

MEETING SUMMARY

of the

ENFORCEMENT SUBCOMMITTEE

of the

NATIONAL ENVIRONMENTAL JUSTICE ADVISORY COUNCIL

April 15, 2004
New Orleans, Louisiana

Meeting Summary Accepted By:

Vicki Simons
Acting Designated Federal Official

Juan Parras
Acting Chair

CHAPTER FOUR MEETING OF THE ENFORCEMENT SUBCOMMITTEE

1.0 INTRODUCTION

The Enforcement Subcommittee of the National Environmental Justice Advisory Council (NEJAC) conducted a one-day meeting on Thursday, April 15, 2004, during a four-day meeting of the NEJAC in New Orleans, Louisiana. Mr. Juan Parras, De Madres a Madres, Inc., served as acting chair of the subcommittee. Ms. Vicki Simons, U.S. Environmental Protection Agency (EPA) Office of Enforcement Compliance Assurance (OECA), served as the acting Designated Federal Official (DFO) for the subcommittee. Exhibit 4-1 lists the members who attended the meeting and identifies those members who were unable to attend.

This chapter provides a summary of the deliberations of the Enforcement Subcommittee, is organized in five sections, including this *Introduction*. Section 2.0, *Remarks*, summarizes the opening remarks of the acting chair; the acting DFO; and Ms. Phyllis Harris, Principal Deputy Assistant Administrator, EPA OECA. Section 3.0, *Facilitated Discussion of OECA's National Program Priorities*, summarizes the discussion of OECA's national program priorities. Section 4.0, *Presentations*, provides an overview of each presentation as well as a summary of questions asked and comments offered by the members of the subcommittee. Section 5.0, *Action Items*, identifies the action items adopted by the subcommittee.

Exhibit 4-1

ENFORCEMENT SUBCOMMITTEE

Members Who Attended the Meeting April 15, 2004

Mr. Juan Parras, **Acting Chair**
Mr. Vicki Simons, **Acting DFO**

Ms. Susana Almanza
Mr. Charles "Chip" Collette

Members Who Were Unable To Attend

Mr. Kenneth Warren, **Chair**

2.0 REMARKS

Mr. Parras, acting chair of the Enforcement Subcommittee, opened the meeting by welcoming the members and Ms. Simons, the acting DFO. Ms. Simons then introduced Mr. Rey Riveria, Environmental Justice and Tribal Coordinator, EPA Office of Solid Waste and Emergency Response (OSWER), Office of Brownfields Cleanup, who will serve as the permanent DFO for the subcommittee. Ms. Simons also announced the new members of the subcommittee, Mr. James Huffman, Lewis and Clarke Law School, and Mr. Benjamin Wilson, Beveridge and Diamond. She explained that their appointments to the subcommittee were not finalized soon enough for them to attend the meeting. Ms. Simons then introduced Ms. Harris.

Ms. Harris began by thanking the members of the subcommittee for their commitment to attending and participating in the meetings of the NEJAC. She stated that she enjoyed the dialogue about cumulative risks and impacts that took place during the Executive Council meeting held on the two previous days and looked forward to hearing the thoughts of the subcommittee members about that session.

Ms. Harris then reminded the members of the subcommittee that OECA had asked the subcommittee to provide comments on OECA's national program priorities and to identify mechanisms that EPA could use to effectively integrate principles of environmental justice into its enforcement and compliance assistance programs. Exhibit 4-2 provides background information on OECA's national program priorities.

Exhibit 4-2

In a memorandum dated August 11, 2003, from Ms. Harris to the members of the subcommittee, she had presented the following questions to the subcommittee:

- & What are the most significant human health or environmental problems that you are seeing in environmental justice communities which can be addressed effectively through enforcement actions or compliance assistance activities?
- & Are there particular industries located near environmental justice communities that have disproportionate impacts on those communities?
- & Can you direct EPA to specific environmental justice communities that are at risk from the cumulative impacts of multiple sources of pollution?

The subcommittee members used these questions as a starting point at their meeting on September 17, 2003, and identified several areas of concern that included, lead, accidental releases, the toxic release inventory (TRI), oversight of state and local enforcement programs, Federal facilities, water quality, and air quality issues.

OECA NATIONAL PROGRAM PRIORITIES

On October 1, 2003, EPA issued its new strategic plan that describes how the agency will use its resources to accomplish EPA's mission. The new plan covers fiscal years (FY) 2003 through 2008 and consists of five goals with the OECA's activities contained in Goal 5 – Compliance and Environmental Stewardship. Therefore, OECA has aligned its FY 2005 through 2007 work planning cycle to align with EPA's strategic planning cycle.

The enforcement and compliance assurance programs have selected national program priorities by considering patterns of noncompliance and environmental or public health risk associated with regulated sectors, particular pollutants, or specific regulatory requirements. Priorities usually are national in scope and must be appropriate for Federal attention and response.

During Summer 2003, OECA asked each EPA regional office to

- & Conduct internal discussions about existing and potential national program priorities
- & Engage state and tribal regulatory partners in discussions of existing and potential national program priorities for FY 2005 through 2007

In addition, EPA conducted outreach related to priorities at a meeting of the Enforcement Subcommittee of the NEJAC on September 17, 2003.

OECA selected its national program priorities using the following criteria:

- & Significant environmental benefit: In what specific areas can the Federal enforcement and compliance assurance programs produce a significant positive impact on human health or the environment? What are the known or estimated public health or environmental risks?
- & Noncompliance: Are there particular economic or industrial sectors, geographic areas, or facility operations where regulated entities have demonstrated serious patterns of noncompliance?
- & EPA responsibility: What identified national problem areas or programs are better addressed through EPA's Federal capabilities in enforcement or compliance assistance?

Ms. Harris informed the subcommittee members that although environmental justice was not selected as a stand-alone priority, OECA senior managers determined that environmental justice concerns are broad and cross-cutting. Therefore, she stated, these managers decided that such concerns should be incorporated into each national priority area and that specific performance measures should be established within each priority area to ensure that principles of environmental justice are integrated.

The following priorities were selected:

- Wet weather
- Air toxics
- New source review (NSR) and prevention of significant deterioration (PSD) requirements under the Clean Air Act (CAA)
- Mineral processing
- Tribal compliance
- Petroleum refining
- Safe Drinking Water Act (SDWA) and microbials
- Financial responsibility

Detailed descriptions of the priority areas are provided in Section 3.0 of this chapter.

Ms. Harris expressed her appreciation to the subcommittee for developing and submitting papers on its proposed priority issues. She then explained that although not all the recommendations of the subcommittee were selected as National Program Priorities, OECA continues to address the remaining issues. For example, she stated, lead in water continues to be a serious issue, and OECA is working closely with the local agencies of the District of Columbia to address the lead issues that face the residents of Washington, DC. In addition, OECA's Office of Regulatory Enforcement is working with regional offices to monitor lead levels at schools in Philadelphia, Pennsylvania; Baltimore, Maryland; Boston, Massachusetts; and New York City and Syracuse, New York. OECA also is partnering with the EPA Office of Water to compile data about cities that have lead levels in their drinking water that are reaching action levels.

In addition, Ms. Harris explained that EPA, the U.S. Department of Housing and Urban Development (HUD), and the U.S. Department of Justice (DOJ) are working on a joint initiative to investigate and promote compliance with the Federal Lead-based Paint Disclosure Rule. This initiative includes a strong environmental justice component because the focus is on low-income communities, which often have a high incidence of childhood blood-lead poisoning that is associated with older, substandard housing. A number of settlements reached so far have required property owners and managers to inspect and test housing for the presence of lead-based paint, she stated. A priority also has been placed on abating hazards in residential units occupied by children. Ms. Harris stated that settlements have resulted in commitments to inspect and test more than 160,000 housing units and in collection of more than \$350,000 in penalties.

Continuing, Ms. Harris proceeded to update the members on activities related to the TRI. Ms. Harris stated that based on the most recent publicly available TRI data, over 3,000 facilities failed to submit approximately 8,000 reporting forms under the TRI on time during reporting years 2000 and 2001. In addition, releases of about 1.3 billion pounds of materials were reported late; therefore, that information could not be included in the public data release reports, depriving people of information on chemicals being released near the locations where they live. To address this problem, OECA's Office of Regulatory Enforcement has started a new initiative to target companies that submit TRI forms late. Under the initiative, OECA developed a three-tiered enforcement response:

- Tier one applies to facilities that reported too late for 2000 and 2001. Under this scenario, companies will receive an opportunity to either dispute the violation or settle in accordance with EPA's penalty policy.
- Tier two applies to facilities that reported too late for the public data release report for one of the two years. Under this scenario, companies will receive either an opportunity to dispute violations or an offer to settle for a flat penalty of \$5,000 per facility.
- Tier three applies to facilities that reported late but whose information was included in the public data release report. These facilities will receive a notice of noncompliance.

Ms. Harris explained that the purpose of the initiative is to help ensure that the public has timely access to information about releases of chemicals in the community by providing a stronger incentive for facilities to report on time. She concluded by stating that to measure the initiative's success, EPA will compare late reporting rates before and after the initiative.

Ms. Harris then discussed issues related to accidental releases and explained that OECA's Resource Conservation Recovery Act (RCRA) Enforcement Division has the lead on enforcing the Chemical Accident Prevention Provisions of the CAA. These regulations require companies that use toxic substances to develop a risk management program. The components of a risk management plan include:

- & A hazard assessment of the potential effects of an accidental release, an accident history for the last five years, and an evaluation of worst-case and alternative accidental releases
- & A prevention program that includes safety precautions and maintenance, monitoring, and employee training measures

- & An emergency response program that identifies emergency healthcare facilities, employee training measures, and procedures for informing the public and response agencies should an accident occur

Since the regulations went into effect in 1999, EPA has taken more than 150 enforcement actions against violators. Most recently, OECA issued an Expedited Settlement Approach Policy to streamline the administrative enforcement process for easily correctable violations.

In areas related to providing oversight of state and local enforcement programs, Ms. Harris stated that OECA, with the assistance of the EPA regions, states, and the Environmental Council of States (ECOS), is developing a new tool to assess state performance in enforcement and compliance assurance activities. The purpose of the assessment is for states to determine performance standards in collaboration with the EPA regions. Under the framework, 13 areas are identified for evaluation of state performance, including timely reporting of violations, inclusion of injunctive relief and return to compliance, and timely initiation of enforcement actions. Over the next eight months, EPA will conduct a pilot assessment of one state in each region. Upon completion and evaluation of the pilot assessments, OECA will work with the regions to establish schedules for completing assessments with all the states. Ms. Harris stated that the lessons learned will be shared with the members of the subcommittee and their comments will be requested. She then asked for suggestions on how to engage the public in with this process.

Ms. Susana Almanza, People Organized in Defense of Earth and Her Resources (PODER) and a member of the Enforcement Subcommittee, asked whether the public currently is involved. Ms. Harris responded that currently OECA is focusing on the states agreeing to the assessments. She explained that not all states have agreed to them. Mr. Chip Collette, Florida Department of Environmental Protection (FDEP) and a member of the Enforcement Subcommittee, agreed with Ms. Harris. He explained that the states need to be in agreement, and then EPA can request comments from the public. Ms. Almanza asked whether this process is voluntary for the states. Ms. Harris explained that EPA has the authority to assess the states at any time; however, EPA has not done this consistently. Ms. Harris referred to the 1986 memorandum titled *Policy Framework for State and EPA Enforcement Agreements*, which outlines the process for establishing and maintaining the state and EPA relationship for enforcement and compliance assurance.

Ms. Harris continued by discussing issues related to Federal facilities. She explained that OECA's Federal Facilities Enforcement Office (FFEO) has developed an inspection and enforcement initiative to provide support and resources to EPA regional offices in order to help them conduct multimedia inspections at Federal facilities and provide follow-up case support when appropriate. The initiative, she explained, follows OECA's "smart enforcement principles":

- & Address significant environmental, public health, and compliance problems
- & Use data to make strategic decisions for better utilization of resources
- & Use the most appropriate tool to achieve the best outcome
- & Assess the effectiveness of program activities to ensure continuous program improvement
- & Effectively communicate the environmental, public health, and compliance outcomes
- & Consider environmental justice as a factor in determining inspection targets

She concluded her update on issues related to Federal facilities by stressing that environmental justice factors will be critical in identifying targets for inspection and that preference will be given to facilities in environmental justice communities.

Ms. Harris concluded her remarks by emphasizing that environmental justice will be an integral part of OECA's national program priorities. She stated that each program office in OECA has developed an environmental justice action plan that includes performance goals and outcomes for the next two years. In addition, OECA senior managers recently developed a *Concept Paper for Environmental Targeting* that will assist OECA in identifying a consistent set of parameters that can be used to define

environmental justice communities and to help develop a targeting tool to identify disproportionate impacts in such communities. In 2003, she stated, 600 million pounds of potential pollutants were reduced because of enforcement actions, but OECA cannot identify what percentage of this reduction was in environmental justice communities and is trying to better quantify this achievement.

Ms. Almanza expressed concern that environmental justice was not selected as a stand-alone priority. She asked how OECA senior managers will ensure that environmental justice is taken seriously. Ms. Harris responded that every program in OECA had to develop performance measures in this area.

Mr. Parras stated that the siting of schools next to hazardous facilities or on brownfields-type properties is a major concern that had not yet been addressed during the meeting. Mr. Parras expressed the importance of examining the decisions to locate schools on such properties. In his community, a school was located in the middle of a group of petrochemical plants. The affected community had no resources or political clout to protest the siting. He explained that this type of problem is occurring throughout the United States. Ms. Harris suggested that the subcommittee follow up with Mr. Bill Sanders, Director of the Office of Children's Health. Ms. Marva King, EPA Office of Environmental Justice (OEJ), also suggested that the subcommittee talk with Mr. Kent Benjamin, Environmental Justice Coordinator for EPA OSWER and the DFO for the Waste and Facility Siting Subcommittee.

In closing, Ms. Harris thanked the subcommittee members for all their efforts.

3.0 FACILITATED DISCUSSION OF OECA's NATIONAL PROGRAM PRIORITIES

This section summarizes the subcommittee's facilitated discussion of OECA's national program priorities. Ms. Tinka Hyde, Enforcement Coordinator, EPA Region 5, began this session by explaining the nature of the concerns related to each national priority. OECA's national program priorities are summarized in Exhibit 4-3.

Ms. Simons then explained that performance-based strategy teams at OECA are beginning to develop goal statements to address each national priority. She informed the subcommittee members that this would be an opportune time for them to offer their comments on the selected national priorities and to make recommendations on how OECA could integrate environmental justice into the goal statements.

Ms. Simons encouraged the subcommittee members to consider how OECA could address environmental justice in its national priorities by using the following factors:

- Outreach, education, and communication
- Collaborative problem-solving
- Coordination among Federal, state, and tribal partners
- Tools, targeting, and assessment

Through a facilitated discussion, the members of the subcommittee then offered comments and recommendations on each national priority. The discussion is summarized below.

3.1 Wet Weather Issues under the CWA

Regarding wet weather issues, Mr. Collette said that most states operate their own National Pollutant Discharge Elimination System (NPDES) programs under the CWA. He expressed concern that individual facilities are not applying for NPDES permits. He explained that the effects of not complying with NPDES usually are very broad, and he asked whether EPA has mechanisms to identify environmental justice communities that may be impacted. Mr. Collette continued by saying that states need to be involved when EPA addresses this priority area. He concluded by saying that at a state level

Exhibit 4-3

**OECA'S NATIONAL PROGRAM PRIORITIES
FOR 2005 THROUGH 2007**

OECA has selected the following national program priorities for FY 2005 through 2007.

| National Program Priority | Nature of Concern to be Addressed |
|--|---|
| <i>FY 2005 Priority</i> | |
| Petroleum Refinery Sector | Reduce air emissions and eliminate unpermitted releases from an estimated 162 operable domestic refineries throughout the United States |
| <i>FY 2005 through 2007 Priorities</i> | |
| Wet Weather Issues under the Clean Water Act (CWA) | Ensure compliance with CWA requirements to address storm water runoff, overflows from combined and sanitary sewers, and concentrated animal feeding operation (CAFO) discharges. These discharges can contain bacteria, pathogens, and other pollutants that may cause illnesses in humans; lead to water quality impairments, including beach and shellfish bed closures; and harm the nation's water resources. |
| NSR/PSD requirements under the CAA | Ensure that NSR and PSD requirements under the CAA are implemented. Failure to comply with NSR and PSD requirements may lead to inadequate control of emissions result in the release of thousands of tons of pollution to the air each year, particularly nitrogen oxides, and volatile organic compounds, and particulate matter. |
| Air Toxics and the CAA | Reduce public exposure to toxic air emissions by using directed monitoring and enforcement to ensure compliance with the Maximum Achievable Control Technology (MACT) standards. This is the second phase of this priority following four years of compliance assistance and development of implementation tools. |
| Tribal Compliance | In Indian country and tribal areas in Alaska, address significant human health and environmental problems associated with drinking water, hazardous waste management, and environmental risks in tribal schools (such as lead-based paint risks); ensure compliance within targeted areas, and address adjacent, noncomplying facilities impacting Indian Country and tribal areas. |
| Mineral Processing under RCRA | Address unpermitted mineral processing facilities. Evidence gathered in recent inspections indicates that mineral processing facilities are failing to obtain the necessary permits and adequately manage their wastes. EPA has found that mishandling of mineral processing wastes has caused significant environmental damage and resulted in costly cleanups. These highly acidic wastes have caused fish kills, and the arsenic and cadmium that these wastes often contain have been found at elevated levels in residential drinking water wells. |
| Financial Responsibility | (To begin in FY 2006) Strengthen compliance with financial responsibility requirements under various environmental laws to ensure that individuals or companies handling hazardous waste, hazardous substances, toxic materials, or pollutants have adequate funds to close their facilities, clean up any releases, and compensate any parties affected by their actions. |

(at least in Florida), concerns related to environmental justice are not considered during the process of issuing NPDES permits.

Ms. Hyde responded that facilities may not have NPDES permits for a variety of reasons; for example, a permit could have expired, or a permit did not address long-term problems. For combined sewer overflows, EPA Region 5 works closely with the states. Ms. Harris added that most states have geographic information systems (GIS) similar to EPA's that could assist the states in identifying potential environmental justice communities. Most of the EPA regions are generally familiar with the issues, and several regions assist the states in analyzing permit applications, Ms. Harris stated. Ms. Almanza asked how EPA can ensure that a state addresses environmental justice concerns when considering whether to issue a permit. Ms. Harris explained that it often depends on a state's ability to establish an environmental justice program. She added that the EPA regions will continue to stress that states should address environmental justice concerns during the permitting process.

Members of the subcommittee also inquired about additional approaches that EPA could use to improve its ability to identify communities with significant environmental and public health problems. Ms. Almanza recommended reviewing complaints submitted to EPA under Title VI of the Civil Rights Act of 1964 or using GIS mapping tools. She commented that most wastewater treatment plants are located in communities of color; for example, in Austin, Texas, 90 percent of industrial zoning is in communities of color. Continuing, Ms. Almanza stated that development of a Federal policy on zoning also should be considered. Ms. Harris then added that in Atlanta, Georgia, all wastewater treatment plants currently are located in communities that have environmental justice concerns. Ms. Hyde offered to provide the subcommittee with a report that identifies the locations of all combined sewer overflows in the United States.

Ms. Simons then summarized the recommendations of the subcommittee related to wet weather issues:

- Review complaints submitted to EPA under Title VI of the Civil Rights Act in order to identify communities with environmental and public health problems
- Ensure that states consider environmental justice concerns when issuing citations for wet weather violations
- Use GIS mapping tools to identify wastewater facilities in environmental justice communities
- Examine the compliance of Federal facilities with the CWA by requesting additional information on targeting
- Examine the wet weather impacts on colonias (Follow up with Ms. Wendy Graham, Environmental Justice Coordinator for the EPA Office of International Affairs and the DFO for the International Subcommittee.)

3.2 Air Toxics and the CAA

Beginning the discussion of air toxics, Ms. Almanza recommended that EPA determine whether if states are conducting air monitoring in communities of color. In addition, she stated that the air toxics need to be considered in relation to cumulative impacts on high-risk communities. Ms. Harris explained that there also are attainment issues to consider. She suggested that the members of the subcommittee follow up with the Air and Water Subcommittee on this issue. She also recommended inviting an EPA region that conducts air monitoring in high-risk communities to report its findings to the subcommittee at a future meeting.

Continuing, Mr. Parras described a program in Houston, Texas, that trained members of an impacted community how to collect air samples with the assistance of EPA, the state, and the city. The next step was to place air monitors in the community; however, the program ran out of funding. The state was asked to provide the air monitors but never did so because of the cost. Ms. Hyde clarified that EPA is not focusing on placing air monitors but on collecting data that already exists to identify highly impacted areas. Ms. Harris stated that placing air monitors in communities would be a good supplemental environmental project (SEP) for noncompliant industries. Ms. Almanza recommended that the information that EPA collects for the *Concept Paper for Environmental Targeting* be used to identify highly impacted areas and then to ensure that no other facilities are sited in these areas. She hopes that the states also will use this information.

Mr. Parras suggested that mercury contamination also should be included in the air toxics priority area. In Texas, he stated, numerous coal-burning facilities for specific chemicals cause excessive mercury contamination of the air.

Ms. Simons summarized the recommendations of the subcommittee related to air toxics:

- Conduct air monitoring for specific chemicals in communities
- Consider air toxics in relation to cumulative impacts
- Invite an EPA region to present a report on toxics monitoring (Mr. Mark Hansen, EPA Region 6, was recommended as a potential presenter.)

- Continue funding citizen air sampling in Houston, Texas (Mr. Doug Liptka, EPA Region 6, currently is working on a request for additional funding.)
- Recommend air monitoring as a SEP
- Include mercury contamination in the priority area
- Coordinate with Mr. Wil Wilson, Environmental Justice Coordinator for the EPA Office of Air and Radiation and the DFO for the Air and Water Subcommittee
- Recommend that states use GIS mapping and other data collection methods before siting facilities in highly impacted communities

3.3 NSR/PSD Requirements under the CAA

Ms. Harris began the discussion of NSR/PSD requirements by informing the subcommittee members that EPA has proposed new rules to clarify NSR. In addition, she explained that the Equipment Placement Rule (EPR) has been stayed by EPA. There is an existing rule, however, that places limitations on the resources that EPA can use. Because of these limitations, Ms. Harris stated, it has become important for EPA to ensure that OECA is addressing the appropriate issues (for example, pollution prevention). She explained that OECA continues to enforce the existing law despite the current stay on the proposed EPR.

Mr. Parras then referred to a report issued by EPA's Office of Air and Radiation (OAR) on nonattainment areas. He asked whether OECA could take any action to address these nonattainment areas. Ms. Harris explained that OECA does not have the authority to enforce the CAA; however, she stated, OAR currently is working with the states to address such issues. Mr. Collette also pointed out that addressing ozone in terms of attainment is an environmental justice issues for all because it impacts everyone. Ms. King recommended that the Enforcement Subcommittee coordinate with the Air and Water Subcommittee to address these issues. Also, the Enforcement Subcommittee members requested that Ms. Simons ask Mr. Wilson to provide information on nonattainment and ozone issues. Ms. Almanza stated that it is important to examine the cumulative impacts of nonattainment on environmental justice communities.

Ms. Harris added that as a mechanism for enforcing the requirements of the CAA, state governments often distribute or refuse to distribute transportation funding based on attainment or nonattainment. For example, in Atlanta, legal authorities were used to dispute a transportation conformity plan.

3.4 Mineral Processing under RCRA

Ms. Harris explained that mineral processing as regulated under RCRA was selected as a national priority because many mineral processing facilities have been operating as though they are exempt from RCRA. Mishandling of mineral processing wastes has caused significant environmental damage and is resulting in costly cleanups, she explained. For example, in discussions with the regulated community, EPA Region 4 was led to believe that waste from mineral processing plants was exempt. It is now known that exempt waste was mixed with nonexempt waste, and the region is revisiting these issues.

Continuing, Mr. Collette stated that Florida has problems with phosphate mining and gypsum stacks associated with ongoing coal-firing operations. Mr. Collette explained that gypsum is the by-product of a pollution control process at power plants and that the low-income, rural communities that live near the plants have little capacity or ability to address the problems with gypsum stacks. He expressed his belief that regulators need to be more proactive in identifying what needs to be done to address such problems. Mr. Parras asked how gypsum stacks can be eliminated. Ms. Harris responded that there are opportunities for enforcement when violations are cited. For example, facilities can be made to conduct pollution prevention activities through SEPs. The subcommittee requested a compliance and enforcement update on this issue in the future.

3.5 Tribal Compliance

The members of the Enforcement Subcommittee agreed that the tribal compliance priority area should be addressed by the Indigenous Peoples Subcommittee. The Enforcement Subcommittee then decided to coordinate with Mr. Daniel Gogal, EPA OEJ and the DFO for the Indigenous Peoples Subcommittee, regarding recommendations for OECA's tribal compliance national priority.

Ms. Harris explained that OECA is identifying issues that are unique to specific tribes. It is important to note, she said, that some tribes are very sophisticated and are operating facilities that are causing significant environmental impacts. Ms. Teresa Cooks, Communication Specialist, EPA Region 6, stated that in Region 6, the Mescalero Tribe has 14 water systems, and for the first time, all 14 systems are in compliance. Mr. Parras indicated that low-level radioactive waste also should be addressed as part of the priority area.

3.6 Financial Responsibility

Ms. Harris explained that financial assurance requirements under environmental laws ensure that persons or companies handling hazardous or toxic materials have adequate funds to close facilities, clean up releases, and compensate anyone harmed by releases. EPA is now aware, she continued, that many companies may not have been honest about having adequate funding to close their facilities. When these facilities close and the required funding is not in place, EPA will need to fund the cleanup and have no ability to pursue recovery costs.

4.0 PRESENTATIONS

This section summarizes the presentations made and reports submitted to the Enforcement Subcommittee.

4.1 Facilitated Discussion: *Office of the Inspector General's Report: EPA Needs to Consistently Implement the Intent of the Executive Order on Environmental Justice*

Mr. Charles Lee, Associate Director, EPA OEJ, discussed the *Office of the Inspector General's Report: EPA Needs to Consistently Implement the Intent of the Executive Order on Environmental Justice* (IG report) and the areas in which EPA differs with the Office of the Inspector General's (OIG) findings. Mr. Lee explained that although OEJ disagrees with some findings in the report, OEJ believes that the report has provided an opportunity for EPA to focus on environmental justice. He went on to say that environmental justice is a complex issue and that it is important to have discussions about the concepts of environmental justice and the values associated with it.

Mr. Lee then offered the members of the subcommittee a brief history of the origins of the environmental justice movement. He noted that environmental justice became a nationally recognized issue in 1982 and that in 1983, the U.S. General Accounting Office (GAO) found that three of four commercial hazardous waste facilities in EPA Region 4 were in minority areas and that the fourth was in a low-income area. Mr. Lee explained that EPA responded by forming the Environmental Equity Workgroup in 1990. In June 1992, the workgroup noted that minority and low-income populations bear a higher environmental risk burden than the general population, and in November 1992, EPA established the Office of Environmental Equity (which was renamed the Office of Environmental Justice in 1994). The next major milestone, Mr. Lee stated, was on February 11, 1994, when President Clinton issued Executive Order 12898, "Federal Action to Address Environmental Justice in Minority Populations and Low-Income Populations." Mr. Lee also commented that he and Mr. Barry Hill, Director of EPA OEJ, participated in the effort to develop the language that became Executive Order 12898.

Mr. Lee then explained that the IG report sought to answer the following questions:

- & How has EPA implemented Executive Order 12898 and integrated its concepts into EPA's regional and program offices?
- & How are environmental justice areas defined at the regional levels, and what is the impact?

Mr. Lee explained that OIG believes that EPA has not fully implemented Executive Order 12898 and has not consistently integrated environmental justice into its day-to-day operations. In addition, the IG report states that "EPA has not identified minority and low-income, nor identified populations addressed in the executive order, and has neither defined nor developed criteria for determining disproportionately impacted." Mr. Lee then summarized the three recommendations of the IG report:

- & Develop a standard strategy that limits variations related to GIS applications, including use of census information, determination of minority status, determination of income threshold, and all other criteria necessary to provide regions with information for environmental justice decisions
- & Require that the selected strategy for determining an environmental justice community be consistent for all EPA program and regional offices
- & Develop a clear and comprehensive policy on actions that will benefit and protect identified minority and low-income communities, and strive to include this policy in states' Performance Partnership Agreements and Performance Partnership Grants

Mr. Lee, however, expressed his belief that it is critical to continue to address disproportionate impacts even though the definition of such impacts may vary among EPA and the states.

Mr. Lee informed the subcommittee members that throughout EPA, a new approach to addressing environmental justice has begun to link social and public health factors. For example, OECA has developed the *Concept Paper for Environmental Targeting*.

Continuing, Mr. Lee explained that the premise of the IG report would require the development of a uniform, quantitative, national standard for defining an environmental justice community. The recommendations in the IG report flow from this premise. He explained that other Federal agencies, such as the White House Council of Environmental Quality, the U.S. Department of Transportation (DOT), and DOJ, have developed definitions for environmental justice communities; however, the definitions vary from simplistic to complicated. Mr. Lee stated that each community is unique and should be treated as such. Mr. Lee expressed OEJ's belief that by defining environmental justice, salient issues may be missed. For example, Mr. Lee stated that setting thresholds will create real problems. If "24.9" is established as a threshold, communities with a score of "24.8" would be excluded.

Mr. Lee then noted that one of the most significant parts of the IG report appears on page eight. The report quotes the executive order:

To the greatest extent practicable and permitted by law, and consistent with the principles set forth in the report on the National Performance Review, each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies and activities on minority populations and low-income populations in the United States and its territories and possessions...(emphasis added)

He explained that EPA has not been able to address this section of the executive order because the phrase is a transposition of civil rights legal concepts regarding environmental law. The problem with this transposition is that environmental law does not address a protected class, he stated. The more precise analytical method to use, Mr. Lee explained, is to address environmental justice issues that include adverse impacts on human health, unique exposure pathways, sensitive populations, and multiple cumulative impacts. Mr. Lee stated that human health and environmental effects are a nexus and explained that it is important to determine how to integrate civil rights with social concepts.

Mr. Collette commented that he had conceptual problems with the IG report. He explained that he was most disturbed by OIG's assumption that "disproportionate impact" can be easily handled or identified. He continued by explaining that "disproportionate impact" analysis looks at issues in isolation and would not allow for a cumulative analysis. He also stated that statistical analysis is costly and that EPA probably does not have the resources to apply it.

Ms. Almanza asked what prompted OIG to conduct the evaluation. Mr. Lee explained that OIG asked to investigate the environmental justice implications of air emission trading and as the OIG was collecting this data, it believed that there also was a need to examine EPA's overall implementation of the executive order.

Ms. Almanza expressed agreement with Mr. Lee that environmental justice should not be limited by a single definition. She continued that a definition should not be so concise that some communities will be overlooked. Mr. Lee added that the more fundamental fear is that once environmental justice communities are defined, the issue will be marginalized because enforcement of environmental justice cannot be directly linked to environmental laws. Mr. Lee identified three conundrums of environmental justice: (1) problem-solving, (2) the meaning of "disproportionate impacts", and (3) the conflict between civil rights law and environmental law.

Mr. Parras stated that communities are unaware of the IG report and therefore have not provided any comments. He continued by stating that those who know about environmental justice often view it as an affirmative action program intended to address environmental problems. He then asked whether EPA will request that communities comments on the IG report. Mr. Lee reiterated that EPA's response is dictated by the statute and must be provided within 90 days; however, communities are welcome to provide report comments to OIG.

Mr. Lee also pointed out that most communities do not understand the challenges involved in promoting their cases. Most communities read the executive order and then ask EPA to designate them as environmental justice communities in order to solve their problems. This approach often leads to frustration.

Mr. Parras suggested conducting an outreach campaign for communities about the IG report and EPA's response to assure them that the scope and agenda for environmental justice have not changed. Mr. Lee agreed that there needs to be communication with communities. He also stressed that there needs to be a better understanding of the limits of environmental laws. Ms. King said that OEJ will be distributing 10,000 copies of a DVD titled, *Communities and Environmental Laws and Citizens Guide to Environmental Justice*. Ms. King stated that OEJ is excited about distributing the DVD titled to communities in an effort to educate them about the use of environmental laws. She continued by explaining that OEJ will be providing training on the DVD in the near future.

Ms. Almanza stated that communities do not understand the difference between civil rights and environmental justice. Mr. Lee agreed and stated that most community and advocacy groups have yet to make a distinction between the two concepts. Ms. Almanza also stated that the IG report does not change anything for the communities including the need to still respond to their requests for help. She stated that it is important not to get caught up in "paperwork." Communities, she explained, will try all avenues, including civil rights laws, education, and other Federal agencies, to seek relief from their environmental problems.

4.2 Presentation and Discussion: *Concept Paper for Environmental Targeting: Policy and Technical Issues*

Ms. Hyde explained that the *Concept Paper for Environmental Targeting: Policy and Technical Issues* is the result of an effort that started in May 2003. OECA, she stated, identified a need for

- & A consistent set of parameters that can be used to define an environmental justice community
- & A proactive targeting tool to assist EPA regions and headquarters program offices in identifying the potential for disproportionate impacts on communities

As a result, a small workgroup was developed to work with OEJ in order to develop a targeting tool, stated Ms. Hyde. The concept paper, Ms. Hyde stated, focuses on work within OECA, but other EPA program offices may be able to adopt some of the concepts presented.

Exhibit 4-4

**CONCEPT PAPER FOR ENVIRONMENTAL TARGETING:
IDENTIFICATION OF INDICATORS**

The recommendations identified in the *Concept Paper for Environmental Targeting* recommends that the OECA apply a nationally consistent set of environmental, health, and demographic factors to identify and set priorities among communities with environmental and public health problems as well as to evaluate OECA's national priority sectors in order to determine which facilities are located in geographic areas of concern. To accomplish these goals, the following approach is recommended:

Existing Health Vulnerabilities and Environmental Conditions: The following indicators are recommended for use as threshold criteria, to allow EPA to first identify geographic areas of concern with environmental and public health issues.

- Environmental Compliance Factors
 - Facility density
 - Frequency of compliance monitoring
 - Compliance history of facilities an area
- Health (Vulnerability) Factors
 - Nationally available (Centers for Disease Control and Prevention) health data (for example, cancer mortality, cancer incidence, infant mortality, and low birth weight rates)
 - Available local data (for example, asthma, childhood lead poisoning, and birth defects)
- Environmental Factors
 - TRI emissions using Risk Screening Environmental Indicators Program
 - EPA emission data and ambient environmental data (nonattainment and 305(b) stream data)
 - Available local data (such as beach closures or fish advisories)

Community Demographics Once areas with environmental and public health issues are identified, the following community demographic indicators should be used to set priorities for areas where EPA should deploy its resources:

- Locations where minority populations (defined as all races, except non-Hispanic whites) reside at higher than the state averages
- Locations where the percentage of children (six years of age or younger) and older Americans (65 years of age or older) higher than the state averages
- Locations where the percentage of individuals (or families) whose median household income is at or below the U.S. Department of Human Health Services-defined poverty level is higher than the state average

Continuing, she explained that the workgroup recommends that OECA apply a nationally consistent set of environmental, health, and demographic factors to identify and set priorities among communities with environmental and public health problems as well as to evaluate OECA's national priority sectors to determine which facilities are located in geographic areas of concern. In addition, Ms. Hyde noted that existing health vulnerabilities and environmental conditions will be used as threshold criteria to allow the workgroup to first identify geographic areas of concern with environmental and public health issues. Once areas of environmental and public health issues are identified, community demographic indicators will be used to help prioritize the areas where resources will be deployed. Exhibit 4-4 provides additional information on the indicators for the study.

Ms. Hyde stated that OECA should develop, maintain, and use the recommended environmental justice targeting tool to prioritize geographic areas with environmental and public health issues and to assist in making resource deployment decisions. Ms. Hyde said that the next steps will be to finalize the concept paper, establish a task team to develop a targeting tool, and apply the tool to the national priorities. She stated that she hopes this approach will be applied to the national priorities for FY 2005.

Mr. Parras asked whether the members of the Enforcement Subcommittee would be given the opportunity to comment on the concept paper. Ms. Hyde stated that she would be happy to receive recommendations from the subcommittee. Ms. Simons asked whether the concept paper would result

in a new database. Ms. Hyde responded that the information collected is to be integrated into existing databases. Ms. King commented that the communication and translation of this information will be important. Communities need to understand what the targeting tool is and how it may affect them. Ms. Simons asked whether the workgroup has considered how communities will access the information. Ms. Hyde stated that this is a dilemma for the Enforcement Program because some of the information may be confidential. Overall, the subcommittee members stated that they are happy that OECA has taken the initial steps to develop a targeting tool.

5.0 ACTION ITEMS

This section summarizes the action items adopted by the subcommittee.

- 7 Develop recommendations for community outreach concerning the IG report:
 - Establish immediate communication with communities about EPA's response to the report
 - Focus ongoing outreach on training and resources
 - Use the Enforcement Subcommittee as a vehicle to review and help implement the communication strategy
- 7 Coordinate with other subcommittees of the NEJAC regarding OECA's national program priorities:
 - Coordinate with Mr. Wilson for recommendations related to OECA's air toxics national priority
 - Coordinate with Mr. Gogal for recommendations related to OECA's tribal compliance national priority
- 7 Coordinate with Mr. Sanders regarding the issues of schools being located in highly industrialized and potentially toxic areas
- 7 Provide the members of the subcommittee with a report that identifies locations of combined sewer overflows (Ms. Hyde)