

Environmental Laws and Alternative Dispute Resolution: Tools for Environmental Justice

Permitting and Environmental Justice

Introduction

The decision whether to grant a permit (or a variance or exemption from permitting requirements) for a facility is the one government decision where environmental justice issues most often have arisen. It is during review of site-specific operations that these issues are most likely considered and dealt with in the agency's decision-making process.

There are a variety of environmental justice issues that may be involved in the permitting process, including:

- Disproportionate impacts;
- Cumulative exposure (exposure to multiple sources of contamination or health risks);
- Chronic exposure (exposure, usually at lower doses, over a long period of time);
- Synergistic impacts (when the effect of exposure to two or more contaminants is greater than the combined effect of each contaminant);
- Effects on sensitive populations (for example, increased risk of asthma);
- Unique exposure pathways; and
- Cultural and socio-economic factors relevant to sensitive and vulnerable populations.

Focus of Debate

Permitting has long been a focus of the environmental justice debate. Activists, regulators, and industry agree 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" [*National Environmental Justice Advisory Council (NEJAC), Environmental Justice In the Permitting Process, Appendix A, "Pre-Meeting Report," page A-3 (U.S. EPA, EPA300-R-00-004, July 2000)*] [the "NEJAC Permitting Report"].

Key issues that are being discussed are whether EPA or a state agency can take specific action on a permit (i.e. deny a permit, or place conditions on a permit) based on the impact the activity would have on low-income communities and people of color.

Authority to Address Environmental Justice

The permitting provisions of specific environmental laws or regulations rarely specifically address issues that relate only to low-income communities or people of color. Rather, the authority to consider environmental justice generally is based on a broader statutory authority to “protect human health and the environment,” or to take “appropriate” or “necessary” action to carry out a statute’s purposes and goals.

As part of its authority to consider factors (from environmental conditions to construction design to operation) during the permitting process, EPA or the state regulatory agency has great latitude to take a broad range of actions, provided: (1) the agency’s action is not contrary to Congress’s clear intent, as expressed in the authorizing statute; and (2) the agency’s interpretation of the statute to consider environmental justice issues is “reasonable.” As long as EPA or the state regulatory agency complies with these requirements, several types of action are possible. These include:

- Denial of permits;
- Bans on particular substances or practices;
- Site-specific mitigation measures;
- Heightened monitoring requirements;
- Advanced pollution-prevention practices;
- Best management practices;
- Specialized control technology;
- Enhanced public participation procedures;
- Improved information disclosure; and
- Community inspections.

Environmental Justice and Siting

Siting of industrial facilities and other potentially polluting activities raises important environmental justice questions. To the extent that claims of disproportionate impact rest upon the concentration of sources within a geographic area or their proximity to sensitive populations, decisions about where to site a facility become crucial to ensuring that no single community bears more than its fair share of impacts. Because most land-use and zoning decisions are made at the state and local levels, EPA has comparatively little opportunity to be involved in siting issues directly.

However, EPA has considerable authority over a number of important issues carved out by the federal environmental statutes that can indirectly affect siting. Specifically, the Agency has authority to address siting decisions that involve: (1) geographic areas where the federal government has specialized jurisdiction, such as wetlands and coastal zones; (2) concentrations of pollutants, such as non-attainment areas (areas where air pollution standards are not met) under the Clean Air Act; (3) heavily regulated facilities, such as waste disposal sites and incinerators; and (4) the federal government’s own activities that impact the environment. Within these realms, EPA has broad discretion and numerous opportunities to consider and address environmental justice issues in siting decisions. Its authority to do so often is based on language that requires either an “assessment” of the health or environmental impacts – which may include cumulative impacts – of siting an activity or facility, or an analysis of alternatives to a proposed project, which may include alternative sites or forgoing the project entirely. (See the fact sheet, “Siting of New Facilities,” for more information about this topic.)

Environmental Justice and Permits

EPA or the state agency exercises substantial discretion when administering the permit programs that are at the heart of most major pollution control statutes. EPA's grant of authority often takes the form of general or "omnibus" provisions that give the agency discretion to decide what measures are "necessary" or "appropriate" to protect human health and the environment or to advance the purposes of a particular statute. In addition, EPA's "media-specific" (i.e., air, water, waste, etc.) statutes have provisions that supply EPA with general authority to consider environmental justice issues when deciding whether to deny or to place conditions on operating permits. A number of specific statutory sections and regulations also spell out in more detail the precise types of conditions that EPA may wish to place on permits, many of which are amenable to environmental justice goals.

Environmental Justice and Pesticide Registration

Another type of permit controls the use of potentially polluting *substances*, rather than pollution sources or releases into the air, water, or soil, that also can have significant effects on environmental justice. These substances, which may have both beneficial as well as harmful effects, include "registrations" of pesticides under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), "tolerances" for pesticide residue under the Federal Food, Drug, and Cosmetic Act (FFDCA), and approvals of new manufactured chemical substances under the Toxic Substances Control Act (TSCA). These laws govern manufacture, processing, distribution, use, and disposal of chemicals within their purview. It should be noted that the procedures provided in the law largely presume that use of a substance will be approved unless EPA makes an affirmative finding that its use will adversely affect health or the environment. Nevertheless, EPA's mandate under these statutes to collect comprehensive data to assess a substance's health and environmental effects from a variety of possible uses, and its ability to prohibit or to condition certain uses, provide a preventative approach that the agency can use to address environmental justice concerns.

Permitting Process for CAA, CWA, RCRA

The major pollution control statutes – the Clean Air Act (CAA), the Clean Water Act (CWA), and the Resource Conservation and Recovery Act (RCRA) – provide EPA with authority to address permitting and permit processing issues in heavily impacted areas. As mentioned earlier, EPA's grant of authority often takes the form of general or "omnibus" provisions that require the agency to complete an "assessment" to decide what measures are "necessary" or "appropriate" to protect human health and the environment. The types of control that may be exercised to achieve environmental justice include assessments, information requirements, and ambient pollutant standards.

Assessments

Environmental justice can be addressed through proper assessments of the potential impact of an activity on the environment and human health. The following examples illustrate the authority provided by key environmental laws:

- Although the U.S. Army Corps of Engineers has primary responsibility for administering the Section 404 wetland permitting program under the CWA, it must do so within environmental guidelines produced by EPA, and EPA retains veto authority over individual permits. Through a detailed public notice-and-comment procedure, the Corps and EPA must consider several factors: whether a project is in the public interest; has "practicable alternatives" that would have less adverse ecological impact; whether it would threaten water quality or endangered species, or cause "significant degradation" to drinking water supplies and fish and wildlife habitat; whether the organization proposing the project has taken all "appropriate and practical steps" to minimize and mitigate impacts at the proposed site; and whether the project would contribute unacceptably to cumulative impacts in the surrounding area [40 C.F.R. §§230.10, 230.11].

Assessments, continued

- New source review (NSR) permits under Section 173(a)(5) of the Clean Air Act may only be issued if an “analysis of alternative sites, sizes, production processes, and environmental control techniques for the proposed sources demonstrates that the source’s benefits significantly outweigh the environmental and social costs imposed as a result of its location, construction, or modification” [42 U.S.C. §7503(a)(5)]. The analysis of “social costs” could include a wide variety of impacts on affected communities, and lead to a determination that alternative sites would be preferable from an environmental justice perspective [*Memorandum from Gary S. Guzy, U.S. EPA Office of General Counsel, EPA Statutory and Regulatory Authorities Under Which Environmental Justice Issues May Be Addressed in Permitting (Dec. 1, 2000)*].
- Prevention of significant deterioration (PSD) permits, under Section 165(a)(2) of the Clean Air Act, requires analysis of “the air quality impact of the source, alternatives thereto, control technology requirements, and other appropriate considerations” [42 U.S.C. §7475(a)(2)]. Given the broad wording of these provisions, EPA can exercise its discretion to consider environmental justice concerns, including the possibility of alternative sites, in instances where it is administering the NSR or PSD program [*e.g., In re AES Puerto Rico*, 8 E.A.D. _____, 1999 WL 345288 (May 27, 1999)].

Information Requirements in Permit Applications

Another useful method to address environmental justice is to ensure that information requirements in permit applications are complete. The following examples illustrate opportunities to address information requirements:

- Applications for RCRA land disposal permits must include detailed information about potential releases and exposure pathways at the proposed site – information that EPA can use to require a comprehensive health assessment if the agency determines that the proposed facility “poses a substantial risk to human health” at the proposed site [42 U.S.C. § 6939a]. RCRA land disposal permits must also include information that is useful for emergency planning and response [42 U.S.C. § 6939a].
- Section 504(c) of the Clean Air Act requires permits to include inspection, entry, monitoring, compliance, certification, and reporting requirements [42 U.S.C. § 7661c].
- Section 402(a)(2) of the Clean Water Act authorizes the Administrator to prescribe conditions to assure compliance with discharge permits, “including conditions on data and information collection, reporting, and such other requirements as he deems appropriate” [33 U.S.C. § 1342(a)(2)].

Ambient Pollution Standards

Another important method is ambient pollution standards, which address levels of contamination from pollutants that are in a surrounding area. The following examples illustrate the types of ambient pollution standards available through environmental laws:

- Water quality standards established under Section 303 of the Clean Water Act may require a “total maximum daily load” (TMDL) to be set for specific pollutants within an impaired water body [33 U.S.C. §1313]. Environmental justice concerns may arise because allocating a TMDL for a body of water has distributional consequences.
- Under the Clean Air Act, national ambient air quality standards are met through state implementation plans (SIP) and federal implementation plans (FIP) that allocate total pollutant loadings among permitted sources [42 U.S.C. §7410]. In areas where EPA administers the Act through a FIP, the agency has authority to examine these allocations for their environmental justice implications, and it may also have some ability to review or influence state allocations under a SIP [42 U.S.C. §7410(a)(2)(E)].

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Conclusion

Taken together, the permitting processes established through federal environmental laws provide an opportunity to address environmental justice concerns and allow community residents to protect their health and environment.