

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

## Federal Laws that Address Environmental Justice Concerns

### Introduction

The following is a brief summary of the federal environmental laws that are relevant to environmental justice matters. For a fuller discussion of these laws and the opportunities that they provide for addressing environmental justice concerns, please refer to the ELI publications *A Citizen's Guide to Using Federal Environmental Laws to Secure Environmental Justice* and *Opportunities for Advancing Environmental Justice: An Analysis of U.S. EPA Statutory Authorities*.

In addressing any environmental justice issue, one of your first tasks will be to determine which of these laws might apply.

### National Environmental Policy Act (NEPA)

NEPA sets up a process by which the federal government must evaluate the environmental impacts of any major actions that it plans to take, and consider alternatives.

#### *Relevance to environmental justice issues generally:*

The national environmental policy articulated by NEPA, with its call for the government to fulfill the "social, economic, and other requirements" of present and future generations, speaks broadly to the goals of environmental justice. NEPA seeks to assure for "all Americans" a healthful environment, as well as aesthetically and culturally pleasing surroundings and a wide sharing of life's amenities. These goals mean that having certain communities suffer disproportionate adverse risks or impacts is contrary to the national policy. NEPA was enacted to help ensure that the federal government's use of the environment would be "without risk to health or safety, or other undesirable consequences." NEPA commands that the environment be maintained to support "diversity and a variety of individual choice." Residents of communities of color and low-income communities may use their environment in certain ways, such as for subsistence hunting and fishing, that may differ from the uses by other communities. NEPA seeks to protect and preserve these uses. It should be recognized that the courts have interpreted NEPA's provisions, and there is disagreement on the application of the policy language provided in the statute.

## NEPA, continued

*Relevance to action on environmental justice issues:*

NEPA contains a number of notice-and-comment provisions, most noticeably for NEPA-related hearings, public meetings, and the availability of environmental documents; in deciding the appropriate scope of environmental impact statements (EISs); for draft EISs; and, in certain instances, on final EISs before agency decisions are made. Public hearings or meetings are required where there exists substantial environmental controversy concerning a proposed action, and for draft EISs. It should be noted that this controversy must pertain to disagreement on science, and not merely on degree of public sentiment. NEPA also obliges EPA to provide technical assistance to ensure thorough understanding by those who propose the project and the general public, among others, of a proposed federal action.

Ultimately, the importance of NEPA to environmental justice was highlighted in an agency-wide memorandum issued by EPA Administrator Christine Todd Whitman in 2001, which provided that "[I]n the National Environmental Policy Act of 1989 (NEPA), Congress could not have been any clearer when it stated that it shall be the continuing responsibility of the Federal government to assure for all Americans 'safe, healthful, productive and aesthetically and culturally pleasing surroundings.'"

## Federal Water Pollution Control Act ("Clean Water Act" or CWA)

The CWA reflects Congress' intent first to control and then to eliminate all pollutant discharges into U.S. waters. The statute sets an aspirational "zero-discharge" goal for waters of the United States.

*Relevance to environmental justice generally:*

The CWA brings a number of environmental justice issues within its reach, from protecting drinking water supplies, to reducing toxic exposure, to protecting fisheries, wetlands, and wildlife habitat. Further, the Act's stated goal of eliminating all pollutant discharges, its well-established permitting programs, and its stringent enforcement provisions make it potentially a very effective tool that EPA and other regulatory authorities can apply to address environmental justice concerns.

*Relevance to action on environmental justice issues:*

The CWA offers the opportunity for notice and participation by providing for public review of and comment on the periodic revisions of guidelines for incorporating technology-based standards into facility-specific effluent limitations; for the triennial review of toxic pollutant effluent limitations; and for the issuing of dredge-and-fill activity permits. Public hearings and meetings are called for in the instances of the triennial review of a state's designation of in-stream uses to be protected via water-quality-based standards; before issuance of the National Pollutant Discharge Elimination System (NPDES) permits for discharge of pollutants to navigable waters; upon a state-initiated request for such when EPA proposes to veto issuance of a dredge-and-fill activity permit; and when a state requests delegation of authority to administer a program.

## Clean Air Act (CAA)

The CAA is the federal law that regulates emissions into the air from stationary (not able to move) and mobile (able to move) sources in order to protect public health and decrease air pollution. Title V of the statute establishes a single comprehensive permit that includes all of a facility's applicable CAA requirements.

### *Relevance to environmental justice generally:*

The health effects caused by air pollution and maintenance of air quality that does not endanger public health are important environmental justice issues. Disproportionate numbers of people in low-income communities and communities of color live in urban environments with high levels of air pollution. Exposure to air pollution may trigger or cause adverse health effects and may explain, in part, why illnesses such as asthma and bronchitis particularly affect low-income communities and communities of color.

### *Relevance to action on environmental justice issues:*

The Clean Air Act provides ample opportunity for environmental justice activism by incorporating notice and participation provisions on draft Title V permits; on EPA proposals to approve state Title V permit programs; on pending EPA approval of a State Implementation Plan (SIP) or a SIP revision; on a pending action to re-designate a prevention of significant deterioration (PSD) permit; and on pending action by the federal government to enter into a consent order or settlement agreement under the CAA. The CAA also provides opportunities for public hearings on draft Title V permits; on draft PSD permits; on pending EPA approval of a SIP revision; and on a pending PSD area re-designation. In addition to including a public education provision and reporting requirements, the CAA calls for EPA to consult with advisory committees before issuing various air quality standards and regulations, and requires meaningful community participation in siting solid waste incineration units. The Act also describes the method for initiating citizen suits against anyone who violates the statutory requirements, against the EPA to enforce its non-discretionary duties, or against anyone constructing a new source without the necessary permit(s).

## Resource Conservation and Recovery Act (RCRA)

RCRA is the primary federal law regulating management and disposal of solid and hazardous waste. Subtitle C of the statute creates a system designed to manage hazardous waste from its creation, through its transportation, to its ultimate disposal. Subtitle D of RCRA includes planning requirements and technical criteria for building municipal solid waste (garbage) facilities.

### *Relevance to environmental justice issues generally:*

The siting of hazardous and solid waste facilities has long been an important environmental justice issue. RCRA directly addresses the health and environmental risks posed by waste disposal activities. Implementation of specific RCRA provisions to address environmental justice issues necessarily requires consideration of political, technical, legal, and other factors.

### *Relevance to action on environmental justice issues:*

RCRA requires public hearings to be held if EPA receives written notice of opposition to the siting of hazardous and solid waste facilities. The statute also allows for informal public meetings between permit applicants and affected communities, provided that the meetings occur before permit applications are submitted. Reporting requirements are imposed on waste generators, transporters, and treatment, storage, and disposal facilities. They are also imposed on states, which must provide EPA with an inventory of all sites at which hazardous waste has been stored or disposed. Federal agencies also must provide EPA with an inventory of all federally owned or operated hazardous waste sites. RCRA addresses federal assistance in planning and implementing energy and materials conservation and recovery programs.

## Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)

CERCLA (also known as "Superfund") was enacted in 1980 to address the cleanup of sites where hazardous substances have been released into the environment and threaten imminent and substantial harm to human health or the environment or where such a threat is posed.

*Relevance to environmental justice issues generally:*

According to some estimates, as many as one in four people lives within a four-mile radius of a Superfund site. Many of these people live in low-income communities and communities of color. Effective, equitable and efficient cleanup of Superfund sites is essential to protecting the health and environment of communities of color and low-income communities.

*Relevance to action on environmental justice issues:*

CERCLA has notice-and-comment provisions, which allow for public participation in cleanup decisions; in decisions regarding the transfer or sale of federal facilities before cleanup is completed; in consent decrees; and in settlement with *de minimis* parties or cost recovery settlements. CERCLA also provides opportunities for public meetings to be held in affected areas regarding cleanup alternatives. The act also stipulates reporting and public education requirements. Moreover, CERCLA permits the filing of petitions for preliminary assessment of hazards to human health and environment. The statute also provides for the awarding of technical assistance grants, funding for natural resource damages and restoration (including on tribal land), and reimbursement to the local community for emergency cleanup expenses up to a maximum of \$25,000.

## Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) and Federal Food, Drug, and Cosmetic Act (FFDCA)

FIFRA and FFDCA together provide the framework for pesticide regulation in the U.S. Under FIFRA, EPA is responsible for regulating manufacture, labeling, sale, and use of pesticides. Under FFDCA, it determines allowable levels of pesticide residue in food.

*Relevance to environmental justice issues generally:*

Pesticide use is an important issue in environmental justice for a variety of reasons. First, farm worker communities, composed largely of people of color and low-income families, are usually subjected to more frequent pesticide exposures from more sources than other communities. Second, some low-income communities and communities of color may, as a result of inadequate nutrition or other medical factors, be more vulnerable to the harmful effects of pesticides. Third, many communities of color and low-income communities already bear a disproportionate share of environmental burdens flowing from other kinds of pollution, waste disposal, access to drinking water, and facility siting.

*Relevance to action on environmental justice issues:*

FIFRA and FFDCA both include provisions for notice and comment. These opportunities arise when EPA exercises its discretion to solicit the views of "qualified persons" when suspending or canceling pesticide registration; when reviewing registration applications; and when announcing an intent to cancel pesticide registrations or change pesticide classifications. Public hearings and/or meetings are to be held within 60 days after setting pesticide tolerances or exemptions; public evidentiary hearings are to be held if requested by an interested person. Public hearings are also required on pesticide registration cancellations or on changes in pesticide classifications if requested. The statutes also contain public education and reporting provisions.

## Safe Drinking Water Act (SDWA)

The SDWA has two principal programs: regulating public water systems and the quality of water they provide for human consumption, and protecting underground sources of drinking water from contamination (the "underground injection control" or UIC program).

### *Relevance to environmental justice issues generally:*

Environmental justice goals present an important challenge in implementing the public health provisions of the SDWA. Many people in the United States – including residents of *colonias* along the U.S.-Mexico border and farm worker communities – still live without access to safe drinking water. Contaminated drinking water supplies may present particularly high risks to children and other sensitive populations. In addition, public drinking water systems in low-income communities, if small, may have difficulty meeting stringent health-based standards for drinking water, nor can those local municipalities afford to fix problems with drinking water quality.

### *Relevance to action on environmental justice issues:*

The notice-and-comment requirements of the SDWA call for public notice and comment before granting facility-specific variances to national primary drinking water standards; for EPA's three-year review of variances and exemptions granted to national primary drinking water standards; and on a state's plan of intended uses for the drinking water treatment revolving loan fund. Public hearings and meetings are to be held upon an EPA notice to revoke a variance from, or revise the compliance schedule for, attaining national primary drinking water standards; before an exemption is granted from the national primary drinking water standards due to compelling factors; and before EPA acts on a state's application to administer the underground injection control program. SDWA requires that the National Drinking Water Advisory Council include 5 of its 15 members from the general public and 5 from private organizations and groups. States must establish technical and citizens' advisory committees to encourage public participation in developing underground injection control programs. The Act contains public education and reporting requirements, and allows for the submission of petitions to have EPA object to and/or revoke state variances from attaining national primary drinking water standards.

The SDWA also provides grants to state authorities to provide additional subsidies for loans to disadvantaged communities. Further, 1.5% of the annual appropriation for the revolving loan fund capitalization is to be set aside for Indian tribes and Alaska Native villages. The Act provides for grants to Arizona, California, New Mexico, and Texas for assistance to the low-income communities known as *colonias* to facilitate compliance with national standards. Program funding is available to states and tribes to implement public water system supervision programs and underground water supply protection programs. Finally, the Maximum Contaminant Levels established under the SDWA must consider the impact on sub-populations.

## Toxic Substances Control Act (TSCA)

TSCA provides a framework for addressing threats to health and the environment from chemical substances. Under TSCA, EPA has authority to screen new chemicals, test existing chemicals, and place restrictions on the use of chemical substances that pose "unreasonable" health or environmental threats.

### *Relevance to environmental justice issues generally:*

Equitable distribution of environmental problems and benefits has become an increasingly important social and public health issue over the past several years. While TSCA establishes specific requirements for the various regulatory actions described in

## TSCA, continued

the Act, the statute's broad goal can support efforts to ensure that health and environmental risks to communities of color and low-income communities are addressed in implementing it. TSCA Section 2(c) also states explicitly Congress' intent that EPA "shall consider the environmental, economic, and social impact of any action" taken to implement the Act. This provision provides general support for EPA to consider fully the impacts of TSCA decisions on communities of color and low-income communities.

### *Relevance to action on environmental justice issues:*

The notice-and-comment provisions of TSCA apply before EPA regulates chemicals that pose unreasonable risk; before EPA issues testing rules for chemicals that may pose unreasonable risk; to consent agreement negotiations on testing requirements that are open to the public; and to all documents in EPA's public file. Public hearings are required upon the filing of a petition to issue, amend, or repeal a rule. The statute also contains public education and reporting requirements. Funding of public participation activities is available to compensate for the costs of participating in EPA's attempts to regulate chemicals that pose unreasonable risk (although it should be noted that due to court reversals, EPA is "deemphasizing" this regulatory authority). The U.S. Department of Health and Human Services is authorized by TSCA to make grants to non-profit organizations to develop inexpensive and efficient testing methods for addressing health and environmental impacts of chemical substances that can be used in developing test data. Program funding is made available to states for technical assistance to carry out radon-related activities and to implement radon programs.

## Emergency Planning and Community Right-To-Know Act (EPCRA)

EPCRA addresses two important issues, community right-to-know and community preparedness. EPCRA establishes programs that impose reporting requirements on owners and operators of certain facilities that produce, store, or use toxic chemicals, or release them into the environment, and makes the reports available to the public.

### *Relevance to environmental justice issues generally:*

EPCRA was enacted in response to the perceived need for improved emergency preparedness, including the need to provide information about chemical use and storage to communities and emergency personnel, prior to chemical release accidents. EPCRA requires state and local entities to take certain steps to prepare for chemical release emergencies, such as preparing local emergency response plans. EPCRA also seeks to increase the amount of information available to the public about chemicals in their communities by requiring certain businesses to report information about the use, storage, and release of specific chemicals. The EPCRA provisions aim to provide the public with a framework for considering the scientific, technological, political, and legal factors that may influence future EPA efforts to use other statutory authorities to promote environmental justice through more effective regulation of the release of contaminants.

### *Relevance to action on environmental justice issues:*

EPCRA promotes public education and reporting by state emergency response commissions (SERCs), local emergency planning commissions (LEPCs), and facility owners/operators about certain kinds of information to health professionals. EPCRA provides for the filing of petitions to SERCs to modify membership of LEPCs; for petitions to add or delete a chemical from the list subject to toxic chemical release reporting requirements; and for petitions for disclosure of specific chemicals identified and claimed as trade secrets. EPCRA also addresses the manner in which the public may request material safety data sheets (MSDS) from LEPCs; Tier II information on hazardous chemical threshold quantities from a SERC or LEPC about a particular facility; and information about adverse health effects from a state governor or SERC about chemicals not revealed due to trade secret claims.

## Freedom of Information Act (FOIA)

FOIA ensures that the public has access to information in the federal government's files. A member of the public can file a written request for information from the federal government. The government must respond within ten days, saying how and when it will provide access to the documents (or stating why it will not provide such access). Many states have similar public access statutes.

*Relevance to environmental justice issues generally:*

Information is key to addressing environmental justice concerns. While not an "environmental" statute, FOIA is an extremely valuable tool to get important documents and other information about environmental issues from federal agencies. It may not be necessary to use FOIA in your first attempt to gather information, and we recommend that you check to see whether relevant information is automatically available to the public under provisions of the various environmental statutes listed above. In other cases, you can get the information you need simply by calling or visiting the appropriate agency offices. If there is any reason to believe that all of the relevant information is not being made available, however, FOIA is a useful method to make sure or at least to identify documents that have been withheld.

*Relevance to action on environmental justice issues:*

FOIA promotes more effective citizen participation in government decision-making because it provides community residents with the ability to obtain information that is being considered in that process. It also provides the opportunity for community residents to better understand the nature of activities regulated by government.