

Environmental Laws and Alternative Dispute Resolution: Tools for Environmental Justice

Siting of New Facilities

Introduction

Siting of new facilities that may affect the environment and human health is an important environmental justice matter. To the extent that claims of disproportionate impact rest upon the concentration of sources within a geographic area or their proximity to sensitive populations, siting decisions become crucial to ensuring that no single community bears more than its fair share of the impacts.

Authorities of Government

It is very important to determine the roles of various levels of government in the siting process. Generally, the location of a facility does not always have to be considered in decisions made under environmental laws. Federal environmental laws will consider environmental and health effects on the surrounding population and environment, but generally will not be involved in reviewing the alternatives. Siting usually is the responsibility of local zoning authorities. Since most land-use and zoning decisions are made at the state and local levels, in most cases the U.S. Environmental Protection Agency has comparatively little opportunity to weigh in on siting issues. Yet, in certain circumstances, federal environmental laws do allow for consideration of siting issues in key decisions.

Federal environmental statutes address many important decisions that can involve:

- Geographic areas where the federal government has specialized jurisdiction, such as wetlands and coastal zones;
- Concentrations of pollutants, which can result in designation of non-attainment areas under the Clean Air Act;
- Heavily regulated facilities, such as waste disposal sites and incinerators; and
- The federal government's own activities that impact the environment.

Within these areas, EPA or the state regulatory agency has broad discretion and numerous opportunities to consider and address environmental justice issues in siting decisions. Its authority to take action is often based on language within specific laws that requires an "assessment" or consideration of the health or environmental impacts – which may include cumulative impacts – associated with siting an activity or facility, or that requires an analysis of "alternatives" to a proposed project, which may include the identification of alternative sites or forgoing the project entirely.

Examples of Siting Provisions

There are provisions in federal environmental laws administered by the U.S. EPA or the delegated state programs that do address matters associated with the siting of new facilities. The following examples illustrate some of those opportunities where community residents can pursue environmental justice.

Water and Wetlands

Under the Clean Water Act, permits may not be issued for discharges of dredged or fill material into surface waters, including wetlands, if there is a "practicable alternative" with less impact on the aquatic environment. Specific environmental justice impacts that may be considered include:

- Wetlands and other waters may support fish and wildlife populations used by communities for subsistence fishing or hunting purposes;
- Wetlands may filter pollution to keep other waters clean for drinking water and other domestic uses; and
- Wetlands may prevent flooding in communities located near adjacent water bodies.

Community residents can use this authority during the permitting process involving wetlands. For example, discharges and the deposition of fill materials into important water bodies can be prevented if the permitting agency (in this case, the Army Corp of Engineers or a state agency) is provided information about viable alternatives, such as conducting the activity in another location, possibly where fill is not needed. The Clean Water Act also requires the Army Corps of Engineers to conduct a "public interest review" when it considers a permit application for the discharge of dredged or fill material into the navigable waters at specified disposal sites. This public interest review is based on an evaluation of the probable impacts, including cumulative impacts, of the proposed activity and its intended use on the public interest. A long list of factors may be considered, such as conservation, economics, historic properties, fish and wildlife values, and the needs and welfare of the people. Several of these factors touch on environmental justice concerns. For example, the definition of "historic properties" expressly includes "Indian religious or cultural sites."

Air

Under the Clean Air Act, special procedures are required before a major new source of air pollution is allowed. In areas in which air quality standards are already violated, new source permits may be issued only after the regulatory agency:

- Evaluates alternative sites for the facility;
- Considers production methods and pollution control techniques; and
- Is provided a showing that the benefits from the proposed new source will be greater than the environmental and social costs.

Hazardous Wastes

Under the Resource Conservation and Recovery Act (RCRA), the U.S. EPA has developed location standards that may limit the siting of hazardous waste treatment, storage, and disposal facilities. Community residents can provide helpful information about pre-existing levels and areas of pollution, and common uses of the property where a new or expanded facility may be built. This can help the state or EPA decide whether the proposed site for a hazardous waste activity will be appropriate.

Other Opportunities to Address Issues Associated with Siting

In addition to the opportunities for action outlined above, community residents can use authorities provided in environmental laws to address the siting of new facilities in their community.

First, community residents can use the same information that they would use to address the siting of a facility to request more protective permit conditions. For example, in a community in which multiple factories already discharge into the surface water, a new proposed facility may further increase the pollutant load on the river. The Clean Water Act requires the permitting agency to deny a water discharge permit where necessary to enforce water-quality standards in impaired waters. Therefore, the permitting agency should consider the information about existing pollutant loads to the river and community uses of the river in deciding whether to issue the permit, or in setting the level of pollutants the new factory will be allowed to discharge. This information could also change the cost-benefit analysis for the new factory (increase the costs, decrease the benefits) and cause the company to rethink whether the best location for the new facility has been identified.

Second, community residents can play a key role in documenting the environmental and social costs of a major new source of pollution. This is especially true for human health, and for costs imposed on communities that already face high levels of environmental or other human health threats. Information about environmental exposures in the community can help the agency write a permit that is more protective of the community's health. Community residents can play an important role in gathering this information and giving it to government agencies. This will ultimately increase protection of the community's health and environment and help it achieve environmental justice.