

# Environmental Laws and Alternative Dispute Resolution: Tools for Environmental Justice

## Delegation of Environmental Programs to States and Tribes

### Introduction

Most major pollution control laws authorize the U.S. Environmental Protection Agency (EPA) to *delegate* significant programmatic responsibility for permitting, monitoring, and enforcement activities to state and tribal governments. *Program delegation* means that the authority to operate a regulatory program has been shifted from EPA to a state environmental agency or tribal government. Consequently, the state agency or tribal government is responsible for carrying out the provisions of the laws.

### Why "Delegate"?

Delegation places authority in the hands of state officials whose residents will experience the benefits and burdens of environmental decisions. One purpose behind the delegation of statutory programs from EPA is to address the balance of power between federal and state or tribal governments. The federal system of law uses modern pollution control statutes to establish *national* standards and to provide for *uniformity* in their implementation and enforcement. At the same time, the federal system of laws gives a large role to state and tribal governments in the implementation and enforcement of these laws. There is also a general policy preference for "*states' rights*" and tribal sovereignty. Often states and tribes are more aware of, and better positioned to respond to, conditions in the field due to their first-hand account of local problems. The purpose of delegating EPA's authority is therefore:

- To achieve a balance between local control and nationally consistent environmental protection; and
- To ensure that federal and state expertise and resources are put to their most effective uses.

So long as a state implements a program that is comparable with the federal requirements, EPA plays only an oversight and compliance assurance function.

## Process Used for Program Delegation

Programs that can be delegated include water and air pollution, hazardous and solid waste, and drinking water. With the exception of the Comprehensive Environmental Response Compensation and Liability Act (CERCLA), which has no delegated programs, the delegation provisions of EPA's major statutes are substantially similar. The process for delegation includes:

- Formal application by the state or tribal government for federal authorization, which is reviewed by EPA through a public process;
- Determination by EPA of whether the state's or tribe's laws and proposed measures provide adequate personnel, funding, and authority to carry out the federal program; and
- Approval by EPA of the program, by which EPA gives to the state or tribal government the appropriate elements of its authority within that jurisdiction.

Community residents can participate in EPA's decisions regarding delegation of environmental regulatory programs by providing written information and testimony. Useful information relates to the adequacy of personnel, funding and authority of the state or tribal government to carry out the program.

## EPA Oversight

Even after authority for a program has been delegated, EPA often retains oversight of various state actions and decisions. This oversight is important to ensure that the federal requirements are met. Examples of EPA's oversight include:

*Clean Air Act (CAA):* Under the CAA, EPA can impose sanctions against a state if the Agency makes a "finding, disapproval, or determination" that sanctions are necessary to ensure that any State Implementation Program (SIP) meets the requirements of the CAA [42 U.S.C. §7410(m)]. One drastic sanction EPA can impose, if a state's transit plan does not conform to its SIP, is withholding federal highway funds for the state. Citizens can also impact the process of developing a SIP. This can provide significant opportunities for addressing environmental justice concerns related to air pollution.

### EPA Oversight, continued

Clean Water Act (CWA): The CWA authorizes EPA to make grants to assist states in administering programs, and requires EPA to withhold grant monies from states that fail to conduct adequate water quality monitoring and reporting [33 U.S.C. §1256]. However, the CWA lacks the financial leverage of withholding federal highway funding, as under the CAA. The CWA authorizes EPA to review state-issued discharge permits and dredge-and-fill permits, and to object in writing to the issuance of any permit “as being outside the guidelines and requirements” of the Act. If the state fails to address EPA’s objections following a public hearing, EPA may issue its own federal version of the permit [33 U.S.C. §1342(d)(2)(B) and 33 U.S.C. §1344(j)]. Depending on circumstances, such ongoing review processes may provide an additional opportunity, and an additional forum, for incorporating environmental justice concerns into operating permits.

*Resource Conservation and Recovery Act (RCRA):* EPA is entitled to participate in the public notice-and-comment period on proposed state-issued permits [40 C.F.R. §271.19(a)]. If the state has been delegated EPA’s “omnibus authority” to protect human health and the environment, but fails to address factors identified by EPA as necessary for doing so, EPA can seek to enforce its comments and have the state include appropriate permit conditions.

It is important to note that commenting by community residents and others is generally permitted when EPA exercises its oversight of state and tribal government programs.

### Revoking Program Delegation

Most of the statutes that authorize delegation of EPA program authority to state environmental agencies and tribal governments also make some provision for its revocation and return to EPA if the authority is not being properly used.

The EPA’s power to completely revoke delegated authority implies a variety of lesser-included powers and sanctions. These include the ability to review and object to state-issued permits and place conditions on federal funding; or other measures that fall short of total revocation of the delegated authority. Examples of these measures under the CAA, CWA, and RCRA are described below.

## **Revoking Program Delegation**

Examples of measures that revoke delegated authority:

The CWA and CAA both provide that if EPA finds violations of state-issued permits that “are so widespread that such violations appear to result from a failure of the State to enforce such permit conditions or limitations effectively,” it must give the state notice, and if the situation goes uncorrected, temporarily assume federal enforcement authority until the state provides assurances that it will enforce its program [33 U.S.C. § 1319(a)(2) (CWA), 42 U.S.C. § 7413(a)(2)(CAA)].

The CWA also authorizes total revocation on a number of grounds, including inadequate permitting, inadequate public participation, or inadequate enforcement [33 U.S.C. § 1342(c)(3) and 40 C.F.R. §§ 123.63(a)(2) & (3)]. Similar revocation provisions and authorities are found in, or have been read into, other statutes and programs, including RCRA [42 U.S.C. § 6926(e)].

## **Environmental Justice for Delegation**

EPA has authority to consider environmental justice issues during the approval process for program delegation. For example, when EPA examines a state’s or tribal government’s capacity to actually carry out a program, that inquiry could include consideration of how the proposed allocation of budget, staff, and other resources may affect low-income and minority communities.

EPA has a broad mandate to protect low-income communities or communities of color in implementing its programs. States are not allowed to propose laws that are any *less* stringent than the federal requirements. But it is important to note that states may make laws that are more stringent than federal requirements. As a result, a broad interpretation of EPA’s mandate could actually result in even stricter requirements by the states.

Ultimately, it is very important for community residents to understand the importance of the program delegation process and the authority provided by law to make sure that federal environmental laws are met by state and tribal governments.