I-129-130.
  - d. Develop a plan for community involvement in conjunction with the community. Tr. I-91-92.
  - e. Require a community outreach plan modelled on those used with success in the brownfields grants program; follow up to ensure that the plan is implemented. Tr. I-131-132, R. 12.
  - f. Use broadcast media and other effective forms of communication to advertise the public participation process. Tr. I-94-95, R. 19.
  - g. Require permit notices in newspapers to be printed in legible print and to be placed in spots likely to attract the attention of potentially affected residents. Tr. I-82-83, 355, R. 14.
  - h. In public notices of proposed permits, describe what the discharge/emission means to the community in lay, rather than technical, terms. Otherwise,

- comment periods end before communities learn about potential impacts. Tr. I-87-88, 101-103, 132-133, III-20, R. 14.
- i. Utilize local government resources as well by bringing local government into the process as early as possible. Tr. I-95-97, 187-189.
  - j. Make technical reports accessible to the community as soon as they are available, rather than holding them internally until commencement of a 30-day comment period. The 30-day comment period is often an inadequate time in which to obtain independent technical advice on the complicated issues involved in permitting. (Presumably, this recommendation would require agencies to establish a publicly accessible permit docket.) Tr. I-132-133, 274-275, R. 14.
  - k. Extend the 30-day public comment period for complicated permits. Tr. I-132-135.
34. Adopt permit conditions which provide communities with adequate test data and sufficient control over ongoing monitoring to ensure the safe operation of a facility. Tr. I-45-46, 202. In pre-meeting interviews, stakeholders identified a variety of obvious, as well as innovative, ways to accomplish this objective, including:
- a. bucket brigades in which citizens learn how to collect and send samples to EPA-approved labs (used as the basis for at least one successful enforcement action in Region IX),
  - b. requiring companies with continuous emission monitoring to have digital printouts on stacks reporting their emission limits,
  - c. Community Advisory Committees,
  - d. monitoring and enforcement by other governmental entities (e.g., tribes and local governments),
  - e. use of qualified consultants,
  - f. community-facility good neighbor agreements, and
  - g. daily posting of compliance data on the web. R. 22-23.
35. Assess, for the purposes of developing benchmarks, whether required public participation programs associated with permitting are working effectively because there is considerable testimony to the effect that such efforts are extremely problematic. Tr. III-132-133.
36. Make qualified, independent experts available to the local community to review permit technicalities. Tr. I-101.
37. Require permit applicants to certify under penalty of perjury that the information they provide to the public is complete and accurate. Tr. I-133-134.
38. Provide training for citizens and tribal governments on the permitting process itself. Tr. I-101, 210-211, 365-366, III-20-21.
39. Develop a citizens' guide to grandfathered facilities to facilitate citizen monitoring and involvement in permit reissuance for these facilities. Tr. III-115-116.
40. Identify existing legal authority to address cumulative impacts in permitting; make a list of these authorities available to environmental justice communities. Tr. III-116.

41. Require permit applicants to make geographic information system ("GIS"), demographic, and other computerized data (including the computers to review the data) available to local communities. Tr. I-191-194.
42. Address, through permits, communication networks extending from the community to the upper echelons of EPA in the event of chemical accidents or explosions. Tr. III-59-60.

*Data gathering for permits:*

43. (To EPA and other agencies), recognize the excellent health effects research now being done by community organizations and support further community-driven (i.e., community controlled) health effects research to ensure better permitting decisions. Tr. III-55-56.
44. (To ATSDR), incorporate more communities of color in research, such as the recent report on the economic burden of medical costs and lost productivity, since such information is relevant to permitting. Tr. III-84-85.

*Funding:*

45. (To EPA, in conjunction with other federal agencies), establish a fund to remedy pre-existing environmental injustices in hard-hit low income and minority communities. Such a fund is an essential precondition to improved permitting. Tr. I-164-169, 185-186, R. 11.
46. (To EPA as well as to the National Institute for Environmental Health Sciences, Agency for Toxic Substance Disease Registry, the National Institutes of Health, Center for Disease Control, and other agencies with health responsibilities), fund research on cumulative exposure analysis analogous to the research conducted by Communities for a Better Environment along the Aladema Corridor in Los Angeles. There, researchers used GIS mapping systems, demographic data, the Toxic Release Inventory database, other facility siting information, and a physical inventory conducted by community members to publish a report on cumulative exposure entitled "Holding Our Breath." Noteworthy findings included the fact that 70% of area facilities were not reporting to environmental agencies and, hence, were not identified in agency databases. In addition, an industrial chrome plating facility had been permitted immediately adjacent to an elementary school. Such research can be an essential tool for community empowerment, enabling communities to identify appropriate permit terms and conditions or circumstances in which permitting should not go forward. (The Los Angeles research was funded by the National Institute of Environmental Health Sciences, UCLA School of Public Health, Center for Occupational Environmental Health, Labor Occupation Safety and Health Divisions, and the USC Southern California Environmental Health Science Center.) Tr. I-60-65.
47. Attach environmental health funds to permits, with special emphasis on communities of color, children, women, and elders. Tr. I-203, III-59.
48. Provide funds for universities to provide independent technical advice on permitting issues to affected communities. Tr. I-134, 215-216.

49. Make funding available to states to engage in activities related to improved permitting in environmental justice communities, including site and community data-gathering and evaluation, expanded public participation, and community training. Tr. I-207.
50. Make funding available to encourage youth in low-income and minority communities to pursue environmental careers so that permit agencies can employ a diverse workforce. Tr. I-214-216.
51. Recognize the special funding needs of tribes to develop regulatory and permitting infrastructure. Tr. I-241-245.

*Enforcement of permits and related regulatory requirements:*

52. Ensure that EPA guidance on environmental justice reaches beyond the headquarters level to each of the regional offices and, in particular, regional permit writers. Tr. I-155-160, 277.
53. Ensure that EPA guidance on environmental justice reaches beyond to state personnel, especially permit writers, administering federally approved or required programs. Tr. I-160.
54. Assess all delegated state permit programs for compliance with federal legal requirements and withdraw federal program delegation in states which fail to implement the requirements. Tr. I-84, 102.
55. Address unpermitted or underpermitted activity, since this is a major problem. (For example, NEJAC heard testimony that a facility in Arizona is being allowed to operate even though EPA Region IX believes that the facility does not have an effective permit.) Tr. I- 144, III-62-63.
56. (To EPA and States), use enforcement programs to capture the economic benefits of permit violations so that corporations cannot profit from pollution. (See the NEJAC Enforcement Subcommittee's resolution and report on "Credible Deterrence," can be found in the NEJAC Executive Summary Report on the EPA Web Site as Appendix B.) Tr. III-164-165.
57. Be more assertive in exercising regulatory authority to reopen permits for grandfathered facilities, many of which would not have been approved under modern standards. One stakeholder asserted that, under modern "takings" case law, old polluting facilities can be shut down where there is a documented technical basis that they are causing an adverse impact. Tr. I-169-170.
58. Explore an initiative to clean up 1,712 high priority RCRA facilities. Tr. III-47.
59. Conduct a pilot test of enforcement options against waste transfer stations in New York City. Tr. III-152-153.
60. Adhere to the NEJAC Enforcement Subcommittee's resolution recommending that EPA refrain from recognizing state and local authority to grant variances from federally mandated air pollution permit requirements in cases of alleged malfunction, start-up, shut down, and maintenance. The Subcommittee cautioned

that, in practice, state and local variances receive little scrutiny, reflect highly subjective standards, and are relatively easy to obtain. Federal recognition of these variances would preclude both federal and community enforcement suits, potentially increasing emissions in low-income and minority communities which disproportionately host polluting facilities. Instead, the Subcommittee recommended that EPA exercise case-by-case prosecutorial discretion to determine whether or not Clean Air Act violations due to alleged malfunction, start-up, shut down, or maintenance merit enforcement. (A copy of the Subcommittee's resolution can be found in the NEJAC Executive Summary Report on the EPA Web Site as Appendix B.) Tr. III-164.

*Concentrated animal feeding operations:*

61. Accelerate the schedule for permitting concentrated animal feeding operations because now there is virtually a complete lack of permitting and a tremendous need for enforcement. Tr. III-25-26, 129-131, 178-180.
62. Require states to assume responsibility for permitting concentrated animal feeding operations within their jurisdiction. (A corollary recommendation is to educate states that have not had much experience with concentrated animal feeding operations about the associated environmental problems, because states often assume that these facilities do not discharge and, hence, do not require permits.) Where states are not interested in permitting these facilities, conduct federal inspections. Tr. III-130-131.
63. Investigate compliance with permit and regulatory requirements in Oklahoma where there has been a rapid proliferation of concentrated animal feeding operations in a small geographic area. Tr. I- 332-344, III-131-132, 180. (See related resolutions pertaining to tribal land, below.)

*Urban air pollution:*

64. Adhere to the recommendations of the NEJAC Air and Water Subcommittee on the urban air toxics strategy. (See their report, a copy of which can be found as Appendix C on the EPA Web Site.) Many of these recommendations address significant outstanding issues, such as choice of pollutants, selection of monitoring location and technology -- issues which remain relevant during the implementation phase of the strategy. Tr. III-116-120.
65. Structure public hearings and workshops around the country on implementation of the urban air toxics strategy to address monitoring questions, choice of technology, and state and local pilot projects. Tr. III-116-120.
66. Develop model materials on urban air toxics so that when state and local governments start implementing the program, communities can participate effectively. Tr. III-120-121.
67. Address the environmental justice implications of energy generation. Tr. III-119-127.
68. Address the environmental justice implications of Tier II reductions in the amount of sulfur in commercially sold gasoline. The concern is that, as refineries tighten

production processes to produce cleaner fuels, they will emit more locally. Trading programs may allow facilities to offset local emission increases with estimates of emission reductions from cleaner fuels. Tr. III-127-129.

69. Create a two (2)-page document informing communities impacted by Tier II-related local emission increases how to ensure new source review of plant process changes and reasonable reductions in local emissions. Tr. III-127-129.
70. Assess the pollution effects of permitted and proposed nuclear incinerators such as that proposed for Idaho Falls. Tr. III-134.
71. Take specific actions with respect to Puerto Rico's state implementation plan (SIP); namely, a) require Puerto Rico to revise the SIP because the regulations for power plants do not include federally mandated emission limitations on sulfur dioxide and particulates, even in nonattainment areas, b) require these power plants to use clean fuel (i.e., sulfur content of no more than 0.5%), and c) require these power plants to install continuous emission monitoring for sulfur dioxide. Tr. III-135-143, 183.
72. In consultation with the U.S. Department of Transportation, convene a meeting of the New Jersey Department of Transportation, the New Jersey Department of Environmental Protection, and the South Jersey Transportation Authority to address: a) long-term air quality issues associated with the Atlantic City Tunnel Project, b) community exposure to contaminated soil during construction, c) potential post-construction impacts such as flooding and safety, and d) the broader policy issues implicated by this project. Tr. III-153-155. (A copy of the NEJAC Resolution can be found in the NEJAC Executive Summary Report on the EPA Web Site as Appendix B.)

*Streamlining, trading, offsets and other alternative compliance schemes:*

73. Five different recommendations for “alternative compliance schemes” emerged; some of these are mutually exclusive:
  - a) (From EPA's Air Program), explore whether, in certain communities heavily burdened by toxics or large concentrations of pollutants, the desire for economic development can be harnessed to drive reduced total loadings of toxics. Specifically, communities could proactively undertake toxic reductions (e.g., replace diesel-fueled buses with natural gas-fueled vehicles, retrofit pollution controls on existing trucks and buses, replace oil-based solvents with water-based products) and identify still further potential emission reductions. Accomplished emission reductions would provide room for new growth; targeted, desired reductions would identify potential offsets for new sources. Both types of reductions -- and the streamlined, expedited permitting EPA would offer new sources in these communities -- would make the communities more attractive to new development than communities where further growth would cause environmental justice problems. Tr. I-140-148, III-25, 29-46.
  - b) Explore whether global facility permits, used in several states, provide an opportunity to reduce total emission loadings. Tr. III-39.
  - c) Recognize that compliance alternatives are a huge potential loophole in permitting. Trading, in particular, allows a company to bypass public

involvement and obviate community gains in permitting. EPA, therefore, should adhere to the recommendations of the Enforcement Subcommittee of NEJAC as outlined in their comments on the Economic Incentive Program document, a copy of which can be found in the NEJAC Executive Summary Report on the EPA Web Site as Appendix B. Tr. I-145-148, 318, 327-332, III-62-64, 167-178.

- d) If trading is to be allowed, consider some or all of the following limitations on it:
- restrict its use to situations that directly and favorably impact conditions in environmental justice communities. Tr. III-113-114.
  - avoid using counties as a geographic area for emission trading purposes because California has counties (like San Bernadino) that are as big as Connecticut, Rhode Island, and Massachusetts combined. Reducing pollution in the county as a whole may still impact environmental justice communities adversely or disproportionately. Tr. III-41-45.
  - avoid emission trading of lead emissions. Tr. III-163.
  - consider that less poisoning of a community is still poisoning. Tr. I-271-272, III-59.
  - prohibit streamlining or expediting the permit process in overly impacted communities because additional time may be needed to evaluate the additional complex issues presented in these communities. Tr. I-227-228.
- e) Create an environmental emission trading review board of representatives of environmental justice communities; federal, state, and local officials; and experts in health, engineering, and real estate. The board would rank and prioritize environmental justice projects, contract for professional services where necessary, use a pre-funded \$50 million emission trading bank to address disparate impacts, and auction emission reduction credits. Tr. I-230-234.

*Tribal and Indigenous Peoples:*

74. Recognize that EPA has a special legal relationship with tribes who are sovereign governments. In recognition of that relationship, educate representatives of both regulated communities (e.g., industry) and regulators (i.e., state and federal government agencies) on indigenous cultural values. Lack of understanding of indigenous cultural, religious, and historical values permeates permitting on or adjacent to tribal lands. Tr. I-240-246, III-20-23, 77-83.
75. Notify potentially affected tribal governments and members directly of pending review of permits as soon as a permit application is submitted. Tr. I-245, III-20. Identify community leaders accurately; do not rely on local government to represent environmental justice communities, because many low-income and/or minority communities do not have visibility or political influence. Tr. I-129-130. However, consistent with the government-to-government relationship with tribal governments and the federal trust responsibility owed to them, in the case of Native American communities, initial outreach efforts should, in the first instance, be directed to the tribal governments as representatives of their communities and to their tribal members. Additional outreach to other potentially affected persons and nongovernmental organizations also may be needed to ensure optimal public participation.

76. Encourage and support ongoing consultation between tribes and the permitting agency throughout the permit process. Tr. I-242-245, III-20.
77. Modify public participation requirements to account for the special problems attendant in reaching small, isolated rural communities on tribal lands. Tr. I-86-88.
78. Develop core water quality standards for permitting on tribal lands lacking such standards. Federal action is necessary because tribes which have adopted their own standards have found those standards attacked approved water quality standards, protect the quality of reservation waters from excessive degradation due to licensing or permitting activities by developing, in consultation and agreement with tribes, core water quality standards. Tr. I-127-128.
79. Include tribal lands in best management practice and regulatory requirements applicable to waste transfer stations. Tr. I-127-128.

(Note related recommendations #16, pertaining to substantive permit criteria, #38, pertaining to training, #51, pertaining to funding, and #63 pertaining to concentrated animal feeding operations on tribal land.)

*Private sector initiatives:*

80. Encourage the private sector to address environmental justice issues. Specific initiatives suggested by industry representatives for the private sector include:
  - Utilize the NEJAC guidelines on public participation. Tr. I-198-199.
  - Commit to listen, record, and respond to every question asked of a permit applicant at a public meeting. Tr. I-198-199, R. 20.
  - Change corporate policies on siting and acquisition so that environmental personnel are integrated into decision-making earlier in the process, before companies are heavily invested in a particular site. (Under current practice, siting is primarily market-driven. Only after a lengthy analysis of non-environmental factors, such as access to supplies and transportation corridors, growth potential, etc., does a company look at the community, its environment and quality of life.) R. 12.

#### **IV. APPENDICES (On EPA Web Site)**

##### **A – Pre-Meeting Report**

<http://www.epa.gov/oeca/main/ej/nejacpub.html>

##### **B – December 1999 NEJAC Executive Council Meeting**

[http://www.epa.gov/oeca/main/ej/nejac/past\\_nmeet.html](http://www.epa.gov/oeca/main/ej/nejac/past_nmeet.html)

##### **C – Air/Water Subcommittee Comments on Draft Urban Air Strategy**

<http://www.epa.gov/oeca/main/ej/nejacpub.html>

##### **D – Transcripts from November 30-December 2, 1999 NEJAC Meeting**

**I – November 30, 1999, Plenary Session w/Permitting Public Comment Session**

**II – December 1, 1999, General Public Comment Period**

**III – December 2, 1999, Plenary Session**

<http://www.epa.gov/oeca/main/ej/nejacpub.html>

# **PRE-MEETING REPORT: ENVIRONMENTAL JUSTICE IN THE PERMITTING PROCESS**

*A Report on Stakeholders' Views*

*APPENDIX A of the Final Report "Environmental Justice in The Permitting Process - EPA 300-R-00-004*

*Prepared for the National Environmental Justice Advisory Council  
A Federal Advisory Committee to the  
U.S. Environmental Protection Agency*

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## EXECUTIVE SUMMARY

Environmental permitting poses a true challenge to the Environmental Protection Agency(EPA). EPA's mission is to ensure, among other things, that all Americans, regardless of race, color, national origin or economic status, are protected from significant risks to human health and the natural environment -- air, water, and land -- where they live, learn and work. EPA must carry out this mission consistent with Executive Order 12898 on environmental justice and federal environmental laws.

Environmental permitting represents the principal arena where companies and communities confront each other over the details of which businesses may operate, where, and under what conditions in or near residential neighborhoods. In short, it is where the rubber hits the road in terms of implementing a host of regulatory standards designed, with varying degrees of adequacy, to protect health and the environment.

This report presents the results of interviews about the permit process with twenty (20) stakeholders drawn from government (EPA, Tribal, State, or local), industry, academia, and community organizations. These discussions revealed common concerns -- and fundamental disagreements -- over where and how to integrate environmental justice in the permitting process.

All stakeholders agreed that EPA needs to address the issue of incorporating environmental justice considerations in permitting because communities increasingly are insisting upon a broader view of permitting and because neither companies nor permit writers know what is expected of them. While several stakeholders stressed that permitting is only one of several contexts in which government agencies need to respond to environmental justice concerns, all agreed that permitting guidelines are a high priority.

Stakeholders differed as to what the Agency's permitting goal should be. Tribal, State, local government, academic and community stakeholders thought agencies should address pre-existing conditions with potential health and environmental impacts. EPA stakeholders, in general, agreed, though several expressed an interest in doing so only for a limited category of permits. Industry stakeholders acknowledged the need to deal with cumulative risk in some fashion (though not necessarily in permitting), and expressed a willingness to explore approaches. Stakeholders identified twelve (12) government or private sector approaches to addressing environmental justice.

Stakeholders also agreed that the current permit process typically does not address environmental justice issues, though they differed as to what transpires.

Industry stakeholders saw the process as largely centered on technical issues of compliance; government stakeholders saw themselves addressing a broader set of issues; community stakeholders saw the process as driven towards finding a means to grant the applicant a permit.

Stakeholders identified numerous problems with the current permit program, including failure to consider environmental justice or cumulative impacts, lack of clear guidance for permit writers on how to address environmental justice, and lack of adequate public participation.

Non-Agency stakeholders agreed that the current program does not adequately include community input, while EPA stakeholders held a range of opinions on this subject, ranking the Agency's performance anywhere from "poor" to quite successful. Stakeholders held mixed views on the utility of Alternative Dispute Resolution as a tool for facilitating stakeholder cooperation.

Stakeholders recommended: (1) expanded public involvement in permitting; (2) addressing cumulative impacts (in permitting or elsewhere); and (3) clarifying what the permit writer should consider and how the permit writer should react when confronted with a disparate impact. Many suggested the need for legal guidance -- presumably from the Office of General Counsel -- in this area. Stakeholders also acknowledged opportunities for mutual industry/community gain in permitting.

Community, Tribal, State, local government, and academic stakeholders enthusiastically endorsed community monitoring of facility compliance. Industry stakeholders were willing to entertain proposals for community monitoring, but expressed caution about data adequacy and accuracy. EPA officials generally were skeptical of the extent to which community monitoring assists technical compliance, but might be less skeptical of its value for enhancing community-facility relations. Stakeholders also identified additional areas of inquiry into environmental justice issues.

## **PURPOSE**

EPA, through the Office of Environmental Justice, has asked the National Environmental Justice Advisory Council (NEJAC) to provide advice and recommendations on the following question:

In order to secure protection from environmental degradation for all citizens, what factors should be considered by a federal permitting authority, as well as state or local agencies with delegated permitting responsibilities, in the decision-making process prior to allowing a new pollution-generating facility to operate in a minority and/or low-income community that may already have a number of such facilities?

To address this question, NEJAC has scheduled a three-day public meeting of industry, government (federal, Tribal, State, and local), academic, and community stakeholders to explore whether and how the issue of environmental justice could be integrated into the permitting process. The discussion is a prelude to a comprehensive report addressing stakeholder perspectives on this significant issue as well as recommendations for Agency review.

This report summarizes interviews with a representative sampling of stakeholders scheduled to participate in the upcoming public meeting. By interviewing a diverse group of stakeholders in advance, the Office of Environmental Justice intends to lay the groundwork for a focused and productive policy dialogue, make efficient use of the time and talents of participating stakeholders, and ensure that any advice and recommendations for Agency action reflect careful attention to the concerns of all affected parties. This report, therefore, aims to capture the views and voices of the stakeholders in their own words, identifying both potential areas of agreement as well as fundamental differences in perspective.

## METHODOLOGY

Twenty (20) stakeholders were interviewed for this report: eight (8) representing EPA programs, three (3) representing industrial interests, three (3) representing academia, three (3) representing State or local governments, two (2) representing community organizations, and one (1) representing a Native American Tribe. A list of the stakeholders and their organizational affiliations is attached as Attachment 1.

Each stakeholder was asked a series of questions (Attachment 2). In addition, the stakeholders were invited to deviate from the questions to discuss issues, concerns, or insights triggered by the questions and also to suggest other appropriate areas of inquiry.

This methodology has both inherent strengths and weaknesses. The relatively small sample size made it possible to conduct in-depth interviews, focusing not just on stakeholder opinions, but also on the reasoning behind those opinions. On the other hand, the small number of stakeholders and their relative distribution (EPA vs. non-EPA representatives) precludes any quantitative analysis of the results. This report, therefore, presents the results of these interviews principally in terms of their content, adding only the most obvious quantitative references (e.g., where "all," "many," "most," or "several" stakeholders expressed a particular view).

## RESULTS

### **1. The importance of environmental justice in permitting.**

All stakeholders agreed that EPA needs to address the issue of incorporating environmental justice considerations into the permitting process and decisions. They differed only in the strength with which they held these views. Even the mildest response acknowledged that *“we need to work out the role of environmental justice in the permitting process.”* Most stakeholders ranked the issue as *“important”* to *“extremely important.”*

Several stakeholders stressed that permitting is only one of several contexts in which government agencies need to respond to environmental justice concerns. As one put it, *“Environmental justice is much more than permitting.”*

*Doing a good job on the front end makes permitting go much better.” This State stakeholder stressed the need to incorporate environmental justice concerns into agency policies, programs, standards, and enforcement procedures as well as permits. An industry stakeholder, citing numerous types of government decisions with environmental justice impacts, echoed the sentiment, “Permitting has a role, but it's not a one-stop answer to environmental justice.... We don't want the permit program to be viewed as the sole fix to 200 years of social ills.”*

On the other hand, stakeholders seemed to acknowledge the importance of placing a high priority on tackling permit concerns immediately. One stakeholder emphasized the confusion, confrontation, and delay that will occur until EPA resolves how to handle environmental justice in permitting. Another emphasized the opportunity to avoid end-of-process Title VI and community complaints. Another concluded, *“Permitting is forward-looking.”* A third noted permitting is a *“promising place to address the problem.... Permits respond to local conditions as compared to a one-size-fits-all national approach.”* One summarized community perspectives, stating that: *“Permitting is the gateway for emissions and the first in a series of possible events that could lead to noncompliance and contamination. Minimum standards are supposed to ensure safety (or so people assume), but in the end, it is the host community that bears the risk. Standards, policies, programs are important, but communities often don't have the resources to participate at that level. So for them, permitting is the key.”*

While acknowledging the need to address environmental justice, stakeholders candidly shared their uncertainty about how to proceed. As one put it, *“This is not something we have thought about until recently.”* Another observed, *“EPA and States are still on a learning curve about how to handle environmental justice issues.”* Still another, raising similar questions, recognized that addressing the issue could *“potentially represent a sea change in the way we do permitting.”*

This dichotomy between a clear goal and an uncertain implementation mechanism frustrates Agency officials. On the one hand, EPA, State, and local government stakeholders expressed a sincere desire to address environmental justice. Typical comments included the following: *“We are committed to look at [environmental justice in permitting] and seek opportunities for meaningful progress;” “We want to make sure all communities are involved, including environmental justice communities, ... and our decisions occur in as open a*

*process as possible;" and "We can't do a proper permit without looking at those [environmental justice] concerns."*

On the other hand, despite their intentions, Agency officials admitted they can show little practical real world impact to environmental justice communities. An EPA official confessed, *"There is a real bafflement on the part of states and EPA as to how to take environmental justice into account. We don't have the statutory authority, expertise, or tools. We pass around stories and articles and realize we have to do more, but we're not sure what."* A State stakeholder explained: *"Permit writers lack an objective standard or protocol to accept or reject a project. There is no federal definition of disparate impact, so we feel open to suit."* This stakeholder urged EPA to provide the leadership: *"We are looking to EPA for the tools on how to do this."* An EPA official, in turn, said *"Good question ... this is the guidance we want to get from NEJAC."*

## **2. NEJAC as a forum for addressing this issue.**

One key question interviews sought to determine was: Is NEJAC the appropriate forum for initiating a dialogue on this issue? While a few stakeholders demurred on this question (due to lack of direct working experience with NEJAC), all of the stakeholders familiar with NEJAC agreed that NEJAC is, or could be, an appropriate forum for this exercise. Within this overall umbrella of approval, however, stakeholder perception of NEJAC varied, as outlined below.

NEJAC won very high marks from many stakeholders representing community organizations, state and local government, and academia. One stakeholder explained: *"NEJAC is one of the few bureaucratic institutions where community organizations feel they can come and speak openly."* A community representative echoed the sentiment, *"No one else is even trying"* to address these issues. Another stated, *"NEJAC has been very important in lifting up questions about environmental and economic justice."* Academic stakeholders also praised the Council, *"NEJAC can be a very useful forum. It provides the Agency with a place to have interested stakeholders ventilate their concerns. The Agency has used it historically as a good source of information."* Another added, *"They are as good as any forum -- as good as we have.... They do a good job within the limits they have."*

By contrast, NEJAC earned more measured acceptance and respect from industry stakeholders. (E.g., *"I don't see why they wouldn't be a good forum [to address this issue]. The alternatives are not obviously superior."*)

Within EPA itself, reaction to NEJAC was considerably more mixed. Some Agency officials rated the Council quite highly. One described NEJAC as *"the most knowledgeable about environmental justice issues and concerns."* Several answered simply, *"I can't think of any group who would be better at bringing the right folks together. If not NEJAC, then who?"* Others had had little contact with NEJAC or expressed confusion about how to utilize NEJAC output in program decision-making. E.g., *"NEJAC is a good forum to bounce ideas off, get input from, and share ideas and learning with, but ... one downside of NEJAC is that its various committees are not taking an integrated look at overlapping committee issues. So it is hard to figure out their hierarchy of objectives given limited resources -- in other words, how to make it all fit together at the end of the day. But NEJAC can give valuable feedback on this."* Several flatly stated that NEJAC did not sufficiently reflect pressure from industry, Congress, and the states to make meaningful recommendations for Agency action. (E.g., *"The question is broader than NEJAC"*).

Roughly half of the stakeholders cautioned that, even if NEJAC addresses this issue, there is a need to look beyond NEJAC to a broader group of stakeholders. For some, this represents an effort to achieve a missing balance. (A government stakeholder observed, *"There is a perception that NEJAC is very EJ-friendly."* Indeed, several industry stakeholders suggested more business and local government consultation. By contrast, a community representative strongly argued that more industry and State representation in NEJAC would unbalance the Council, making it resemble other Federal advisory committees which offer communities token representation diluted by the sheer number of other participants.) For others, though, going beyond NEJAC is simply a way to win broad acceptance of any NEJAC recommendations. Several stakeholders stated that it is important to look more broadly even within EPA itself; e.g., *"All departments and programs within the Agency should be discussing [this issue]."*

Finally, one stakeholder commented that the choice of forum was unimportant. *"It can be any forum as long as EPA listens."*

### **3. The overall goal of environmental permitting.**

Stakeholders differed in their view of the appropriate overall Agency goal in permitting. When asked whether the permit agency should address pre-existing conditions with potential health or environmental impacts in permitting, community stakeholders reply simply and emphatically "Yes!" They cited communities where *"shelter in place"* alarms are a regular feature of community life. (*"Shelter in place"* refers to governmental strategies which seek to minimize human exposure to high air pollutant episodes by recommending residents go inside whenever an alarm whistle is sounded.) To community stakeholders, this signified that *"the system is broken.... There is no study which proves that "shelter in place" works, that [ordinary residential] structures adequately protect people...."* They stressed the need for meaningful planning and siting so that the number of people adversely affected in a worst-case pollution scenario is minimized or eliminated.

The Tribal, State, local government, and academic stakeholders agreed that permit agencies should address pre-existing conditions. One emphasized these factors *"may be more important than sporadic permit issues."* Another added that such considerations *"should not be an afterthought, but should be raised early in the process and used as a guideline for determining whether any [siting] action should be taken at all."* A third concluded, *"A responsible agency looking out for the community's interests should relatively level the playing field."*

Collectively, these stakeholders offered a variety of recommendations for addressing pre-existing conditions. They suggested that, where facilities are sited in or near residential areas, permitting agencies:

- (1) Assess community vulnerability. Typical comments included: *"We need to have a good sense of the existing baseline;" "There ought to be an inventory of pre-existing adverse conditions which shows that [some communities] experience a substantially inferior environment;" "Where you have a vulnerable population (for example, where the incidence of asthma is high), a responsible agency official should be circumspect about permitting another air emitter."*
- (2) Identify and weigh cumulative risks, including those associated with a worst-case spill or incident. (Admittedly, quantifying the degree of risk would require better research on both the effects of pollutants and synergism among pollutants.)
- (3) Consider future as well as existing projects. One stakeholder called for *"a future allocation mechanism"* to ensure that the first applicant doesn't absorb all of a neighborhood's potential for growth (e.g., traffic capacity).

- (4) Require applicants for new or modified permits to ask: What modifications are necessary to address environmental justice impacts or cumulative risks?
- (5) Gather and assess economic and demographic data in permitting to ensure that adverse uses don't get disproportionately located among minorities and poor people.
- (6) Establish a budget for addressing pre-existing conditions. One stakeholder warned: *"Any attempt to deal with pre-existing conditions has to be accompanied by a budget."*

Industry stakeholders approached this environmental justice goal more cautiously. They acknowledged *"agencies have to deal with cumulative risk in some fashion,"* but stressed the need for *"legal authority," "clear criteria for injustice," "enough information on emissions and health effects to make clear calls," "[and avoiding having] the system bog down."* They questioned whether *"agencies have the resources to have permit writers become fully conversant with these issues"* and emphasized that different perceptions on the issues may exist even within the local community, further complicating review.

Nonetheless, industrial stakeholders shared with other stakeholders a willingness to explore approaches to environmental justice in permitting. While not endorsing any particular solution, industry stakeholders raised the following possibilities:

- (1) Permit agencies can examine, document, and help raise awareness of pre-existing conditions.
- (2) There could be further public scrutiny of zoning and land use planning for environmental justice impacts.
- (3) Agencies could publicize more information on what factors contribute to successful brownfields projects.
- (4) Rather than subject all permits -- even minor permits -- to full-blown cumulative impact analysis, agencies could screen permits to determine which merit fuller scrutiny because of the size of the source, toxicity of the emissions, or degree of public interest in the outcome.
- (5) Corporate policies on siting and acquisition could be changed so that environmental personnel are integrated into decision-making earlier in the process, before companies are so heavily invested in a particular site. (Under current practice, siting is primarily market-driven. Only after a lengthy analysis of non-environmental factors, such as access to supplies and transportation corridors, growth

potential, etc., does a company look at the community, its environment and quality of life.)

- (6) Where high risks exist due to prior land use planning errors, successful relocation efforts and voluntary buy-outs could be examined. In the Netherlands, for example, when cumulative risk analysis indicated that community exposure crossed a specified threshold, the government devised a 5-10 year community relocation plan. Voluntary buy-outs to expand buffer zones around industrial facilities have also occurred in the United States.

In general, EPA stakeholders agreed with the goal of addressing cumulative environmental impacts in permitting (assuming legal authority to do so). Some, however, expressed interest in limiting such analysis to major permits, "cancer alleys," or "hot spots," while others appeared to embrace it for a broader universe of permits. Several recommended greater attention to the environmental impacts of zoning and planning decisions, and other stakeholders concurred.

#### **4. The focus of current permitting.**

The stakeholders shared differing views as to what now transpires in the permit process. Industry stakeholders saw the current process as largely centered on technical issues of compliance with federal and state discharge regulations. Government stakeholders saw themselves addressing a somewhat broader set of issues -- still largely centered on compliance with technology requirements, but also encompassing public participation, protection of health and the environment, interagency coordination, enforcement, and state oversight. In marked contrast, Tribal and community stakeholders saw the process as exceedingly narrow, ignoring treaty rights and community views -- indeed, driven toward a distinctly (from their view) biased result. One cited situations where facility construction is underway while the permit application is purportedly still being considered: *"Companies wouldn't invest this money if they didn't feel they could get their permit."* Another put it: *"The process proceeds with an eye toward nothing but technical compliance with numbers and, if there is not compliance, then how can we help the facility get its permit?"* At least one EPA stakeholder appeared to agree: *"If the objective [of the community] is to stop the permit altogether, ... it is hard for EPA to share that goal. Our goal is to make sure these sources have permits, unless they don't comply [with applicable regulations]."*

All stakeholders, however, agreed that, absent a stronger or more comprehensive state statute, the current process does not address the type of environmental justice concerns being raised by Tribal and community organizations. One EPA official summarized, *"There is not a wit given to environmental justice issues [in permitting]."*

Even where states look at cumulative impacts (for example, under a state NEPA-type statute), the analysis tends to be cursory in comparison to the issues raised by environmental justice groups. As one stakeholder put it, *"We are better at looking at project-specific impacts than we are at looking at the cumulative impacts of related projects. Even when we try to do so, we fall short.... We tend to jump directly to mitigation. With environmental justice especially, we need to go back to how to avoid impacts, then how to minimize them, and then mitigation. There is a hierarchy there.... We also need to ask what are the real objectives of the project? What alternatives are we required to consider under the law? We seldom look at how these are written. But if they are not broad, then we don't look at issues of alternatives."*

## **5. The limitations of the current permit program,**

The most frequently cited problems with the current permit program were: (1) the failure to consider environmental justice or cumulative impacts; (2) the absence of clear authority (either from explicit statutory language or official Agency legal interpretation) to address environmental justice in permitting; and (3) the lack of adequate public participation.

Other problems stakeholders mentioned included fundamental weaknesses in the level of protection provided by the underlying regulatory standards and failure to obtain pre-decisional input from Native American Tribes. One stakeholder also questioned whether existing sources, less subject to intense scrutiny in permit proceedings, weren't often more of a problem than the more thoroughly reviewed new sources.

## **6. Stakeholder involvement in the permit program.**

While all stakeholders agreed on the importance of community involvement in permitting, EPA stakeholders tended to differ from others over the adequacy of current public participation.

Non-Agency stakeholders agreed that the current program does not adequately include community input. Industry stakeholders ranked the process *"not a good job"* to *"terrible."* They criticized: (1) the inadequate publicity (*"It's not in the local papers, what the community reads."*); (2) failure to address language barriers; (3) lack of efficiency in public meetings (*"They're time wasters; they lack focus."*); (4) heavy and unnecessary reliance on technical language; (5) poor outreach (*"The same old [stakeholder representatives] are always consulted"*); and (6) poor timing: *"The timing is all wrong. Thirty days at the end of the process makes no sense when the company and agency have been negotiating together for years. The agencies should move it up."* One noted that Agency staff suffer from the same syndrome as corporate personnel: *"It is a tough thing for plant managers to swallow when the little lady next door has the right answer."* This stakeholder also observed, *"Technical people are often unqualified to run public meetings. They often try to devise technical solutions to what are essentially relationship problems."*

When asked whether agencies now do a good job, a community stakeholder responded *"resoundingly no!"* This community representative faulted agencies for *"absolute reluctance and resistance ... to meet,"* and for not *"listening and incorporating stakeholder concerns. For example, they say 'we have an approach to deal with this problem without any input.... Take it or leave it'."* Another, noting that *"EPA has come a long way,"* stated, *"I want to be respectful of what has been done, but things could be moving a lot faster."* This stakeholder observed a tendency in some Regions to do *"just enough to get by."*

Tribes, too, felt uninvolved at meaningful stages of the process. Academic, State and local government stakeholders also identified public participation as an area in need of strengthening.

EPA stakeholders presented a different picture. While some confessed the Agency does a poor job of stimulating public involvement, most rank the Agency's performance as *"okay," "getting better,"* or varied depending upon the State or location. Several cited the *"many opportunities"* for public involvement, the *"clear open door,"* and the *"stakeholder-driven"* nature of the Agency. Several stakeholders, however, noted with concern a growing tension between demands upon EPA from Congress and other stakeholders to streamline the

permit process, on the one hand, and conflicting pressure to slow down to include more public participation.

Regardless of how they viewed the current process, stakeholders identified similar criteria for determining whether the public participation process is working:

- Public knowledge of pending permit decisions would be more widespread. (*"It would be a long time since you heard the complaint that I didn't know [about this proceeding] and they wouldn't listen to me."*)
- *"The community would be showing up at meetings."*
- The public would be *"informed enough to participate effectively."*
- Proceedings would be characterized by *"meaningful dialogue"* on community issues. Communities would suggest operating conditions and other adjustments in facility operations.
- *"Permits [would] more regularly respond to individual community needs."*
- *"Ongoing, continuing communications"* would occur between stakeholders, perhaps even after permit issuance.
- There would be greater indicators of community satisfaction with the process (E.g., *"People would feel heard and heard early in the process."* One stakeholder suggested EPA survey for such indicators, *"You could ask stakeholders after-the-fact, 'Did you have the information you needed?'"* EPA could then examine responses to outline a successful model.)
- There would be greater satisfaction among EPA's own Regional Environmental Justice Coordinators.
- Permit writers also would feel satisfied. They would *"be able to look at all affected populations and feel comfortable that they understood and had input."*
- *"See what happens to the pollution loading. Is it coming down? Is there real world progress or just messing around with public participation?"*

A community stakeholder had specific recommendations for achieving better participation: a commitment to public participation at the Regional Administrator level in all regions, in-depth training of Agency personnel at all levels, and additional resources for communities to do their own training and to acquire technical assistance (legal, scientific, medical, etc.). This stakeholder

commented, *"You can't talk about equality when you have one side with resources and the other with none. The Agency has to be prepared to assist in balancing the equality."*

## **7. Facilitating stakeholder cooperation.**

While stakeholders acknowledged that the current permit process can be adversarial -- at times needlessly so, they generally rejected casting the solution as a search for a more cooperative permitting model. A community stakeholder stated flatly, *"It's not a matter of finding a more cooperative mechanism... The struggle comes in because the community feels that it is not being treated properly."* A government stakeholder explained: *"The amount of conflict should not be a criterion. Conflict could be a sign of a healthy process."* An industry representative amplified: *"The issue is not cooperation. People need a platform to be heard. They need to have their questions and concerns addressed. If that happens, people can accept a technical answer better. They will still disagree, but not violently."* As one industry stakeholder explained, the issue of cooperation is really one of finding better ways to facilitate communication: *"We need better communication. That will lead to cooperation."*

In general, most EPA stakeholders tended to view facilitated Alternative Dispute Resolution (ADR) as potentially helpful in certain high controversy permit proceedings -- if done effectively, and therefore worthy of further exploration. However, other stakeholders warned against too eager or sweeping an embrace of ADR.

For example, industry stakeholders viewed the utility of ADR as dependent, to a great extent, on the problem-solving, communication, and persuasion skills of the facilitator: *"It could help. It depends on who's doing it. Ideally, you want the lines of communication to include some sense of what the community wants."* Another echoed: *"Some people are terrible at it. Problem-solving requires certain skills; you have to have them."* An academic stakeholder agreed: *"This is an area that is ripe for ADR ... [but also] a challenging area for ADR. If the ADR people tend to look and act condescending to the environmental justice representatives, trust evaporates immediately."*

Academic stakeholders warned that ADR can *"be troubling as a response [in view of] power disparities [between the facility and the community];"* they suggested *"ADR has no real integrity until you equalize the playing field,"* but

admitted it is difficult to craft appropriate *"safeguards."* A Tribal representative also cautioned that, while ADR *"used properly is an effective tool,"* used improperly it can be *"a tool to coerce based on a 'panel of experts' opinions'."*

A community stakeholder described ADR as *"nothing more than process ... trying to get to yes when they never considered why the community would say no.... The issue is not properly framed.... It's not a matter of finding a more cooperative mechanism.... Antagonism exists now because the agency and the facility are unwilling to consider significant changes and the 'no project' option."* Another cautioned, *"ADR may hinder.... It depends on the situation and the process the parties went through - whether they will trust [ADR]."*

Indeed, lack of trust appeared as a serious obstacle to further use of ADR. An industry representative summarized: *"Corporations are nervous about giving away too much. Attorneys don't like unless they're doing it. Communities either fear giving away too much or else they're not comfortable. If the ADR person is paid by the company or the government, communities assume he or she will hold their [paying] views in higher regard."*

But trust is not the only obstacle. ADR also requires resources and time. An industry spokesman explained: *"Going public takes more time which is often inconsistent with business needs. To speed up [public involvement], you have to start early and have an infrastructure to support it."* A government stakeholder also warned: *"ADR is a lengthy process and it doesn't necessarily resolve the dispute."*

Several stakeholders cautioned that success with ADR requires more definition of the underlying ground rules of the transaction. One explained: *"ADR begs the question. It's like asking an arbitrator to resolve a claim without providing the information that may lead to an agreement. It may be a good safety valve, ... [but] the real concern is that the rules of the road are unclear."* Another agreed: *"The parties start from different premises without settled law. Everyone is afraid to negotiate anything away, especially at the beginning."* A third echoed the need for EPA leadership: *"EPA needs to decide the parameters of the box.... EPA can set people up to fail if they don't set forth ... the ground rules and time constraints. If they just say, 'Let's all get together and solve the problem' without any consequences, people come together but there is no reason to come to agreement."* One stakeholder concluded that agencies need to know what they are doing when they embrace ADR or other facilitation techniques so

as not to frustrate environmental justice communities anew: *"When you promise a new solution, you can breed further unhappiness if you don't solve the problem."*

## **8. Expanding the horizons of current permitting.**

Three (3) recommendations for improving the current permit process emerged continually in these interviews. The first relates to expanded public involvement. As one stakeholder put it, *"People feel not welcomed or taken seriously. Everyone agrees we ought to fix that."* The second relates to consideration of cumulative impacts. The third involves clarifying the permit writer's obligations. All three (3) are discussed below.

### a. Expanded public involvement.

Stakeholders frequently recommended improvements in: (1) timing of public involvement; (2) agency and company responsiveness to communities; and (3) conduct of public meetings.

Typical comments from industry stakeholders on the timing of public comment included the following:

- *"Often the largest challenge is creating a credible public dialogue. The earlier this occurs, the better the public is served. The later it happens, the more the public feels left out, that the deal is done."*
- *"The current system requires public input, but only late in the process. This tends to create an adversarial environment rather than an open public dialogue because of the lateness. It leaves the public feeling that its vote didn't count, that they weren't heard -- and it's true to some extent."*
- *"There is ample room for creative expansion of notice (TV, bulletin boards, etc.) This is not rocket science. It's deciding it's worth it."*

Community stakeholders agreed. One stated: *"Permittees talk to the agency on a daily basis for years before the first public hearing. It's only human nature; [the agency staff] don't want to hear what's wrong with a permit they have spent two years writing. They should have a hearing on the day of the application and give everyone whatever information they have."*

Industry stakeholders also recommended that companies listen more effectively to communities. One stated: *"Companies should make a commitment to respond in writing with a report to each question and a copy to anyone who wants one. They can supply an interim report if they don't have answers to all the questions right then."* This echoed community sentiments that agencies and companies give mere *"lip service"* to their comments.

Finally, industry and community stakeholders recommended that EPA improve the quality of public meetings. An industry representative stated, *"EPA is terrible at running public meetings. Their very nature tends to create an adversary environment. There is technology in mediating and facilitating a public forum, but the agency hasn't embraced it."* A community representative agreed: *"Usually, it's one A.M. before[permit] opponents have a chance to testify."*

b. Identification of cumulative impacts.

All stakeholders agreed that environmental agencies -- whether through permitting, regulation, or cooperation with land use agencies -- need to address cumulative impacts in some fashion. Permit writers, in particular, decry the lack of tools and guidance on how to accomplish this task.

c. Clarifying the permit writer's obligations.

Stakeholders agreed that there is also a need to define more clearly what the permit writer should do when confronted with disparate treatment. Government stakeholders frequently cited their lack of authority to reject projects on environmental justice grounds. Community stakeholders, by contrast, claimed that Agency staff have not been asked to respond creatively to Office of General Counsel guidance identifying existing statutory authority. An industry stakeholder summarized, *"On the substance, there is real intellectual bankruptcy. What are the rules of the road? What does the Executive Order forbid? What is the basis of a Title VI complaint? What is the right thing to do? Companies fear that projects will be abandoned or delayed without reason and that others will go forward where they shouldn't.... There is no coherent understanding of what we're trying to do."* Taken together, these comments suggest the need for additional legal guidance -- presumably from the Office of General Counsel -- in this area.

## 9. Opportunities for mutual stakeholder gain.

Industry stakeholders were optimistic about the possibility of identifying opportunities for mutual stakeholder gain. One stated: *"There are lots of win-win opportunities. You can get people talking, get companies to be better corporate neighbors, enhance community involvement."* Examples of opportunities these stakeholders envision included: *"certainty that a company can get a permit and operate within it,"* avoiding *"after-the-fact Title VI complaints which drive companies crazy [by] upfront discussions to surface and resolve problems,"* *"making companies pay more attention to communities,"* and identifying *"opportunities for emission offsets [that reflect] the community's understanding of the emission sources [most strongly] impacting their lives."* Industry also saw unexplored benefits for communities: *"The continued operation of a well-run facility brings employment and secondary benefits from jobs. Facilities attract support services and other facilities."* In addition, *"facilities can do things for communities that the city may not do ... such as addressing suppliers' driving habits."*

Industry stakeholders cautioned, however, that consensus is possible only up to a point. As one stated: *"You can't control what people want. It goes back to expectations. Neighborhood control over who can operate there is not realistic, but better outreach, process, safety, housekeeping is all doable."* Another clarified that impasse-type situations comprise only a small percentage of permit applications: *"The [current] process is not broken, though it might not be adequate. But it is broken on the highly controversial issues. Where a company does a sneak attack with the application, that's when people get frustrated. Ninety-nine of one hundred permits happen without contest. A whole lot of permits involve only minor modifications of a facility. The controversy centers around siting ... or where a facility has already ticked off the community. But these are the exceptions rather than the rule."*

Community stakeholders also sensed some opportunities for mutual gain. One stated: *"We want industries that want to be good neighbors.... From a proactive side, it is worth it to spend time on what we want it to be like - envisioning our communities."* Another added: *"The process could be revamped to take multiple, cumulative, synergistic impacts into account. We could also create buffer zones. The agency has the authority to be more protective than it is now.... We could change ways of thinking in industry and the agencies. Industry could see profits go up with cleaner facilities. Agencies could say 'do we have discretionary authority to address this problem,' [rather than] 'show me a direct mandate'."*

These stakeholders' optimism, too, was edged with realism. *"It's not that toxic facilities will go elsewhere, but we can find a way to produce products without sacrifice to health and the environment. The ultimate goal is sustainable development, not dead-end, extractable, exploitative development."* A Tribal stakeholder cautioned, *"When you balance the economy versus the ecology, this has to be done in small steps, carefully thought through, with the involvement of the entire community. You need input early, upfront, and as a guideline for the eventual decision."*

## **10. Community monitoring of compliance.**

Stakeholders differed markedly in their initial responses to questions about community monitoring of facility compliance, though the differences may have had more to do with whether their response was focused on ensuring technical compliance or enhancing program credibility.

Community, Tribal, state, local government, and academic stakeholders, for the most part, enthusiastically endorsed community monitoring of facility compliance. They cited a variety of obvious, as well as innovative, ways to accomplish this objective, including:

- a. bucket brigades in which citizens learn how to collect and send samples to EPA-approved labs (used as the basis for at least one successful enforcement action in Region IX),
- b. requiring companies with continuous emission monitoring to have digital printouts on stacks reporting their emission limits,
- c. Community Advisory Committees,
- d. monitoring and enforcement by other governmental entities (e.g., Tribes and local governments),
- e. use of qualified consultants,
- f. community-facility good neighbor agreements, and
- g. daily posting of compliance data on the web.

A community representative pointed out that *"the Agency can't be everywhere"* and that citizen monitoring *"from the front porch"* can be maintained over longer time intervals than temporary Agency monitors. This stakeholder also observed that many community groups distrusted Agency enforcement personnel as *"dismissive"* of their concerns and suspected that *"it's a rare instance where monitoring doesn't show a violation."*

Industry stakeholders were willing to entertain proposals for community monitoring, but expressed caution about issues such as inadequate data quality, errors in data transmission, collection of data which is unwanted and unused, and the risk of citizen suits. Nonetheless, industry stakeholders accepted the fact that compliance data will be made public.

Industry stakeholders also recognized that the issue of community monitoring of compliance is intertwined with the notion of trust. As one stakeholder put it, "*Communities don't want to run the company. They want to be listened to and have their questions answered. If you establish a trust relationship, the community will rely on you to do the job. If you don't, you can't possibly supply enough data.*" This may explain why industry stakeholders were not adverse to exploring ways to enhance community trust in compliance data -- for example, sending a community representative into a facility to read monitoring dials or requiring companies to respond to community questions about compliance.

EPA stakeholders as a group expressed the greatest skepticism to community compliance monitoring. One stated "*Community policing is best left to the regulatory agency.*" Others "*doubt[ed] its effectiveness,*" questioned the expense and practicality, cited the difficulties in training citizens, saw themselves as already addressing the need (by requiring companies to submit annual reports to the community), or saw additional requirements as unnecessary because citizens are already using monitoring data to file enforcement suits or urge EPA to step up enforcement.

It is not clear, however, that EPA stakeholders would differ so substantially from other stakeholders if the goal were enhanced facility-governmental-community relations as opposed to mere technical compliance with regulatory standards. Most EPA stakeholders were not familiar with situations in which community monitoring had either assisted the agency or increased public acceptance of the regulatory program. If community monitoring proposals were tailored to accomplish these ends, they might have garnered more support from EPA. As one EPA official put it, "*if it would reduce suspicion,*" then community monitoring would be helpful.

## **11. Additional issues.**

Most stakeholders expressed satisfaction with the scope of the interview questions. Several suggested additional areas of inquiry, including but not limited to the following:

- a. How to promote agency awareness of, and response to, the Office of General Counsel's identification of EJ opportunities under existing statutes and how to get permit writers to begin utilizing these opportunities.
- b. How to address environmental justice in *"all of the program decisions that stack the deck by the time you get to permitting ... (i.e., program design, policy formation)."*
- c. How to start looking at not just the permit process, but the *"implementation level of permitting ... what's happening day to day... go further into the nuts and bolts. This could raise a plethora of issues."*
- d. How to address cross-agency coordination, engaging other federal agencies (e.g., HUD), state agencies and local health departments in addressing environmental justice (including funding states).
- e. How to develop a national policy to ensure State consistency in addressing disparate impacts, in order to avoid industrial forum shopping for lax regulatory jurisdictions.
- f. How to distinguish between competing objectives, defining not only a vision of success, but also priorities and intermediate steps for achieving the vision.
- g. How to determine which sources pose the biggest risks for environmental justice communities (i.e. permits for new sources or small, existing, mobile, or other sources) in order to target agency resources and maximize risk reduction.
- h. How better to incorporate input from Tribes, which occupy a unique status as sovereign stakeholders and which differ from each other in terms of religion, culture, and ways of living.
- i. How to address the need for jobs -- and good ones -- in environmental justice communities. E.g., *"The number one factor in life expectancy/longevity is poverty. Poverty doesn't get factored in well."*

## CONCLUSION

The stakeholders surveyed here shared many common concerns -- and fundamental disagreements -- over where and how to address environmental justice concerns regarding permitting. Nonetheless, the degree of accord suggests that there are promising opportunities for consensus on recommendations which enhance the capacity of the current permit process to respond to stakeholders' needs regarding environmental justice.

Accord was greatest on issues related to better public outreach, expanded community participation in decision-making, greater assurances of industry compliance, and greater attention to cumulative risks. Stakeholders differed more sharply over a community's right to prevent siting of a facility which otherwise complies with applicable regulatory standards. However, stakeholders acknowledged that these situations represent a small percentage of permit applications and can frequently be avoided by changed industry and government behavior (such as early involvement of environmental personnel in internal corporate decision-making and community representatives in government decision-making.) For the bulk of permit decisions, the stakeholders surveyed here have laid the foundation for an ample set of recommendations for EPA review.

## Attachment 1 List of Interviewed Stakeholders

### **EPA:**

Tim Fields  
Assistant Administrator  
Office of Solid Waste and Emergency Response  
(OSWER)

Rob Brenner  
Acting Deputy Assistant Administrator  
Office of Air and Radiation (OAR)

Vernon Myers  
Environmental Scientist  
Office of Solid Waste and Emergency Response  
(OSWER)

Freya Margand  
Environmental Protection Specialist  
Office of Solid Waste and Emergency Response  
(OSWER)

Anna Wood  
Regulatory Impact Analyst  
Office of Air and Radiation (OAR)

Bob Kellam  
Associate Director  
Information Transfer and Program Integration  
Division  
Office of Air and Radiation (OAR)

Rosanna Hoffman  
Attorney Advisor  
Office of Water

Tom Voltaggio  
Region III Deputy Regional Administrator

### **Tribal/State/Local Government:**

Stuart Harris  
Cultural Resources Coordinator  
for the Special Science and Resources Program  
Confederated Tribes of the Umatilla Indian  
Reservation

Robert Varney  
Commissioner  
New Hampshire Department of Environment

Andrea Kreiner  
Manager, Business and Permitting Services Office

Delaware Department of Natural Resources &  
Environmental Control

Lillian Kawasaki  
General Manager  
City of Los Angeles Department of Environmental  
Affairs

Russell Harding (could not be interviewed due to  
scheduling conflicts)  
Director  
Michigan Department of Environmental Quality

### **Industry:**

Pat Hill  
Senior Manager  
Georgia Pacific

Michael Steinberg  
Attorney at Law (Partner)  
Morgan, Lewis & Bockius

Jerry Martin  
Vice President & Global Director of EJ&S  
Regulatory Affairs  
Dow Chemical Company

### **Community:**

Richard Moore  
Director  
Southwest Network for Environmental and  
Economic Justice

Nathalie Walker  
Managing Attorney  
Earthjustice Legal Defense Fund

Deeohn Ferris (could not be interviewed due to  
scheduling conflicts)  
Owner  
Global Environmental Resources, Inc.

### **Academic:**

Richard Lazarus  
Professor  
Georgetown University Law Center

Yale Rabin  
Professor

Massachusetts Institute of Technology

Eileen Gauna  
Professor  
Southwestern Law School

## Attachment 2 Interview Questions

1. How important is the issue of incorporating environmental justice considerations in environmental permitting?
2. Is NEJAC the appropriate forum for initiating a dialogue on this policy question?
3. What are the most important factors, or categories of factors, that the permitting authority now considers when making a permitting decision?
4. What are the problems (both substantive and procedural) with the permitting process in terms of addressing environmental justice issues?
5. What types of factors, if any, should the permitting authority consider to help ensure environmental justice in permitting?
6. Should the permit authority address pre-existing potential health or environmental conditions in the affected community with respect to permit actions? If so, how (e.g., through cumulative impacts analysis, siting criteria, assessment of vulnerable or sensitive populations, or some other mechanism)?
7. (a) Is stakeholder involvement in the permitting process important to the development of good decision-making or important for other reasons (other than to satisfy legal requirements)?  
(b) Is the permitting process now doing a good job of involving the public at large, and environmental justice populations in particular, in permit decision-making?  
(c) What are the three things that EPA and/or the permitting authority does best to involve stakeholders in the permitting process and the three things they do least well?  
(d) Are there improvements you could suggest?  
(e) How would you assess whether the process is working well at involving stakeholders in a meaningful manner?
8. (a) Does the current permitting process encourage cooperative or adversarial relationships among stakeholders? Would a process that encourages cooperation be advantageous?  
(b) Would dispute resolution techniques help or hinder the permitting process?  
(c) What are the obstacles to use of dispute resolution?
9. (a) What are your most important needs from the permitting process?  
(b) Are there opportunities in the permit process for mutual community/industry gain?  
(c) What could be done to encourage such opportunities?
10. (a) Would permit terms and conditions providing for community monitoring of compliance be of use?

- (b) Are there instances where community monitoring has improved compliance or the relationship between the permitted facility and other stakeholders?
- 11. How should the Agency address quality of life issues and risk communication in the permit process?
- 12. Are there other questions NEJAC should be asking about this topic?  
Other suggestions you would like to make?

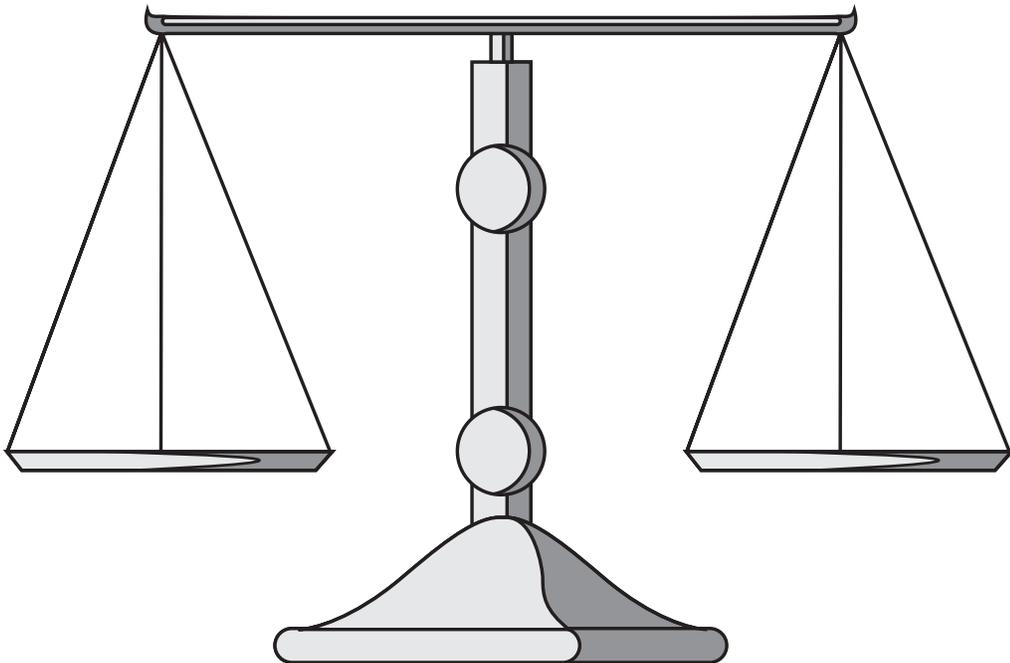
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Office of Environmental Justice (OEJ)



# Summary of the Meeting of the National Environmental Justice Advisory Council

**A FEDERAL ADVISORY COMMITTEE**



**EXECUTIVE SUMMARY**

Hilton Crystal City at National Airport  
Arlington, Virginia  
**November 30 through December 2, 1999**

## **PREFACE**

The National Environmental Justice Advisory Council (NEJAC) is a federal advisory committee that was established by charter on September 30, 1993, to provide independent advice, consultation, and recommendations to the Administrator of the U.S. Environmental Protection Agency (EPA) on matters related to environmental justice. The NEJAC is made up of 25 members, and one DFO, who serve on a parent council that has six subcommittees. Along with the NEJAC members who fill subcommittee posts, an additional 39 individuals serve on the various subcommittees. To date, NEJAC has held fourteen meetings in the following locations:

- Washington, D.C., May 20, 1994
- Albuquerque, New Mexico, August 3 through 5, 1994
- Herndon, Virginia, October 25 through 27, 1994
- Atlanta, Georgia, January 17 and 18, 1995
- Arlington, Virginia, July 25 and 26, 1995
- Washington, D.C., December 12 through 14, 1995
- Detroit, Michigan, May 29 through 31, 1996
- Baltimore, Maryland, December 10 through 12, 1996
- Wabeno, Wisconsin, May 13 through 15, 1997
- Durham, North Carolina, December 8 through 10, 1997
- Arlington, Virginia, February 23 through 24, 1998 (Special Business Meeting)
- Oakland, California, May 31 through June 2, 1998
- Baton Rouge, Louisiana, December 7 through 10, 1998
- Arlington, Virginia, November 30 through December 2, 1999

The NEJAC also has held other meetings which include:

- Public Dialogues on Urban Revitalization and Brownfields: Envisioning Healthy and Sustainable Communities held in Boston, Massachusetts; Philadelphia, Pennsylvania; Detroit, Michigan; Oakland, California; and Atlanta, Georgia in the Summer 1995
- Relocation Roundtable, Pensacola, Florida, May 2 through 4, 1996
- Environmental Justice Enforcement and Compliance Assurance Roundtable, San Antonio, Texas, October 17 through 19, 1996
- Environmental Justice Enforcement Roundtable, Durham, North Carolina, December 11 through 13, 1997
- International Roundtable on Environmental Justice on the U.S./Mexico Border, San Diego, California, August 19 through 21, 1999.

As a federal advisory committee, the NEJAC is bound by all requirements of the Federal Advisory Committee Act (FACA) of October 6, 1972. Those requirements include:

- Members must be selected and appointed by EPA
- Members must attend and participate fully in meetings of NEJAC
- Meetings must be open to the public, except as specified by the Administrator
- All meetings must be announced in the Federal Register
- Public participation must be allowed at all public meetings

- The public must be provided access to materials distributed during the meeting
- Meeting minutes must be kept and made available to the public
- A designated federal official (DFO) must be present at all meetings of the NEJAC (and its subcommittees)
- NEJAC must provide independent judgment that is not influenced by special interest groups

Each subcommittee, formed to deal with a specific topic and to facilitate the conduct of the business of NEJAC, has a DFO and is bound by the requirements of FACA. Subcommittees of the NEJAC meet independently of the full NEJAC and present their findings to the NEJAC for review. Subcommittees cannot make recommendations independently to EPA. In addition to the six subcommittees, the NEJAC has established a Protocol Committee, the members of which are the chair of NEJAC and the chairs of each subcommittee.

Members of the NEJAC are presented in the table on the following page. A list of the members of each of the six subcommittees are presented in the appropriate chapters of the report.

<b>NATIONAL ENVIRONMENTAL JUSTICE ADVISORY COUNCIL MEMBERS OF THE EXECUTIVE COUNCIL (1999)</b>	
<b>Designated Federal Official:</b> Mr. Charles Lee, Associate Director for Policy and Interagency Liason, EPA Office of Environmental Justice	<b>Chair:</b> Mr. Haywood Turrentine
<b>Members</b>	
Mr. Don Aragon Ms. Rose Marie Augustine Ms. Leslie Ann Beckoff Cormier Ms. Sue Briggum Mr. Dwayne Beavers Mr. Luke Cole Mr. Fernando Cuevas, Sr. Ms. Rosa Franklin Mr. Arnoldo Garcia Dr. Michel Gelobter Mr. Tom Goldtooth Ms. Jennifer Hill-Kelley	Ms. Annabelle Jaramillo Ms. Vernice Miller-Travis Mr. David Moore Dr. Marinelle Payton Mr. Gerald Prout Ms. Rosa Hilda Ramos Ms. Peggy Shepard Ms. Jane Stahl Mr. Gerald Torres Mr. Damon Whitehead Ms. Margaret Williams Mr. Tseming Yang

EPA's Office of Environmental Justice (OEJ) maintains transcripts, summary reports, and other material distributed during the meetings. Those documents are available to the public upon request.

Comments or questions can be directed to OEJ through the Internet. OEJ's Internet E-mail address is:

***environmental-justice-epa@.epa.gov***

Executive Summaries of the reports of the NEJAC meetings are available in English and Spanish on the Internet at the NEJAC's World Wide Web home page:

***<http://www.epa.gov/oeca/main/ejnejac/index.html>*** > (click on the publications icon)

## EXECUTIVE SUMMARY

### INTRODUCTION

Exhibit ES-1

This executive summary provides highlights of the fourteenth meeting of the National Environmental Justice Advisory Council (NEJAC), held November 30 through December 2, 1999 at the Hilton Crystal City at National Airport in Arlington, Virginia. Each of the six subcommittees met for a full day on December 1, 1999. The NEJAC hosted on November 30 a public comment period which focused on issues related to environmental justice and the issuance of environmental permits. The NEJAC also hosted on December 1 a second public comment period for general environmental justice issues. Approximately 400 persons attended the meetings and the public comment periods.

The NEJAC is a federal advisory committee that was established by charter on September 30, 1993 to provide independent advice, consultation, and recommendations to the Administrator of the U.S. Environmental Protection Agency (EPA) on matters related to environmental justice. Mr. Haywood Turrentine, Laborers' District Council Education and Training Trust Fund (an affiliate of the Laborers' International Union of North America), serves as the chair of the Executive Council. Mr. Charles Lee, Associate Director for Policy and Interagency Liaison, EPA Office of Environmental Justice (OEJ), serves as the Designated Federal Official (DFO) for the Executive Council. Exhibit ES-1 lists the chair and DFO of the executive council, as well as the persons who chair the six subcommittees of the NEJAC and the EPA staff appointed to serve as the DFOs for the subcommittees.

OEJ maintains transcripts and summary reports of the proceedings of the NEJAC meetings. Those documents are available to the public upon request. The public also has access to the executive summaries of reports of previous meetings, as well as other publications of the NEJAC, through the World Wide Web at <http://www.epa.gov/oeca/main/ej/nejac/index.html> (click on the publications icon). The summaries are available in both English- and Spanish-language versions.

#### NATIONAL ENVIRONMENTAL JUSTICE ADVISORY COUNCIL CHAIRS AND DESIGNATED FEDERAL OFFICIALS (DFO)

##### Executive Council:

Mr. Haywood Turrentine, **Chair**  
Mr. Charles Lee, **DFO**

##### Air and Water Subcommittee:

Dr. Michel Gelobter, **Chair**  
Ms. Alice Walker, **co-DFO**  
Dr. Wil Wilson, **co-DFO**

##### Enforcement Subcommittee:

Mr. Luke Cole, **Chair**  
Ms. Shirley Pate, **DFO**

##### Health and Research Subcommittee:

Dr. Marinelle Payton, **Chair**  
Mr. Lawrence Martin, **co-DFO**  
Mr. Chen Wen, **co-DFO**

##### Indigenous Peoples Subcommittee:

Mr. Tom Goldtooth, **Chair**  
Mr. Daniel Gogal, **Acting DFO**  
Mr. Anthony Hanson, **Alternate DFO**

##### International Subcommittee:

Mr. Arnoldo Garcia, **Chair**  
Ms. Wendy Graham, **DFO**

##### Waste and Facility Siting Subcommittee:

Ms. Vernice Miller-Travis, **Chair**  
Mr. Kent Benjamin, **DFO**

### REMARKS

Ms. Carol Browner, Administrator, EPA, extended her appreciation to representatives of EPA and members of the NEJAC who have been working on addressing issues related to environmental justice at the agency. She stated that addressing environmental justice is not an easy task and one that is not becoming easier to address as new evidence is identified that minority and low-income communities do bear a disproportionate "brunt of [the impacts of] our modern technological society." She emphasized the need for

the members of the NEJAC to stay focused on the topic of this meeting. Ms. Browner expressed her belief that when decision-makers truly engage a local community, up front and in an informed and meaningful manner, the quality of the decision that the agency or other regulatory entity is able to make is dramatically improved compared to a decision that is made without the engagement of the community. She continued by saying that the challenge that lays before EPA is how to involve a local community in an effective, open, honest, and informed manner.

Ms. Browner concluded her remarks by stating that the agency needs to take a “real look” at the regulatory decisions made as well as the guidance and framework that EPA issues to state and local governments to ensure that principles related to environmental justice are being integrated into the decision-making process for issuing permits.

Mr. Steven Herman, Assistant Administrator, EPA Office of Enforcement and Compliance Assurance (OECA), expressed the agency’s continuous appreciation to the members of the NEJAC for their invaluable assistance in providing EPA advice and counsel on issues related to environmental justice. Mr. Herman then noted the change in format for this and future meetings of the NEJAC. He explained that each NEJAC meeting now will focus on a single issue and its relationship to environmental justice. Announcing that this meeting of the NEJAC would focus on permitting, Mr. Herman stated that through panel discussions, members of the NEJAC, EPA, and other meeting participants will examine aspects of permitting related to various authorities and opportunities where the agency can ensure that environmental justice is integrated into the decision-making process for issuing permits. Mr. Herman concluded his remarks by noting that numerous assistant administrators and other senior-level managers of EPA will be in attendance at this meeting.

Mr. Barry Hill, Director, EPA OEJ, began his remarks by stating that environmental justice is “something that belongs to everyone” in that every American citizen is entitled to clean air, water, and land based on the United States’ protective environmental laws. He continued by defining environmental justice, and explaining that the concept:

- ▶ Acknowledges that environmental justice is a basic right of all Americans to live and work in environmentally protected surroundings.
- ▶ Recognizes that environmental justice is not only an environmental issue, but a public health issue.
- ▶ Recognizes that environmental justice is forward-looking and goal-oriented because the concept seeks to include affected communities in the decision-making processes.
- ▶ Indicates that environmental justice is inclusive.

Mr. Hill then stated that based on these premises the definition of environmental justice is compatible with the mission of EPA to protect human health and to safeguard the environment.

Continuing his remarks, Mr. Hill pointed out that environmental justice is at a critical stage from the point of view of environmental law and public policy. He then proceeded to provide historical examples of environmental justice, starting with the issuance in 1987 of a report by the United Church of Christ on race and environmental contamination to present day legal cases to highlight the various stages of environmental justice as a legal concept.

Mr. Hill concluded his remarks by stating that for this meeting OEJ has asked the NEJAC to provide advice and recommendations on how best to integrate environmental justice into the decision-making process related to permitting so that the concept can be applied as measurable, rationalized, and routine standards of evaluation.

Ms. Samantha Fairchild, Director, Office of Enforcement, Compliance, and Environmental Justice, EPA Region 3, emphasized that environmental justice continues to be a major area of concern at EPA Region

3 and that the regional office has taken steps to improve communication among all affected stakeholders. For example, she explained that EPA Region 3 is developing partnerships with state environmental agencies in the five-state region to provide assistance during the decision-making process related to permits. This effort includes establishing consistent meetings with states to discuss potential environmental justice issues before those issues become legal problems, she said. Ms. Fairchild also noted that EPA Region 3 has participated in Pennsylvania's Environmental Equity Work Group to define and identify criteria for environmental justice communities.

Continuing her remarks, Ms. Fairchild also noted that the regional office has been involved in several studies to investigate public health issues in environmental justice areas with heavy industry as well as conducted a study in a southwest Philadelphia, Pennsylvania area that is heavily concentrated with auto body and paint shops. She explained that the information collected from these studies will assist the state of Pennsylvania and Region 3 meet the needs of its citizens. Ms. Fairchild concluded her remarks by stating that the NEJAC is a valuable tool to grapple with the many complex problems facing communities related to environmental justice.

Mr. Bradley Campbell, White House Council on Environmental Quality (CEQ), reported on the second environmental justice listening session held in New York, New York in March 1999 that continued to bring together various federal agencies and community members to discuss issues related to environmental justice. Mr. Campbell explained that the purpose of the listening sessions was to ensure the environmental justice principles that have been integrated into EPA's policies and programs also are being implemented in other federal agencies actions that affect local communities. As a result of the listening session, he noted, several federal agencies, such as the U.S. Army Corps of Engineers (USACE), agreed to reopen public comment periods to review permits related to transportation decisions for New York City. In addition, the Healthcare Financing Administration agreed to help local New York communities to gain better access to medical care for asthma related health problems.

### **PUBLIC COMMENT PERIODS**

The NEJAC hosted public comment periods on November 30 and December 1, 1999. More than 30 people participated in the two public comment periods. Significant concerns expressed during the public comment periods included:

- ▶ Several commenters continued to express concern about the "unfair process" under which permits are issued by the Louisiana Department of Environmental Quality (LDEQ).
- ▶ Many commenters expressed concern about the "unrealistic" time frame by which to review and provide comments on proposed permits during the decision-making process. Many commenters recommended that EPA revise the time line related to issuing a permit to provide for earlier notification of a proposed permit, as well as provide documents in easier to understand language.
- ▶ Several commenters expressed concern about the lack of options available for recourse once a permit has been issued and a facility has begun operations.
- ▶ Several commenters recommended that the NEJAC address environmental justice issues at federal facilities.

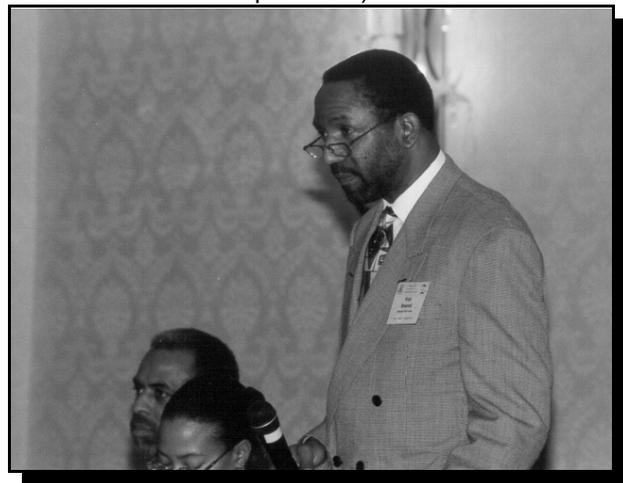
## PANELS ON PERMITTING AND ENVIRONMENTAL JUSTICE

The NEJAC, in its continuing efforts to provide independent advice to the EPA Administrator on areas related to environmental justice, focused its fourteenth meeting on a specific policy issue -- permitting and environmental justice. On Tuesday, November 30, 1999, the members of the NEJAC listened to a series of panels comprised of various stakeholders that were designed to provide insight into the issues and concerns raised with respect to environmental justice in the permitting process.

Mr. Richard Lazarus, Professor of Law, Georgetown University Law Center and former member of the Enforcement Subcommittee of the NEJAC, provided background information on the historical development of integrating concerns related to environmental justice into the permitting process. Mr. Lazarus explained that "environmental justice permitting" refers to the consideration of concerns related to environmental justice in the context of an environmental permitting authority's decision to grant, deny, or condition a permit at a facility, the operation of which has adverse or potentially adverse environmental effects on the community. Ms. Zulene Mayfield, Chester Residents Concerned for Quality Living, presented an overview on the challenges her community has faced related to state environmental agencies and the permitting process. Ms. Mayfield emphasized the necessity for local and state agencies to allow local affected communities to participate earlier and more often in the decision-making process. Mr. Carlos Porras, Communities for a Better Environment, provided information on several communities near Los Angeles, California facing environmental justice issues related to air quality and permitting. Mr. Porras explained that there are several challenges EPA needs to address related to permitting that included collecting more reliable data.

The panel presentations included (Exhibit ES-2 provides the names of the panelists):

- ▶ *Facilitated Dialogue* — Mr. Kojo Nnamdi of National Public Radio, facilitated a dialogue among representatives of communities; industry; tribes; and state, local, and federal governments to identify issues and concerns related to environmental justice and permitting. (Exhibit ES-3 shows Mr. Nnamdi facilitating.) The primary issue identified by all stakeholder groups was that the public should become involved in the permitting process as early and as often as possible. Several members of the panel expressed concern that members of the public believe that public outreach related to permitting is superficial, citing the fact that although a regulation may take two years to develop, the public only receives 30 days in which to review and provide comment.



**ES-3: Mr. Kojo Nnamdi facilitating a dialogue session on issues related to environmental justice and the permitting process.**

- ▶ *EPA Panel* — Senior managers from EPA's Office of Solid Waste and Emergency Response (OSWER), Office of Air and Radiation (OAR), Office of Water (OW), and Region 3 provided information on their program's efforts to incorporate environmental justice into the permitting processes. Each of the headquarter program offices announced to the members of the NEJAC various commitments to increase public involvement and revise the permitting processes to integrate environmental justice into them.

**PANEL PRESENTATIONS ON PERMITTING RELATED TO ENVIRONMENTAL JUSTICE****Overview:**

Introduction: Richard Lazarus, Georgetown University Law Center (Washington, D.C.)  
 Community Case Studies: Zulene Mayfield, Chester Residents Concerned for Quality Living (Chester, Pennsylvania)  
 Carlos Porras, Communities for a Better Environment (Los Angeles, California)

**Facilitated Dialogue:**

Community: Margie Richard, Local Resident (Norco, Louisiana)  
 Community: Zack Lyde, Local Pastor (Brunswick, Georgia)  
 Industry/Business: Michael Steinberg, Morgan, Lewis and Bockius (Washington, D.C.)  
 Tribal/Indigenous: Bill Swaney, Confederated Salish and Kootenai Tribes (Pablo, Montana)  
 State Government: Alissa Harris, State of Pennsylvania (Harrisburg, Pennsylvania)  
 Local Government: Matt Ward, National Association of Local Government Environmental Professionals (Washington, D.C.)  
 Federal Government: William Harnett, U.S. Environmental Protection Agency (EPA), Office of Air Quality Planning and Standards (Washington, D.C.)

**EPA Panel:**

Office of Solid Waste and Emergency Response: Timothy Fields, Jr., Assistant Administrator (AA)  
 Office of Air and Radiation: Robert Brenner, Acting Deputy AA  
 Office of Water: Dana Minerva, Deputy AA  
 Region 3: John Armstead, Associate Director, Environmental Services Division

**Panel 1: Addressing Real Life Dilemmas of Environmental Justice in Permitting: How Do We Respond to the Legacy of Land Use Impacts?**

Academia: Yale Rubin, Professor Emeritus, Massachusetts Institute of Technology (Cambridge, Massachusetts)  
 Industry/Business: Michael Gerrand, Arnold & Porter (New York, New York)  
 Community: Paula Forbis, Environmental Health Coalition (San Diego, California)  
 Local Government: Sarah Lyles, City of Detroit (Detroit, Michigan)

**Panel 2: The Current State of Environmental Justice and Permitting:****What Are Its Limitations?**

Industry/Business: Jerry Martin, Dow Chemical (Midland, Michigan)  
 Community: Larry Charles, O.N.E./C.H.A.N.E. (Hartford, Connecticut)  
 State Government: Andrea Kreiner, Delaware Department of Natural Resources and Environmental Control (Dover, Delaware)  
 Federal Government: Steve Heare, EPA Office of Solid Waste

**Panel 3: Opportunities for Improvement: What Factors Should EPA Consider to Help Ensure Environmental Justice in Permitting?**

Academia: Eileen Gauna, Southwestern University Law School, (Los Angeles, California)  
 State Government: Robert Shinn, New Jersey Department of Environmental Protection (Trenton, New Jersey)  
 Community: Nathalie Walker, Earthjustice Legal Defense Fund (New Orleans, Louisiana)  
 Tribal/Indigenous: Stuart Harris, Confederated Tribes of Umatilla (Pendleton, Oregon)

- ▶ *Panel 1: Addressing Real Life Dilemmas of Environmental Justice in Permitting: How Do We Respond to the Legacy of Land Use Impacts?* — Representatives from academia, industry, community, and local government discussed the dilemmas for the permitting process related to the historical development of land use and zoning requirements. Several members of the panel recommended that EPA involve stakeholders of local government earlier in the development of guidance and policy to help prepare local governments to implement new regulations.
- ▶ *Panel 2: The Current State of Environmental Justice and Permitting: What Are Its Limitations?* — This multi stakeholder panel identified areas of concern and gaps related to integrating environmental justice into the permitting process. A primary concern expressed by several members of the panel focused on the need for local, state, and federal government agencies to diversify their staff to better understand the needs and concerns of their constituents.
- ▶ *Panel 3: Opportunities for Improvement: What Factors Should EPA Consider to Help Ensure Environmental Justice in Permitting?* — Members of the multi stakeholder panel provided recommendations to EPA on how to improve efforts to integrate concerns related to environmental justice into the permitting process. Several key recommendations included:
  - Create an air emissions credits trading review board to evaluate the disparate effects the trading of air emissions credits may have on an affected community.
  - Provide additional resources to improve data from geographical information systems to more accurately identify demographics and other cultural considerations.

### COMMON THEMES

During the meetings of the Executive Council and its subcommittees, the members of the NEJAC discussed a wide range of issues related to environmental justice. Specific concerns of and commitments made by the NEJAC include:

- ▶ Continued concern about the “crisis” environmental contamination conditions under which certain residents of Louisiana live.
- ▶ Concern about the lack of public participation in the decision-making process related to issuing permits.
- ▶ Recommendation that EPA develop a process by which the agency can step in to “fill the regulatory gap” left when EPA is not the primary authority.

Members of the NEJAC recommended that the EPA Administrator assume an active role in discussions with LDEQ about the environmental contamination and the issuance of permits in that state. In addition, the Executive Council also approved a resolution that requested that the EPA Administrator recommend that the Inspector General of EPA conduct an audit of the LDEQ to ensure that the state agency is in compliance with applicable environmental laws.

Members of the NEJAC, as well as members of the various panels, agreed that local communities need to be included often and as early as possible in the decision-making process related to issuing permits. The Executive Council agreed to create a special work group to develop a report to provide advice on how EPA can integrate concerns related to environmental justice into the permitting process in a manner that would be beneficial to all stakeholders. Ms. Vernice Miller-Travis, Partnership for Sustainable Brownfields Redevelopment and chair of the Waste and Facility Siting Subcommittee of the NEJAC, agreed to chair the work group.

Several members of the NEJAC expressed concern about several cases, such as waste transfer stations, in which a “regulatory gap” is created because EPA is not the primary authority and the local or state agency

is not responding to concerns of its constituents. The members recommended that EPA develop a process by which the agency can step in to “fill” such a gap.

### **SUMMARIES OF THE SUBCOMMITTEE MEETINGS**

Summarized below are the deliberations of the members of the six subcommittees of the NEJAC during their meetings.

#### ***Air and Water Subcommittee***

The Air and Water Subcommittee reviewed the activities of its three work groups on cumulative permitting, urban air toxics, and fish consumption, and proposed a new work group of the subcommittee which would focus on public utilities. Updates from the current work groups included:

- ▶ The Work Group on Cumulative Permitting proposed a list of issues for EPA to consider related to public participation and permitting.
- ▶ The Work Group on Urban Air Toxics discussed and offered comment to EPA OAR on the agency’s urban air toxic strategy.
- ▶ The Work Group on Fish Consumption focused its efforts on subsistence fish consumption, specifically related to cultural practices of native communities; fish monitoring; the necessity for fish advisories; and reducing human exposure to contaminants in fish.

The subcommittee also hosted a joint session with the Enforcement Subcommittee of the NEJAC that focused on OAR’s economic incentives program (EIP), Tier II/gasoline sulfur rule, and OW’s proposed rule on standards for total maximum daily load (TMDL).

#### ***Enforcement Subcommittee***

The members of the Enforcement Subcommittee heard three presentations on environmental justice and the decision-making process related to permitting. The members of the subcommittee also participated in a discussion about the proposed budget cuts for OECA. In addition, Ms. Ann Goode, Director, EPA Office of Civil Rights (OCR), provided the subcommittee with an update on activities at OCR and the progress on processing administrative complaints filed under Title VI of the Civil Rights Act of 1964 (Title VI).

In addition, the members of the subcommittee discussed at length three pending resolutions that had been forwarded by mail ballot vote to the Executive Council of the NEJAC for approval. The pending resolutions addressed state-issued variances from the Clean Air Act permit requirements, EPA’s proposed guidance on EIP, and the economic benefit to industry of noncompliance with environmental laws. The members of the subcommittee also began discussions on a proposed resolution on concentrated animal feeding operations (CAFO).

#### ***Health and Research Subcommittee***

Members of the Health and Research Subcommittee heard presentations by the following individuals:

- ▶ Dr. Dorothy Patton, EPA Office of Research and Development (ORD), presented information on the responsibilities of ORD, including the office’s activities and new directions for the future.
- ▶ Dr. William Sanders, EPA Office of Pollution Prevention and Toxic Substances (OPPTS), provided an update on EPA’s proposed lead rule, EPA’s community-right-know program, and the agency’s community assistance technical team.

- ▶ Dr. Henry Falk, Agency for Toxic Substances and Disease Registry (ASTDR), discussed his agency's approach to conducting environmental health assessments.
- ▶ Dr. Jerome Balter, Public Interest Law Center of Philadelphia, provided information on a model used by the city of Philadelphia, Pennsylvania to evaluate and support an administrative complaint filed under Title VI.

Members of the subcommittee also agreed to develop resolutions on 1) guidelines for community-based research ethics and 2) to request that EPA and other federal agencies explore opportunities to fund environmental health research topics identified by communities.

### ***Indigenous Peoples Subcommittee***

Members of the Indigenous Peoples Subcommittee continued to discuss the development of a consultation and collaboration guidance to provide assistance to federal and other agencies on how to participate in meaningful consultation with tribal governments and tribal communities. The subcommittee agreed to distribute the draft guidance to all federally recognized tribes for review and comment. In addition, the subcommittee agreed to forward by March 2000 a copy of the guidance to the members of the Executive Council for approval.

Members of the subcommittee also discussed and developed a strategic plan for the subcommittee for the next two years. Several goals express in the strategic plan include identifying key environmental justice issues, particularly related to permitting, in Indian Country and provide training to members of the NEJAC on environmental justice issues related to indigenous peoples.

In addition, members of the subcommittee discussed EPA's proposed core standards for water quality for Indian Country, the air permitting program related to tribes, and the recent trade negotiations related to persistent organic pollutants (POP).

### ***International Subcommittee***

Members of the International Subcommittee reviewed more than 100 recommendations that were generated from the Roundtable on Environmental Justice on the U.S./Mexico Border meeting held in August 1999 in San Diego, California. The members established priorities among the recommendations and decided to focus on:

- ▶ Creation of a binational community-based commission that would monitor and assist in the development of environmental policies that would affect the border region.
- ▶ Cleanup two contaminated sites, Metales y Derivados near Tijuana, Mexico and the Condado Prestos in Ciudad Juarez, Mexico.
- ▶ Conduct of a site assessment of the Matamoros Tamaulipas site in Mexico.

Members of the subcommittee also participated in discussions with Mr. Alan Hecht, Principal Deputy Assistant Administrator, EPA Office of International Activities (OIA); Mr. Gregg Cooke, Regional Administrator, EPA Region 6; and Dr. Clarice Gaylord, Special Assistant to the Regional Administrator, San Diego Border Liaison Office, EPA Region 9.

### **Waste and Facility Siting Subcommittee**

Members of the Waste and Facility Siting Subcommittee discussed issues related to environmental justice and the administration of the Superfund program by EPA. The members of the subcommittee recommended that communities be protected as EPA continues to delegate authority to tribes and states under Superfund.

Members of the Waste Transfer Station Work Group of the subcommittee presented its report of recommendations on criteria for siting waste transfer stations, a planning process to assure a more equitable distribution of waste transfer facilities among communities, and a more deliberative approach to evaluate how many of these types of facilities are necessary. The members of the work group noted that, in the absence of a federal baseline for waste transfer stations, there exists an enormous variability in operating practices among such facilities.

In response to continued concerns expressed during earlier public comment periods of the NEJAC, members of the subcommittee agreed to participate in quarterly conference calls convened by EPA Region 6 to address environmental justice issues related to Calcasieu Parish, Louisiana. Also, members of the subcommittee agreed to address differences between presentations made by staff of EPA related to the relocation of community members of Pensacola, Florida and those comments offered by affected community members during the December 1, 1999 public comment period.

### **SUMMARY OF APPROVED RESOLUTIONS**

This section summarizes resolutions that were discussed by the subcommittees and approved by the Executive Council of the NEJAC during the meeting. Appendix A provides the full text of each resolution that was approved by the Executive Council.

- ▶ The NEJAC recommends that EPA request that Puerto Rico Commonwealth revise its State Implementation Plan to comply with the .1lbs/MBTU federal emission limitation of particulate matter and the appropriate sulfur dioxide emission limitation for the entire island including the non-attainment area.
- ▶ The NEJAC recommends that EPA request that the U.S. Department of State and the United States Trade Representative (USTR) comply with the provisions expressed in Executive Order 12898 on environmental justice and Executive Order 13141 related to environmental reviews of trade agreements.
- ▶ The NEJAC recommends that EPA communicate to the U.S. Secretary of State that the United States supports the adoption of the current draft declaration on the rights of Indigenous Peoples before the United Nations.
- ▶ The NEJAC requests that EPA Region 2 facilitate a meeting between the Westside Homeowners Protective Association, the Venice Park Civic Association, the U.S. Department of Transportation, the South Jersey Transportation Authority, and the New Jersey Department of Environmental Protection to address the issues of exposure of community residents from contaminated soil, long-term air quality issues, and the potential adverse effects to the community residents after the construction of the Atlantic City/Brigantine Connector tunnel project.
- ▶ The NEJAC recommends that the EPA Administrator request that the Inspector General of EPA conduct a full audit of the state of Louisiana's permitting programs with particular attention to the violations of EPA's public participation regulations, the public participation guidelines of the NEJAC, and the provisions of the U.S. Constitution.
- ▶ The NEJAC recommends that EPA amend the agency's proposed EIP regulations to include considerations and requirements related to environmental justice.

- ▶ The NEJAC recommends that EPA's policies on determining appropriate penalties for noncompliance require that these penalties reflect the economic benefit of noncompliance enjoyed by violating facilities.
- ▶ The NEJAC recommends that EPA adopt a national policy which prohibits federal recognition of variances issued by states to the permitting requirements under Title V of the Clean Air Act.

**NEXT MEETING**

The next meeting of the NEJAC is scheduled for May 23 through 26, 2000 in Atlanta, Georgia at the Omni at CNN Center. Planned activities will include two opportunities for the public to offer comments. Exhibit ES-4 identifies the dates and locations of future meetings as well as the issues the NEJAC plans to address. For further information about this pending meeting visit NEJAC's home page on the Internet at: [http://www.epa.gov/oeca/main/ej/nejac/conf\\_ne.html](http://www.epa.gov/oeca/main/ej/nejac/conf_ne.html) or call EPA's toll-free environmental justice hotline at 1-800-962-6215.

**Exhibit ES-4**

**FUTURE MEETINGS OF  
THE NATIONAL ENVIRONMENTAL JUSTICE ADVISORY COUNCIL**

<b><u>Date</u></b>	<b><u>Location</u></b>	<b><u>Issue</u></b>
May 23 - 26, 2000	Atlanta, Georgia	Community Health
December 2000	Washington, D.C.	Interagency Environmental Justice Implementation

**APPENDIX A**  
**FULL TEXT OF THE RESOLUTIONS**

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**RESOLUTION CALLING FOR AN AUDIT OF  
LOUISIANA PERMITTING PROGRAMS**

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WHEREAS, public participation in environmental decision-making is fundamental to environmental justice, as it allows those affected by decisions to take part in them;

WHEREAS, all major environmental laws contain legally binding public participation requirements;

WHEREAS, EPA offices with permitting authority further agreed to and embraced the NEJAC Public Participation Guidelines;

WHEREAS, the right to legal representation is indispensable for public participation and essential to the viability of citizen suit provisions of said federal environmental laws;

WHEREAS, public participation and speech on environmental decisions is constitutionally protected by the 1<sup>st</sup> Amendment;

WHEREAS, NEJAC has heard testimony at each of its last five meetings from residents of Louisiana, who have presented substantial evidence indicating a pattern of intimidation by the State of Louisiana of citizens engaged in public comment, leading to the curtailing of citizens' right to free speech in environmental permitting processes;

WHEREAS, the State of Louisiana has moved to abridge citizens' rights to legal representation in environmental decision-making;

WHEREAS, the failure to guarantee public participation represents dereliction of the State of Louisiana's delegated and authorized environmental permitting programs;

WHEREAS, implementation failures and delegated programs undermine the federal government's authority for those programs at the national level;

WHEREAS, such threats to federal authority, if confirmed, provide grounds for the revocation of the State of Louisiana's permitting authorities;

THEREFORE, BE IT RESOLVED, that the NEJAC recommends that the Administrator direct the Inspector General to conduct a full audit of the State of Louisiana's permitting programs with particular attention to violations of the Agency's public participation regulations, the NEJAC's public participation guidelines, and the U.S. Constitution.

**RESOLUTION ON POLLUTION CAUSED BY THE PUERTO RICO  
ELECTRIC POWER AUTHORITY (PREPA)**

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WHEREAS, the Puerto Rico State Implementation Plan Revision of 1993 to reduce PM10 has failed to obtain attainment in the Guaynabo non attainment area

WHEREAS, NAAQS exceedances have occurred for four consecutive years

WHEREAS, these exceedances were predicted in the modeling process of the 1993 SIP revision

WHEREAS, exceedances in Puerto Rico during dust migration episodes from the Sahara dust and the Monserrate volcano eruptions are always predictable by the available satellite technology

WHEREAS, the state cannot control non anthropogenic emissions, it can control anthropogenic emissions from point sources such as power plants stacks to ensure NAAQS compliance

WHEREAS, the use of a fuel with a sulfur content of 1.5% as a control strategy to minimize the impact of the Puerto Rico Electric Power Authority (PREPA) in the non attainment area in Cata-Guaynabo has failed to obtain attainment in the area

WHEREAS, PREPA has no pollution control in its stacks

WHEREAS, a residual oil with 1.5% of sulfur content is considered a dirty fuel

WHEREAS, the particulate emission limitation (mass emission) of .3lbs/lbs/MBU is less restrictive than the federal standard of 0.1 lbs/MBTU

WHEREAS, the state mass emission standard of 0.3 lbs/MBTU has never been proven by the state to be equivalent to 20% opacity,

WHEREAS, the PR state mass emission limitation of .3lbs/MBTU has been identified by EQB officials as a "typographical error"

WHEREAS, the state emission standard cannot be less restrictive than the federal particulate standards,

WHEREAS, PREPA has been identified as egregious opacity violator while firing 1.5% sulfur fuels since 1993,

WHEREAS, the use of a fuel with 1.5% sulfur content has failed to sustain a clean emission in PREPA's stacks,

WHEREAS, relying in opacity as the only federally emission standard to protect the health of the people from excessive sulfur dioxide emissions from a dirty fuel results in an unequal protection of law to residents,

WHEREAS, PREPA has been convicted of criminal environmental actions in a federal Court as is under certain strict probation terms,

WHEREAS, eliminating the mass emission limitation in a non attainment area for particulates, in the Cataño-Guaynabo area, contravenes the Clean Air Act

WHEREAS, PREPA is the second Public Utility with the highest revenues in the USA,

WHEREAS, PREPA has a monopoly in energy sales, even in the presence of other cogenerators

WHEREAS, PREPA is included by EPA as one of the 100 dirtiest power plants in terms of sulfur dioxide and particulate emissions,

WHEREAS, the installment of appropriate enforceable limitations is the only mechanism available in Puerto Rico to protect its citizens from acid rain and sulfur dioxide emissions because PREPA is exempted to comply with the title IV program provisions

WHEREAS, PREPA has made significant modifications and capital investments and no longer qualifies to be exempted to comply with the New Source Performance Standards,

WHEREAS, Puerto Rico must be treated as a state,

Be it resolved that EPA should take the following actions,

1. To request the Puerto Rico Commonwealth State to revise its State Implementation Plan in order to establish the .1lbs/BMTU Federal emission limitation of particulate, and the appropriate sulfur dioxide emission limitation for the entire island including the non attainment area,
2. To request PREPA to establish a continuous SOx emission monitoring mechanism
3. To request PREPA to fire a residual oil with a sulfur content no higher than .5 percent in all of its plants.

**RESOLUTION ON “CREDIBLE DETERRENCE” CIVIL PENALTIES:  
CAPTURING THE ECONOMIC BENEFIT OF NONCOMPLIANCE**

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Whereas, “Capturing the Economic Benefit” means that when a penalty is assessed against an environmental violator, a significant part of the assessment is calculating the costs avoided as a result of non-compliance, plus the interest earned on money as a result of delayed compliance; and

Whereas, Examples of economic benefit from noncompliance include delayed and avoided pollution control expenses, delayed and avoided installation, operation, and maintenance costs of pollution control equipment, and delayed and avoided costs of one-time acquisitions needed for compliance; and

Whereas, under U.S. EPA Policy and many federal environmental laws and regulations, one of the major considerations in calculation of any proposed penalty assigned to a violator is the question of what the economic benefit was to the violator; and

Whereas, the underlying policy consideration is that the penalty burden must be at least as great as the benefit of the violation or there would be no reason to comply;  
and

Whereas, the EPA Strategic Plan, Goal 9, calls for the Agency to provide a “credible deterrent to pollution and greater compliance with the law”;

We hereby resolve that:

- ▶ EPA Penalty Policy which requires that penalties should include the component of economic benefit should be complied with at the national, regional, and state level.
- ▶ Technical assistance in calculating the economic benefit (EBN calculation training) should be provided to all enforcement authorities who assert that they can’t do it because they don’t know how.
- ▶ A model penalty policy that includes providing for the calculation of economic benefit should be made available to all enforcement authorities who assert that they can’t do it because they don’t have such a penalty policy.
- ▶ Any enforcement authority asserting that their laws prevent them from calculating the economic benefit should be required to provide an Attorney General’s (or the equivalent) certification to that effect.
- ▶ EPA Regional Officials should consider taking independent enforcement actions against facilities in cases where state assessed penalties do not recover substantial economic benefits of noncompliance.
- ▶ A requirement of capturing the economic benefit should be incorporated as part of the Memoranda of Agreement with the Regions, or EPA’s Performance Partnership Agreements with the delegated agencies, or through any other delegation agreements.
- ▶ To establish credible deterrence it should be made clear that agencies are delegated legal authority to establish general pollution control requirements consistent with federal statutory mandates and EPA policies and that as to capturing the economic benefit, they will not be allowed to sink below the minimum.

**RESOLUTION ON EPA TO AMEND ITS ECONOMIC INCENTIVE PROGRAM (EIP)  
REGULATIONS TO INCLUDE ENVIRONMENTAL JUSTICE CONSIDERATIONS  
AND REQUIREMENTS**

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WHEREAS, the EPA is advocating both environmental justice as a means to reduce pollution in communities of color and pollution trading as a cost-effective method to reduce pollution.

WHEREAS, the EPA has adopted Economic Incentive Program (EIP) regulations which establish approvability requirements for pollution trading programs.

WHEREAS, the EIP regulations currently do not include safeguards sufficient to prevent adverse environmental justice impacts, including the creation of toxic hot spots in communities of color.

WHEREAS, the Assistant Administrator of the Office of Air and Radiation (OAR) has met with the NEJAC Enforcement Subcommittee to discuss environmental justice concerns related to emissions trading, and appeared generally receptive to the concerns raised by the NEJAC.

WHEREAS, the NEJAC recognizes the willingness of EPA OAR to continue to have a dialogue with the NEJAC until these issues are resolved.

WHEREAS, certain pollution trading programs have the potential to create, perpetuate or exacerbate air pollution toxic hot spots in communities of color by allowing facilities in those communities to increase or continue emissions.

WHEREAS, certain pollution trading programs allow facilities to increase or continue emissions of highly toxic chemicals, due to offsets obtained from decreases in less toxic chemical emissions, thereby resulting in a net increase in airborne toxicity.

WHEREAS, since stationary source polluters are often disproportionately located in communities of color, while mobile source pollution is widely distributed geographically, mobile to stationary source pollution trading has the potential to create or exacerbate toxic hot spots.

WHEREAS, pollution trading programs require accurate quantification of emissions reduced and increased through the program, and such quantification is particularly difficult in the case of mobile source trading programs.

WHEREAS, pollution credits should only be granted for emission reductions that are real, surplus, and quantifiable, and pollution credits should therefore not be granted for emission reductions that would have resulted even in the absence of the pollution trading program.

WHEREAS, economic modeling tools exist that allow agencies to predict the probable geographic and demographic impact of pollution trading programs, including the location of probable pollution credit purchasers and sellers.

WHEREAS, a fundamental principle of the environmental justice movement is that communities affected by pollution must be allowed to participate in decisions affecting their environment.

BE IT RESOLVED THAT NEJAC urges EPA to Amend the EIP Regulations to:

- ▶ Prohibit the trading of toxic air pollutants, as defined in the Emergency Planning and Community Right-to-Know Act if the result would be adverse health or environmental impact(s) in an environmental justice community, and unless EPA requires the states to develop adequate quantification protocols that must be reviewed and approved by EPA into an enforceable state implementation plan (SIP) prior to trading plan implementation to ensure accurate quantification of pollutants to be traded and to ensure enforceability and verifiability.
- ▶ If trading of toxic chemicals is allowed, prohibit emissions trading that will result in an increase in toxic chemical pollution in already overburdened communities, taking into account cumulative pollution risks. If trading of toxic chemicals is allowed, require implementing agency to consider selective toxicity of specific chemicals being traded, and to prohibit trading that will expose the public to unacceptable risk.
- ▶ Prior to approval of any pollution trading program, require the agency proposing the program to conduct an economic analysis ~~similar~~ comparable to the model prepared by the Regional Economic Modeling, Inc. (REMI) to determine the location of probable emission credit purchasers and sellers. Require the agency to overlay the REMI analysis with demographic information to determine whether the proposed trading program will have an adverse impact on communities of color. Prohibit emissions trading programs that are predicted to have an adverse impact on communities of color.

- ▶ Require that at a minimum, all facilities ~~must~~ install technology-based controls defined as reasonably available control technology (RACT) under the Clean Air Act, and prohibit trading that allows companies to avoid installing RACT.
- ▶ Require all emissions trading programs to incorporate public participation components that include notification to affected communities of any trade that will result in an increase or continuation of toxic chemical pollution, and allow the affected communities a reasonable opportunity to review and comment upon said adverse impacts. Require the responsible agency to retain discretion to revise or reject the proposed pollution trade based upon comments received.
- ▶ Prohibit mobile-to-stationary source trading where the result would be adverse health or environmental impact(s) in an environmental justice community, and unless EPA requires the states to develop adequate quantification protocols that must be reviewed and approved by EPA into an enforceable state implementation plan (SIP) prior to trading plan implementation to ensure accurate quantification of pollutants to be traded and to ensure enforceability and verifiability.
- ▶ EPA should retain requirements in found in the emissions trading policy statement regulation requiring a portion of the economic benefit resulting from pollution trading to benefit the public through increased emission reductions.

**RESOLUTION ON EPA TO ADOPT A NATIONAL POLICY PROHIBITING  
FEDERAL RECOGNITION OF STATE-ISSUED VARIANCES** 

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WHEREAS, the Region IX of the EPA is considering whether to grant federal recognition of state-issued variances from Title V permit requirements, and has proposed to recognize such variances in cases of malfunction, start-up, shut-down, and maintenance;

WHEREAS, the federal recognition of these variances would preclude both federal and community enforcement of the federal Clean Air Act where violations have been documented, and thus provide a disincentive to compliance with Clean Air Act requirements;

WHEREAS, since stationary source polluters are disproportionately located in communities of color, issuance of variances to stationary sources will result in a disproportionate impact on these communities;

WHEREAS, the issuance of variances can result in increased impacts to public health from emissions of air toxics at levels above permit requirements and above those levels which have been analyzed for their impact to public health;

WHEREAS, the issuance of variances could impede reasonable further progress on attainment of federal air quality standards;

WHEREAS, Clean Air Act case law only allows for permit modifications after amendment to the appropriate State Implementation Plan;

WHEREAS, EPA enforcement policy takes into consideration problems such as malfunction, start-up, and shutdown procedures as mitigating factors to penalties assessed for violations;

NOW THEREFORE BE IT RESOLVED THAT:

NEJAC urges EPA to adopt a national policy which:

- ▶ Prohibits federal recognition of variances from Clean Air Act requirements, except for variances resulting in more stringent levels of control at the facility;
- ▶ Acknowledges that existing federal enforcement policies consider the nature of a violation and factors such as malfunction, start-up, shut-down, and maintenance as mitigating factors in determining the appropriate federal enforcement response.

- ▶ Requires consultation with NEJAC before consideration or approving any variance policy, by EPA or any of its regions.

## **RESOLUTION ON THE UNITED NATIONS DRAFT DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES**

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WHEREAS Executive Order 12898 establishing the National Environmental Justice Advisory Council (NEJAC) recognizes that Indigenous Peoples as a group are especially vulnerable to disproportionate impacts of environmental despoliation;

WHEREAS Executive Order 13107 of December 15, 1998, requires all Executive Departments and Agencies to respect United States human rights international obligations relevant to their functions, and to perform such functions so as to respect and implement those obligations fully;

WHEREAS the International Covenant on Civil and Political Rights (ICCPR) is an international human rights obligation of the United States, which recognizes the right of all Peoples to Self-Determination, including the right of Peoples to freely pursue their economic, social and cultural development and to freely dispose of their natural wealth and resources;

WHEREAS, the ICCPR also provides that Peoples may not be deprived of their own means of subsistence;

WHEREAS, The Vienna Declaration and Program of Action, also applicable to the United States:

- ▶ Reaffirmed that all human rights are universal, indivisible, interdependent and interrelated;
- ▶ Reaffirmed the commitment of the International Community to ensure the enjoyment of all human rights and fundamental freedoms of Indigenous Peoples and to respect and value the diversity of their cultures and identities;
- ▶ Considered the denial of the right of self determination as a violation of human rights and underlined the importance of the effective realization of this right;
- ▶ Called for concerted, positive steps from the international community to ensure respect for all human rights of Indigenous Peoples on the basis of equality and non-discrimination, recognizing the value of their distinct identities, cultures and social organization;

WHEREAS, the international community has recognized the spiritual relationship between Indigenous Peoples and their lands and territories, notably through International Labor Organization Convention no. 169 and numerous special studies;

WHEREAS, other United Nations studies have found that Indigenous lands are being subjected to unprecedented development and frequently resultant irreparable environmental damage;

WHEREAS, the Right to Development is a right of Peoples in which the enjoyment of self determination and full sovereignty over all natural wealth and resources is fundamental;

WHEREAS, the United Nations Commission on Human Rights is presently considering a Draft declaration on the rights of Indigenous Peoples;

WHEREAS, the present draft of the declaration before the Human Rights Commission was elaborated with the full and ample participation of hundreds of Indigenous Nations and thousands of their representatives before the United Nations Working Group on Indigenous Populations over a 12 year period;

WHEREAS, recognizing and underscoring, that these Indigenous participants found that the present draft before the Commission on Human Rights is a minimal standard to ensure the survival of Indigenous Peoples and their environment;





WHEREAS, the Atlantic City Tunnel route traverses within 25 feet of the remaining residents.

WHEREAS, soils that will be excavated for the construction of the Atlantic City Tunnel are contaminated with heavy metals, petroleum-related compounds, and other organic and inorganic substances at levels in excess of health-based standards established by the New Jersey Department of Environmental Protection and 152,000 cubic yards of these soils will be reuse on site.

WHEREAS, the South Jersey Transportation Authority has rejected the request of community residents for controls ensure that contaminants in the soils do not migrate to the adjacent communities, such as air monitoring – on-site and off-site – of the contaminants found in the soils, continuous engineering controls, and covering of the soils.

WHEREAS, excavation of has continued for 9 months and community residents have begun to complain of respiratory difficulties since the beginning of construction – including the triggering of dormant asthma.

WHEREAS, analysis performed by South Jersey Transportation Authority and the New Jersey Department of Transportation acknowledge the possibility that there could be hot spots of carbon monoxide, particulates and sulfur dioxide in areas adjacent to the tunnel.

WHEREAS, the South Jersey Transportation Authority and the New Jersey Department of Transportation have rejected the request of community residents to install air control devices to address the emissions from vehicles using the tunnel and air monitoring of the emissions for a short time period after the tunnel is constructed to ensure local air quality does not create risk to the adjacent communities.

WHEREAS, South Jersey Transportation Authority has failed to address numerous other issues identified by community residents, including the potential for flooding, safety, and structural damage to homes.

WHEREAS, the Atlantic City Tunnel is funded by the State of New Jersey, administered by one of its agencies, and is to serve a casino that is supported by and would directly benefit the City of Atlantic City and the State of New Jersey.

WHEREAS, the unresponsiveness by all state agencies requires the intervention by the USEPA to prevent irreversible damage to health of community residents and the local communities.

THEREFORE BE IT RESOLVED, that the National Environmental Justice Advisory Council calls upon USEPA to IMMEDIATELY, through its Region II Offices, facilitate the convening of all parties, including the South Jersey Transportation Authority, New Jersey Department of Environmental Protection, and the New Jersey Department of Transportation, to address the immediate issues of exposure of community residents to contaminated soil during construction activities, and other issues of potential impact to the community residents after construction, such as flooding, and safety.

BE IT FURTHER RESOLVED, that the National Environmental Justice Advisory Council calls upon USEPA, in consultation with the US Department of Transportation, to convene a meeting of NJ Department of Transportation and South Jersey Transportation Authority, to address the long term air quality issues associated with tunnel.

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**APPENDIX B**  
**LIST OF PARTICIPANTS**

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**December 1999 NATIONAL ENVIRONMENTAL JUSTICE ADVISORY COUNCIL**  
**List of Attendees**

Total: 397

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## December 1999 NEJAC Meeting

### List of Attendees

#### Page 2

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**APPENDIX C**

**ENVIRONMENTAL JUSTICE IN THE PERMITTING PROCESS:  
A Report from the National Environmental Justice Advisory Council's  
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November 30-December 2, 1999**

**COMMENTS TO THE OFFICE OF AIR AND RADIATION  
ON THE EPA'S DRAFT URBAN AIR TOXICS STRATEGY**

**April 6, 1999**

**Prepared by the**

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## **INTRODUCTION**

The National Environmental Justice Advisory Council's ("NEJAC") Air and Water Subcommittee authorized the creation of the Urban Air Toxics ("UAT") Working Group at its December 7, 1998 meeting in Baton Rouge, Louisiana. The UAT Working Group has been charged to examine the Draft Urban Air Toxics Strategy ("Urban Air Strategy"), published by the United States Environmental Protection Agency ("EPA" or "Agency"), and to develop recommendations for the Agency to incorporate environmental justice concerns into the Urban Air Strategy. The UAT Working Group is comprised of representatives from environmental, local government, industry, civil rights, and consumer rights organizations. The UAT Working Group worked with staff from EPA responsible for developing the Urban Air Strategy to develop an understanding of the strategy, goals, and available resources for implementation. The UAT Working Group conferred numerous times amongst itself and with EPA staff beginning January 1999. The UAT Working Group has completed its initial deliberations and hereby submits this report for EPA's consideration.

## **OVERVIEW**

The UAT Working Group asserts that the Urban Air Strategy serves as the foundation for the agency to comprehensively address air quality in urban areas. The potential benefits of this strategy, if realized, will be an important victory for EPA, environmental justice groups, the communities they serve, and other stakeholders. An EPA analysis has demonstrated that people of color and low income populations disproportionately benefit from the stringent enforcement of the Clean Air Act ("CAA" or "Act"). Environmental Justice Annual Report, EPA 1994. Conversely, it must be true, that these same populations have suffered a disproportionate harm as a result of shortcomings in enforcement of the Act and meeting urban air quality standards. The UAT Working Group believes that the Urban Air Strategy should accomplish the goal of Section 112(k) of the Clean Air Act, to achieve measurable and significant air quality improvements in urban areas, and that this and other important environmental justice issues, such as assessing cumulative impacts and achieving actual risk reductions are attainable. However, to achieve the goals of the Urban Air Strategy and the other broader concerns, EPA must realize and use its immense legal authority under all statutes within its jurisdiction. Proper implementation of the Urban Air Strategy, including effective participation by environmental justice advocates, communities, and other

stakeholders, holds a lot of promise; however, a weak, poorly funded and unfocused strategy will mean many more years with few, if any, measurable results.

## **THE EPA'S DRAFT INTEGRATED URBAN AIR TOXICS STRATEGY**

EPA published the Urban Air Strategy on September 1, 1998. EPA is scheduled to published a final strategy by June 18, 1999. The EPA's Urban Air Strategy is intended to reduce air toxic emissions in urban areas through regulatory and voluntary programs. The Urban Air Strategy is a fulfillment of rulemaking Docket Number 97-44. EPA has stated that the goal of the Urban Air Strategy is to protect public health and the environment from toxic air pollutants. This goal should be pursued with care to avoid creating problems, and interfering with job creation and economic revitalization initiatives of urban communities. Although the Urban Air Strategy is not a rule, the EPA expects the Urban Air Strategy to be the basis for new rules regulating toxic air emissions in urban areas. One of the major challenges for EPA will be to truly integrate the Urban Air Strategy with existing federal air programs, such as the Maximum Achievable Control Technology (MACT) program and rulemaking initiatives.

### **SUMMARY OF ISSUES**

The UAT Working Group will address several core issues in this report. They include:

1. How should EPA integrate the Urban Air Strategy with the MACT program and other rule-making initiatives.
2. How should EPA define "urban" for purposes of the Urban Air Strategy.
3. How should EPA use the Cumulative Exposure Project ("CEP") data.
4. How should air monitoring initiatives be coordinated among EPA, states, and local governments.
5. Should EPA list new Hazardous Air Pollutants ("HAPs") and new sources in the Urban Air Strategy.
6. What is the design and scope of a model local air program that examines environmental justice issues in urban areas.
7. How should community input be solicited and incorporated into the Urban Air Strategy to supplement data used by EPA to identify areas of concern in urban areas.
8. How should EPA measure and quantify risk reduction.
9. How should EPA conduct a cumulative impact analysis in urban areas.
10. How should EPA integrate residual risk principles in the Urban Air Strategy.
11. Should EPA conduct health surveillance as part of implementing the Urban Air Strategy.

#### Consensus Principles

1. The UAT Working Group agrees that discrimination on the basis of race, color, or national origin is illegal and unjust.
2. The UAT Working Group agrees that EPA should identify, promote and ensure meaningful participation by all stakeholders.
3. The UAT Working Group recognizes that cumulative impacts in urban areas should be addressed effectively.
4. The UAT Working Group recognizes that cumulative exposure and synergistic health effects are important concerns of urban areas.
5. The UAT Working Group agrees that EPA should continue to consult with all affected stakeholders in regard to finalizing the Urban Air Strategy.
6. The UAT Working Group agrees that the Urban Air Strategy should be truly integrated with other programs and rulemaking.
7. The UAT Working Group agrees that the EPA should assess the public health significance of exposure of HAPs in urban areas and report that risk in a responsible and understandable manner to communities.

## **THE UAT WORKING GROUP'S RECOMMENDED ACTION ITEMS FOR EPA**

### Integrated and Comprehensive Regulation of Air Toxic Emissions

#### STATIONARY SOURCES

The UAT Working Group believes the Urban Air Strategy has two main goals: to address toxic emissions from area sources that to date are largely unregulated; and, to address the mix of pollutants found in urban areas (the "urban soup"). One of the most immediate and effective means of meeting these two goals is through integrating current regulatory activities within the Agency with the implementation of the Urban Air Strategy.

A majority of the UAT Working Group believes that this can be accomplished, in part, by integrating the Urban Air Strategy into current rulemakings targeting major sources. EPA should:

1. Gather information on area source emissions when developing new MACT's (specifically the 10-year MACT's). Consider the quantity, geographic distribution, and health significance of emissions. Apply best available technology to area sources but also make extensive use of pollution prevention options such as materials substitution. Evaluate health significance of all uncontrolled emissions of a particular HAP (including those sources and emission points not subject to the MACT, as well as area

sources not subject to a standard).

2. Integrate all EPA rulemakings with this strategy and the need to control HAPs and the corresponding health risks. All offices of EPA should evaluate the relationship between their activities and the need to comprehensively control HAPs.

3. Use authority under other statutes to adequately address all HAPs such as emissions from the use of consumer products.

4. Publish a complete list of all major and area sources of all HAP emissions with their relevant 4-digit SIC codes.

5. Conduct a review of MACT affected and unaffected facilities to determine the effectiveness of MACTs thus far in actually regulating source categories involved.

The UAT Working Group further urges that rulemaking targeting area sources to meet the goals of the Urban Air Strategy should:

1. Integrate regulation with the Title V program.
2. Require emissions statements from listed area sources.
3. Establish thresholds for emissions reporting based on toxicity of HAPs.
4. Charge an annual fee, rather than a per ton fee for area sources of HAPs.
5. Allow use of Title V fees to fund state toxics reduction programs.
6. Require all states to set Title V fees at the levels established in the Clean Air Act.

The majority of the UAT Working Group believes that it is important that for current MACT rulemakings (rules that are being developed, but have not yet been proposed), EPA ensure that the goals of the Urban Air Strategy are being met. For instance, the Industrial Combustion Coordinated Rulemaking has the potential to reduce a group of HAP emissions from thousands of small combustion sources. If the final rule does not set specific standards for key pollutants, such as mercury, EPA will miss a crucial opportunity - one that may not be regained - to regulate pollutants that adversely affect urban air quality, and will necessarily contradict the goals of the Urban Air Strategy.

The UAT Working Group believes that all rulemaking should emphasize pollution prevention practices as a means of meeting emissions standards. Existing sources using pollution prevention or toxics use reduction practices (such as materials substitution) should serve as a model, and should drive the outcome of each standard. Moreover, toxics use reduction (source reduction) should be a component of every rulemaking. It is important that major sources currently subject to existing MACT standards not

be targeted for additional emission reduction requirements until EPA has first considered reducing emissions from other sources.

## MOBILE SOURCES

The UAT Working Group believes that EPA should evaluate the need and feasibility of new mobile source regulations as part of updating the mobile toxics inventory. As part of this effort, EPA should estimate potential reductions of tailpipe HAP emissions anticipated through full implementation of the Tier 2 and fuel sulfur rulemakings.

In addition, EPA should take advantage of current efforts to evaluate new diesel emission standards as an opportunity to begin fulfilling the Agency's objectives under the Urban Air Strategy. EPA should recommend the use of innovative technologies to reduce diesel particulate emissions, which will result in reductions of toxic hydrocarbon emissions.

The majority of the UAT Working Group believes that EPA's mobile source emissions rulemakings should evaluate emission contributions from the entire transportation, storage and distribution system for fuels for possible additional regulation. This part of the fuel system usually impacts urban centers because of the distribution of storage facilities as well as high usage in urban areas.

### CEP Data

The UAT Working Group believes that the Cumulative Exposure Project (CEP) data is useful as a screening tool. The majority of the UAT Working Group believes that for the first time, EPA has valuable modeling data on projected ambient concentrations of a range of HAPs. The UAT Working Group, however, believes that the current CEP data should not be the only approach for deciding a course of action to address local toxics because the CEP data has technical limitations. Rather, the CEP data should be used by states to help prioritize local action in terms of identifying toxic concentrations, locating key emission sources, and assessing monitoring needs. It should be used as a tool by states and EPA when developing a local and nationwide toxics monitoring network. The overall objective should be employing a network of monitors in order to verify existing modeling data and generate more complete inventories.

### Air Monitoring Networks

The UAT Working Group believes that air monitoring networks are an important and useful tool to assess emission reductions and high emission concentrations. The UAT Working Group asserts that more ambient monitoring for HAPs is needed, as well as assessments of exposure and health effects posed

by HAPs. While the CEP data provides valuable information, a comprehensive network of monitors is essential to get accurate information on specific pollutants and contributing sources. All monitoring data should be publicly available, including the draft monitoring plans. The majority of the UAT Working Group believes that EPA should pursue the following goals and objectives when developing a national toxic air monitoring program:

1. All large cities of the country should have air monitors for HAPs operating within two years. These monitors should supplement the fine particle monitors being installed. Measured pollutants from fine particle monitors (not just the speciated monitors) and the toxics monitors should be compiled and reported to the AIRS database. Toxics being measured through IMPROVE monitors should also be reported to the same database.
2. EPA should oversee the development of the toxics monitoring program to ensure that additional monitors are being strategically placed and are expanding upon existing networks rather than just being co-located with other monitors (for instance the PAMS and IMPROVE networks). EPA should encourage monitoring for different ubiquitous pollutants to get a broad national perspective as well as to allow monitoring for some pollutants likely to be of local concern. This is critical to confirm or refute the CEP modeling results.
3. HAPs selected because of local concern should have a reasonable rationale for their selection. Monitoring for various persistent bioaccumulative toxins is essential.
4. Large emissions of TRI chemicals (those not on HAP list) in a particular area may warrant ambient monitoring for those particular chemicals.
5. Large concentrations of industrial facilities in a non-urban area should also be considered for selection as part of the early network.
6. Public health researchers should be involved in the development of a toxics monitoring program, including providing input on pollutants of concern and designing the network to enable the data to be used for research purposes.
7. Assuring the public's right to know about the results must be a required element, as well as a proactive process for disseminating information.

The UAT Working Group believes that EPA should provide in the final Urban Air Strategy a description of the roles and responsibilities that will be allocated to EPA, the states, and local government in implementing an air monitoring network.

#### List of Sources

The UAT Working Group believes that due to the limited area source emissions data, the source category list is only a starting point for addressing air toxics. The list of source categories may need to be modified (through additions or deletions) as monitoring data become available. Therefore, the strategy must remain flexible to respond and regulate new sources as data become available. Moreover, the strategy must recognize the economic impact of adding particular small businesses to the area source list. Regulation under the Urban Air Strategy may not be the best and most economical manner for reducing these source emissions. Instead, EPA should consider regulation of the products used in certain small businesses such as nail shops and beauty shops. Furthermore, EPA should encourage pollution prevention and the use of alternative products by small business.

The majority of the UAT Working Group believes that before finalizing the Urban Air Strategy, EPA should revisit the draft source list. EPA should compare the draft source list to the sources identified by the State and Territorial Air Pollution Program Administrators and consider adding several key sources that were omitted from EPA's initial list, such as printers and airports. EPA, however, should not list any source for which the Agency is not prepared to use all of its authority to fully regulate.

#### List of Pollutants

The UAT Working Group recommends that EPA revisit the list of pollutants currently identified in the Urban Air Strategy. The UAT Working Group is concerned with the mechanism used for developing the list of priority HAPs, and believes that EPA should explain in the final Urban Air Strategy how the HAPs were identified. The UAT Working Group also recommends that EPA remain flexible with its list of priority HAPs as the program is being fully implemented. Through rigorous monitoring, a more complete inventory of HAP emissions in urban areas will be developed. EPA should rely on the updated inventory to verify that the right pollutants of concern are being targeted under the Urban Air Strategy.

The majority of the UAT Working Group recommends that EPA consider adding pollutants suggested by STAPPA, as well as polychlorinated biphenyls. If EPA is prepared to use its authority under TSCA to address pollutants emitted almost exclusively from the use of consumer products, then the EPA should list these pollutants in the final Urban Air Strategy. If EPA does not intend to address this "nonpoint" source, it may not be appropriate to list them in the Urban Air Strategy.

#### State Programs

The majority of the UAT Working Group believes that EPA should address consistent and pervasive exceedances of established health benchmark concentrations for a number of priority HAPs found nationally by establishing national standards.

The majority of the UAT Working Group believes that the EPA should signal support and offer incentives, including funding for existing and new-air toxics programs at the state level and encourage states to go beyond minimum requirements. States should be required to develop a UAT plan specific to the individual state, its urban areas and toxic hotspots. EPA should provide guidance to states and review plans to ensure accountability. States should work closely with Small Business Assistance Programs to build on information already gathered. The majority of the UAT Working Group believes that the state plans should:

1. Identify areas that the state agency will focus on for air monitoring.
2. Complete a profile of area sources concentrated in a particular area, and their emissions.
3. Quantify HAP emissions and contributing sources, and whether the source is currently regulated under a MACT, GACT, or another emission standard.
4. Identify known and potential toxic hotspots (using CEP results, ambient monitoring, TRI), and assess which communities are potentially affected, such as adjoining and downwind communities.
5. Describe in detail the full range of public participation activities planned by the agency. One specific requirement should be holding community roundtables in targeted neighborhoods.
6. Develop detailed action plans to ensure representatives from the environmental justice and community organizations are active participants in drafting the state plan.
7. Provide an opportunity for the public to petition the state and EPA for air monitoring changes, such as source category changes and hotspot attention, and require the state agency to provide a detailed response if the petition is not accepted.

The UAT Working Group urges EPA to set up a comprehensive framework to accomplish the goals of the Urban Air Strategy, but allow states flexibility in determining how to achieve the desired results. EPA can best serve this end by defining what must be accomplished and how progress will be measured in the real world.

Resources and incentives need to be made available to provide states added incentive to develop state toxics programs. Some of these may include:

1. Using the 112(l) program and providing grant allocations.
2. Using emission fees to fund portions of the program.
3. Providing new funding to states specifically for this program.
4. Include criteria in EPA's performance partnership agreements that would explicitly require states to set up toxics monitoring networks and a toxics program.

5. Include some requirements in the state air grants issued annually.
6. Issuing grants under the Clean Air Partnership Fund to fund state toxics programs and making this one of the selection criteria when soliciting proposals.

#### Areas of Concern

The UAT Working Group believes that a strategy driven solely on the identification of urban areas or geographic hotspots could cause facilities to merely move to "green fields." The majority of the UAT Working Group believes that the backbone of the overall strategy must be driven by national standards and regulations for all source categories of HAP emissions. This will avoid simply moving toxic problems elsewhere to avoid regulation.

States should address the problem of toxic hot spots in their new or existing air toxic programs. The first step in addressing this is identifying where problems exist and what steps are needed to reduce ambient concentrations of toxics. States should use CEP data as a starting point with their knowledge of area sources in a particular area, and with the intended goal of installing a dense network of monitors to develop a more complete inventory of sources contributing to the problem.

The UAT Working Group believe that pollution prevention, sustainable development and small business assistance should all be emphasized in this strategy. Environmental justice advocates and impacted communities have consistently demanded safe and economically viable alternatives to polluting industries in their communities. EPA should use a multi-program scheme such as crossing brownfield and sustainable development funding to encourage these types of developments.

The majority of the UAT Working Group believes that EPA should develop a national policy requiring close risk review prior to issuing permits to new and modified sources. There should be a national "no-degradation" policy with regards to air toxics. Given that areas throughout the U.S. already have unacceptable levels of HAP emissions, this policy would prohibit the issuance of any new permit that would allow new emissions of a similar class of pollutants in those impacted areas (e.g., if there is a cluster of cancer-causing emissions in a neighborhood, no new source emitting (probable or listed) carcinogens would be allowed). This policy needs to apply to local airsheds (neighborhoods) as well as entire metropolitan areas. The risk review must consider cumulative impacts of HAPs with a common health effect to ensure that public health does not further degrade with the increase in HAP emissions.

#### Measuring and Quantifying Risk Reductions

The UAT Working Group believes risk reductions are not real or quantifiable as long as they are based on inadequate measurements. Risk reductions can be a correlated measure with real reductions in

emissions of hazardous air pollutants, and therefore this is the quantifiable measure that should be used. Estimates of reductions and air modeling are not adequate. Risk reductions also cannot be national in scope. This would ignore both what is mandated in the Clean Air Act and the problem of high concentrations of HAPs in urban areas.

To measure real reductions, baseline air monitoring measurements of HAPs must be established in urban communities throughout the nation. In addition, EPA must establish a more complete emissions inventory based on actual measurements (and not just emission factors) for each listed source category prior to developing an emissions standard. EPA should rely on state Small Business Assistance Programs, many of which have been working with area sources of HAPs and have been gathering emissions data from these sectors.

Risk reductions under the Urban Air Strategy need to be achieved for both priority areas being addressed in the strategy - emissions from currently unregulated area sources, and the concentrated mixture of HAPs uniquely found in urban areas. A majority of the UAT Working Group recommends to EPA as follows:

1. Collect emission statements from area sources of HAPs (working with SBAPs as much as is practicable).
2. Evaluate toxicity of various pollutants—including cancer and non-cancer effects (e.g., neurotoxins, respiratory irritants).
3. Evaluate total aggregate emissions of HAP pollutants and their toxicity for each urban area.
4. Evaluate disproportionate geographic distribution of emissions within the urban area that could lead to higher risks for particular communities.

At the same time, EPA should not just focus on current emissions. Background concentrations from reservoirs should not be ignored since many of these contaminants consist of PBTs, greatly influence the total health risk, and continue to have adverse impacts long after industrial sources are controlled.

### Cumulative Impacts

The UAT Working Group believes EPA should begin conducting an assessment of the cumulative impacts of all HAPs with common health effects, such as neurotoxins, by using an additive model. If synergism is known, appropriate multiplying factors should be utilized. This will require the assistance and involvement of researchers and public health and medical professionals. Cumulative impact analysis must account for background concentrations, persistent bioaccumulative toxins, and more than known

current emissions. Cumulative impacts must be assessed and risk reductions achieved not just at the national and regional level, but also for smaller severely impacted communities, frequently inhabited by people of color and low income populations. Averaging out large impacts is unacceptable and not good public health practice.

Multi-pathway analysis is also important for assessing cumulative impacts.

### Residual Risk

The majority of the UAT Working Group believes that the Urban Air Strategy should include a new approach for conducting residual risk. Analysis of residual risk should be comprehensive and address all HAP sources and opportunities for reducing the risks to public health. (Residual risk is more meaningful to the public if it means risks left over after all possible control strategies have been implemented.) For this reason, instead of looking narrowly at the source category currently subject to the MACT standard, EPA should look at all emission sources of a particular HAP and hold those particular sources accountable. It should then identify regulated and unregulated sources and controlled and uncontrolled emission points. If this more comprehensive approach is adopted as part of the Urban Air Strategy, then EPA should be eligible to exercise broader authority than currently is suggested under the MACT residual risk program.

In addition, rather than waiting to evaluate residual risk once a rule is finalized, EPA should conduct a pre-residual risk analysis while developing new toxic emission standards (for major, area *and* mobile sources). Analyzing all sources of a particular HAP while developing a standard will provide the agency a better assessment on whether the resulting standard will adequately reduce health risks, and how the standard should be improved to ensure risks are, in fact, reduced.

### Linking Health Surveillance with Urban Air Strategy

EPA should coordinate with public health researchers when designing databases and when developing and siting a national toxics monitoring network. Traditionally, EPA does not consider health effects research when setting up these network. It's imperative that this component is incorporated through the design and installation of toxics monitors (similar to approach being taken with the PM2.5 monitoring network). States also should be required to work with public health researchers when developing its network. Any guidance, policies, assessments, or evaluations of toxic exposure initiated by EPA should be conducted in close coordination with public health researchers.

Public health policy also should be a prominent component of the national "no-degradation" policy. For example, in the case of asthma, NYC has high incidence rates for hospitalizations and deaths.

Even without linking air pollutants with the incidence of disease, based on two separate sets of knowledge—knowledge of disease rates and knowledge of air pollution— air quality officials should act to reduce air pollutants that are respiratory irritants so that asthma is not exacerbated.

#### Public Participation and Environmental Justice

The UAT Working Group believes that EPA should develop national policy specifying how federal and states agencies will ensure ongoing, meaningful involvement by the environmental justice advocates, community groups, and other stakeholders as the Urban Air Strategy is implemented. The policy should be explicit in how EPA will guarantee participation in all areas of the Urban Air Strategy such as research, air monitoring, health surveillance.

In addition, the policy should outline state requirements for:

1. Developing a process for continuously consulting communities.
2. Providing assistance needed to guarantee meaningful involvement.
3. Develop protocol for distributing announcements regarding upcoming hearings and public meetings to be sensitive to particular community needs.
4. Identify key civic associations that should be brought into the process, and can play a role in reaching out to communities.
5. Establish a citizen task force to oversee the development and implementation of the state's toxics program.
6. Develop a plan to assess the public health significance of exposure to HAPs in urban areas and to report risk in a responsible and understandable manner to communities.

#### Phase-In of the Urban Air Strategy

The UAT Working Group believes that critical data gaps exist that can jeopardize the integrity of the Urban Air Strategy. It is recommended that EPA implement a national air toxics program in distinct steps as it continues to address these gaps, and seek stakeholder input at each stage of the process. In addition to those suggested above, the following near- and long-term actions are proposed:

#### Near Term Actions

1. Establish a process for continuing dialogue with environmental justice advocates, community organizations, state and local agencies, public health researchers, industry and other stakeholders continuously throughout the phase-in of the program. Solicit interest in receiving regular notices of new draft proposals, updates on progress, and schedule for meetings. Set up a framework for this kind of continuing input in the Urban Air Strategy to be released in June.

2. Develop a plan for providing the public with the CEP information, such as through community roundtables, conferences, educational materials, Internet, and EPA should act as a clearinghouse for information.
3. Carefully consider the budgetary needs of EPA for the Urban Air Strategy as well as for states, so that budget requests can be incorporated into the federal budget process. Make budget recommendations and rationale available to interested parties.
4. Develop a plan to fill remaining data gaps, such as research on area source emissions.
5. Compare CEP information with actual monitoring data in different areas of the country, and ensure that this information is available to the public.
6. Plan air monitoring network with involvement of all identified in number 1 above. Get air monitoring set up immediately in the twenty most populous cities.
7. Identify scientific, public health and technical questions and set up an advisory board to address these questions and oversee implementation of the Urban Air Strategy.
8. Carefully consider the budgetary needs and fund research for assessment of the public health significance of exposure to HAPs in urban areas.
9. Carefully consider the budgetary needs and fund air state monitoring networks and air toxic programs.
10. EPA should fully integrate all EPA rulemaking and the MACT program in the Urban Air Strategy to avoid duplicative regulation of the same HAPs and sources.
11. EPA should conduct research requiring the reduction of risk and emission accomplished by existing rules prior to considering the adoption of additional rules based on the Urban Air Strategy.

#### Intermediate and Ongoing Actions

1. Formalize the framework for continued input by making available research plans for comment; by incorporating public comment in the research plans; by gathering the needed data and information, evaluating it with outside parties and using it to set priorities; by continuing to develop and evaluate the progress of the program with input from the affected public and scientific advisors; and by measuring progress with quantifiable measures.
2. Develop rules for acting on CEP data if verified by monitoring data in sufficient areas of the country.
3. Work with states, locals and the public to develop plans for urban areas and other hotspots. As part of this effort gather information on brownfield sites, and other potential areas of concern.
4. Collect and evaluate air monitoring data on a regular basis, and update pollutant and source category

lists as new information is obtained.

## **CONCLUSION**

This report provides the initial recommendations of the UAT Working Group. We will provide or modify our comments as additional information becomes available, and at a minimum, will review and provide recommendations on the final Urban Air Strategy.