EPA
United States
Environmental Protection
Agency

# Plan EJ 2014

## Legal Tools









**EJ Legal Tools** identifies key legal authorities for EPA policy makers to consider in advancing environmental justice.

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# PLAN EJ 2014

## Legal Tools

December 2011

Office of General Counsel

U.S. Environmental Protection Agency
Washington, D.C. 20460

This document discusses a number of federal statutory and regulatory provisions, but does not itself have legal effect, and is not a substitute for those provisions and any legally binding requirements that they may impose. It does not expressly or implicitly create, expand, or limit any legal rights, obligations, responsibilities, expectations or benefits to any person. To the extent there is any inconsistency between this document and any statutes, regulations or guidance, the latter take precedence. EPA retains discretion to use or deviate from this document as appropriate.

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# FOREWORD

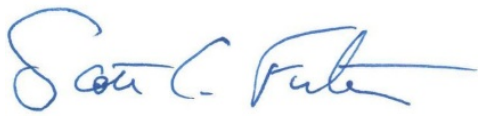
I am pleased to present *EJ Legal Tools*, a review of legal authorities under the environmental statutes administered by the U.S. Environmental Protection Agency that may have contributive application in the effort to advance environmental justice under *Plan EJ 2014* – the Agency's overarching strategy for advancing environmental justice.

*Plan EJ 2014* implements one of Administrator Lisa P. Jackson's top priorities: expanding the conversation on environmentalism and working for environmental justice. That priority reflects the recognition that all too often, minority and low-income communities in our country suffer disproportionate pollution burdens and the intensified health risks and environmental quality-based obstacles to economic growth that attend such burdens. *Plan EJ 2014* focuses EPA's efforts to address these conditions by more effectively integrating environmental justice into our programs, policies, and daily work.

*Plan EJ 2014* called for the Office of General Counsel to identify legal authorities under the federal environmental statutes that bear meaningfully on the environmental justice challenge. This document responds to that call. It identifies numerous legal tools that EPA may consider using to more fully ensure that its programs, policies, and activities fully protect human health and the environment in minority and low-income communities. Some of the tools we have identified are already in use today; others have not yet been applied in an environmental justice setting.

*EJ Legal Tools* should be viewed as a starting point, rather than end point, in the examination of legal authorities. It does not purport to consider every possible contributive authority; rather it focuses on those authorities that appear to be most relevant to the environmental justice challenge as we currently understand it. Moreover, consistent with the leading-by-example orientation of *Plan EJ 2014*, *EJ Legal Tools* looks principally through the lens of EPA as implementer, leaving for further examination and discussion the question of how environmental justice-related legal authorities might inform the activities of states and tribes operating EPA-approved programs and EPA's oversight of those activities. Accordingly, *EJ Legal Tools* should be regarded as a living document, subject to future addition and adjustment.

As the Agency moves forward, its course of action will of course be based not only on its legal authority, but also on sound science and public engagement – all stitched together by good policy judgment. *EJ Legal Tools* is thus intended to serve as a part of an enabling environment for policy judgments that can lead toward a future where all people, regardless of ethnicity or income, have clean air, water, and land in the places where they live, work, play, and learn.



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# INTRODUCTION

This document is designed to identify legal tools to help the U.S. Environmental Protection Agency (EPA) advance its goal of environmental justice in the United States. EPA defines "environmental justice" as "the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies."[1] The goal of environmental justice is to ensure that all communities and persons across the Nation, including minority, low-income, and indigenous populations overburdened by pollution, receive full human health and environmental protection.[2] Environmental justice is a central element of EPA's mission to protect human health and the environment and is one of EPA's top priorities.

This document provides an overview of a number of discretionary legal authorities that are or may be available to EPA to address environmental justice considerations under federal statutes and programs. It grows out of EPA's renewed commitment to environmental justice embodied in *Plan EJ 2014*, which marks the forthcoming 20th anniversary of Executive Order 12898, entitled "Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations" (Feb. 11, 1994).[3] *Plan EJ 2014* is a comprehensive framework for advancing EPA's environmental justice priorities. It specifically calls for the Office of General Counsel (OGC) "to identify opportunities to utilize EPA's statutory authorities to advance environmental justice."[4]

In response to *Plan EJ 2014*, this document consolidates, updates, and expands on OGC's past work on the subject of environmental justice. That work began in earnest over 17 years ago in support of EPA's efforts to implement Executive Order 12898 and its accompanying Presidential memorandum.[5] Part of that effort focused on environmental justice opportunities in the context of environmental permitting programs, and led to a memorandum issued by then-General Counsel Gary S. Guzy, entitled "EPA Statutory and Regulatory Authorities Under Which Environmental Justice Issues May Be Addressed in Permitting" (Dec. 1, 2000).[6] *EJ Legal Tools* reaffirms the principles set forth in that memorandum, expands on its permitting discussion, and addresses other EPA authorities. An understanding of the Agency's legal tools for achieving environmental justice is critical because Executive Order 12898 itself is not a source of authority. Instead, Executive Order

[1] *Plan EJ 2014* (Sept. 2011) at p. 3 (discussing how EPA also defines the terms "fair treatment" and "meaningful involvement" for purposes of achieving environmental justice).

[2] Like *Plan EJ 2014*, this document uses the term "overburdened communities" as the way "to describe the minority, low-income, tribal, and indigenous populations or communities in the United States that potentially experience disproportionate environmental harms and risks as a result of greater vulnerability to environmental hazards." *Id*. at p. 1. & n. 1.

[3] 59 Fed. Reg. 7629 (Feb. 16, 1994) (codified at 3 C.F.R. 859).

[4] *Plan EJ 2014* at p. 23.

[5] 30 Weekly Comp. Pres. Doc. 279 (Feb. 11, 1994).

[6] The memorandum is available at: http://www.epa.gov/environmentaljustice/resources/policy/ej_permitting_authorities_memo_120100.pdf.

12898 calls on federal agencies covered by it to implement its provisions on environmental justice to the greatest extent practicable and permitted by existing law.[7]

As highlighted in the Presidential memorandum accompanying Executive Order 12898, existing environmental and civil rights statutes provide many legal authorities that, in appropriate circumstances, may provide opportunities to ensure that federal programs, policies, and activities do not have disproportionately high and adverse human health or environmental effects on minority or low-income communities, including tribal communities. This document analyzes EPA's statutes and their relevant regulatory standards for action to protect public health or welfare and the environment. It also covers EPA's cross-cutting and non-regulatory programs. It identifies instances when EPA may exercise its discretion to advance environmental justice under existing policy, guidance, and regulations.

It is important to emphasize not only what this document is – a review of what may be some of the more significant potential environmental justice opportunities EPA's policy makers have discretion to consider – but also what it is not. Consistent with the theme of *Plan EJ 2014*, *EJ Legal Tools* focuses principally on EPA's opportunities for advancing environmental justice when EPA is the implementing authority. For the most part, *EJ Legal Tools* does not focus on the actions of state, tribal, or local governments when they are the implementing authority. It also does not attempt a discussion of ways that EPA may advance environmental justice through its alternative dispute resolution or enforcement programs.

Significantly, *EJ Legal Tools* is not a document prescribing when and how the Agency should undertake specific actions. While some of the legal authorities are clear, others may involve interpretive issues or legal risk that call for further analysis. Without the context of specific applications, this document does not attempt to fully characterize any such legal risks. Policy decisions about undertaking particular actions are the responsibility of the Agency's program offices, which consider a wide range of questions beyond the issue of a particular action's legal defensibility, such as budgetary or other practical constraints on implementation, or the benefits or risks of using a legal tool in a given circumstance. Moreover, this document is not an exhaustive inventory of every conceivable legal authority; rather, it attempts to identify some of the leading opportunities that may have viability both in terms of legal defensibility and practicality.

This document should be regarded as a living document. As EPA gains experience working to achieve environmental justice and using the available legal tools, this document may be supplemented and adjusted, as appropriate. The desirability and the effectiveness of any particular legal tool ultimately will depend on the answers to questions such as these:

- Is the science regarding an activity or program sufficiently well developed to provide a sound basis for decision making?
- How strong is the factual basis for predicting that EPA's actions will be effective?
- Will the specific action or measure address the environmental or public health impacts on the affected population?

[7] *See* Executive Order 12898, Sections 1-101 and 6-608.

- Will adopting a new policy or approach (or altering an existing one) create, increase or reduce regulatory uncertainty?
- Does the policy or approach involve a function that could be effectively and efficiently carried out at the federal level?
- Are the public participation measures planned appropriate to provide transparency and meaningful participation for the affected population?
- Will the regulated activity have indirect environmental benefits to the community or unintended environmental or socio-economic costs?
- Will the regulated activity relieve, or avoid adding to, cumulative impacts?
- Would use of the discretionary authority promote the community's transition to clean technologies?
- What resources are needed to effectively carry out the activity?

These are primarily policy questions, although their answers may affect how strong the rationale is for EPA's action and, thus, the action's legal defensibility. The questions are included here to illustrate the type of variables relevant to a decision of whether to invoke an authority identified in this document under a particular set of circumstances.

As noted above, Executive Order 12898 calls on federal agencies, including EPA, to make environmental justice part of their mission "[t]o the greatest extent practicable and permitted by law."[8] We hope that, thoughtfully considered and deployed, *EJ Legal Tools* can serve as a meaningful resource for continued EPA efforts to advance its goal of achieving the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development and implementation of environmental laws, regulations, and policies.

[8] *Id*. at Section1-101.

# CHAPTER ONE: CLEAN AIR ACT PROGRAMS

## INTRODUCTION

EPA has various discretionary authorities that give, or may give, it opportunities to promote environmental justice under programs implementing the Clean Air Act (CAA).[9] The following discussion focuses on addressing and describing opportunities identified to date in permitting and rule development under the CAA and other related environmental statutes. Additional opportunities may be identified as the Agency gains further experience in addressing environmental justice considerations.

The potential for taking environmental justice considerations into account varies greatly across the various CAA programs. A general caveat applies: Because the primary authority and responsibility to select and implement air pollution control measures often rests with the states and with authorized Indian tribes, EPA may have limited authority to influence state or tribal decisions. Nevertheless, the CAA does afford EPA opportunities to consider environmental justice in certain standard-setting and permitting contexts. Because much of this chapter describes opportunities rather than current practice, case law directly addressing consideration of environmental justice under the CAA is limited and many of the opportunities described in this chapter are untested.

This chapter groups the relevant authorities into five broad categories: (1) standard setting, which includes new source performance standards, standards for solid waste incinerators, hazardous air pollutant standards, national ambient air quality standards (NAAQS), and mobile source standards; (2) NAAQS implementation; (3) permitting, which includes the new source review preconstruction permit program and the title V operating permit program; (4) provisions relating to Native American communities and federally recognized Indian tribes; and (5) miscellaneous additional provisions.

## STANDARD SETTING

### I. NEW SOURCE PERFORMANCE STANDARDS

Section 111 of the CAA contains several provisions that could accommodate the incorporation of environmental justice considerations, such as impacts on or participation in decision-making by minority, low-income, or indigenous populations. First, section 111(b) requires EPA to list categories of stationary sources that "cause[], or contribute[] significantly to, air pollution which may be reasonably anticipated to endanger public health or welfare." In determining priorities for promulgating standards for listed categories of sources, EPA is to consider under section 111(f)(2)(B) "the extent to which each such pollutant may reasonably be anticipated to endanger public health or welfare." Together, these two provisions could facilitate the advancement of environmental justice by giving EPA discretion to consider how or whether certain stationary sources particularly impact minority, low-income, or indigenous populations, and to consider the health impacts of the emissions from those sources. While EPA retains the

[9] 42 U.S.C. §§ 7401- 7671q.

authority to add new source categories to the list and could consider environmental justice factors in deciding what categories to add, there are currently no plans to significantly expand the list. EPA has already promulgated standards for all of the listed source categories and is required by statute to review and, if appropriate, revise those standards at least every eight years.

## II. STANDARDS FOR SOLID WASTE INCINERATORS

The CAA provides specific authority to EPA to establish siting requirements for solid waste incinerators that could include environmental justice considerations, such as impacts on or participation in decision-making by minority, low-income, or indigenous populations. Section 129(a)(3) of the CAA provides that standards for new solid waste incinerators include "siting requirements that minimize, on a site specific basis, to the maximum extent practicable, potential risks to public health or the environment." Most of the standards that EPA initially promulgated for each category of solid waste incineration units were remanded to the Agency for further action. EPA recently issued revised standards for commercial and industrial solid waste incinerators, and is currently in the process of issuing revised standards for municipal waste incinerators and other categories of solid waste incinerators. EPA also recently issued standards for sewage sludge incinerators.[10] On May 20, 2011, EPA delayed the effective date of the emissions standards for commercial and industrial solid waste incinerators until the completion of reconsideration proceedings or pending litigation, whichever comes first.

The current standards for large and small municipal waste incinerators require new sources to develop a siting analysis that evaluates how the facility's combustion of municipal waste affects ambient air quality, visibility, soils, vegetation, and other relevant factors. In that analysis, the source must consider the impacts of other industrial facilities near the site. New municipal waste incinerators must also develop a materials separation plan that addresses separation of certain municipal waste components to make such components available for recycling. The siting plans and the materials separation plans must be made available to the public for comment. Similarly, in September 1997, EPA issued emissions standards for medical waste incinerators under section 129 of the CAA. These standards require new sources to develop a siting analysis that considers air pollution control alternatives that minimize, on a site-specific basis and to the maximum extent practicable, potential risks to public health and the environment. EPA issued revisions to the medical waste incinerator standards in October 2009, but did not revise these siting requirements.

The emissions standards issued recently for sewage sludge incinerators and commercial and industrial solid waste incinerators also include siting requirements for new sources. Specifically, owners or operators of new sewage sludge incinerators are required to conduct a siting analysis, which includes submitting a report that evaluates site-specific air pollution control alternatives that minimize potential risks to public health or the environment, considering costs, energy impacts, non-air environmental impacts and any other factors related to the practicability of the alternatives. In conducting an analysis to meet the siting requirements of these recent rules as well as the rules issued earlier for municipal and medical waste incinerators, the owner or operator of the planned new source could consider environmental justice factors as part of the analysis of minimizing potential risks to public health, to the extent a particular

[10] *See* 40 C.F.R. Part 60, Subparts LLLL and MMMM.

demographic category is a population that is more vulnerable to the air pollution produced by the source. The regulatory text of the siting requirements does not currently require such consideration; however, EPA could consider revising the regulations to do so.

## III. HAZARDOUS AIR POLLUTANT STANDARDS

### *A. List of Hazardous Air Pollutants*

Section 112(b) of the CAA contains an initial list of hazardous air pollutants (HAPs) and states that EPA shall, "where appropriate," revise the list through rulemaking to add substances that "present, or may present . . . a threat of adverse human health effects . . . or adverse environmental effects."[11] Additions may be made in response to a petition or on the Agency's own initiative. EPA is required to add an air pollutant to the HAPs list if it determines, or if a petitioner shows, that "emissions, ambient concentrations, bioaccumulation or deposition of the substance are known to cause or may be reasonably anticipated to cause adverse effects to human health or adverse environmental effects."[12] In reaching such a determination, EPA could take into account environmental justice factors in its consideration of adverse human health effects to the extent a particular demographic category is a population that is more vulnerable to the air pollutant at issue.

### *B. MACT Standards*

Under section 112 of the CAA, EPA is required to establish emissions standards for major sources of HAPs, requiring the maximum achievable degree of reduction in HAPs emissions. These standards are technology-based, and are calculated using the emission control achieved by the best performing sources. Therefore, EPA does not have discretion to consider public health impacts in setting the floor for the maximum achievable control technology (MACT) standards. However, EPA may choose to set a standard beyond the level achieved by the best performing sources (*i.e.*, beyond the floor), and when doing so can take into consideration under section 112(d)(2) any non-air quality health and environmental impacts resulting from such standards.

Section 112(d)(4) of the CAA provides that, for HAPs with an established health threshold, EPA may consider such health threshold when establishing emissions standards under section 112(d). This provision has historically been interpreted as allowing EPA to set emissions standards that are less stringent than the MACT floor, where a less stringent standard would ensure that the health threshold is not exceeded, with an ample margin of safety. The legislative history indicates that a health-based emissions limit under section 112(d)(4) should be set at the level at which no observable effects occur, and provide for an ample margin of safety. EPA has exercised this discretionary authority in the past to effectively exempt from the MACT requirement pollutants for which EPA concluded there was a health threshold.

Recently, EPA explained its interpretation of section 112(d)(4) in its proposed emissions standards for major source commercial, industrial, and institutional boilers and process heaters. In that notice, EPA did not propose a health-based standard for such boilers under section 112(d)(4), but explained that it interpreted this provision to allow the Administrator to consider

[11] CAA section 112(b)(2).

[12] CAA section 112(b)(3)(B).

factors other than the health threshold when establishing a health-based standard. Other factors include the potential for cumulative adverse health effects due to concurrent exposure to other HAPs with similar biological endpoints, from either the same or other source categories, where the concentration of the threshold pollutant emitted from the given source category is below the health threshold; the potential impacts on ecosystems of releases of the pollutant; and reductions in criteria pollutant emissions and other co-benefits that would be achieved via the MACT standard. These factors could be applied to consider impacts on overburdened communities, particularly in urban areas where there may be a large number of industrial sources of HAPs located close together.

### *C. GACT Standards*

EPA has discretion to set emissions standards representing generally available control technology (GACT) for area sources (*i.e.*, sources that are not major sources), instead of MACT standards. The Senate report on the 1990 CAA Amendments describes GACT as "methods, practices, and techniques which are commercially available and appropriate for application by the sources in the category considering economic impacts and the technical capabilities of the firms to operate and maintain the emissions control systems."[13] Like MACT, GACT standards are technology-based and the CAA does not explicitly provide for consideration of public health risk in establishing the GACT standards. However, the CAA does not specify any criteria that EPA must consider when exercising its authority to promulgate GACT standards, as opposed to MACT standards, for an area source category or subcategory. The CAA therefore does not preclude EPA from considering non-technology factors, including impacts on minority, low-income, and indigenous populations, in choosing between MACT or GACT standards for individual area source categories or subcategories.

### *D. Regulation of Area Sources Based on an "Adverse Effects" Finding*

Section 112(c)(3) of the CAA provides that EPA shall list each area source category or subcategory that the Administrator finds presents a threat of adverse effects to human health or the environment (by such sources individually or in the aggregate) warranting regulation under section 112. EPA must then issue section 112(d) emission standards for the listed category or subcategory. EPA has previously stated that it "believes that it has discretion to consider a range of health effect endpoints and exposure criteria in making [an adverse effect finding under section 112(c)(3)]" and that it "may consider factors such as the number of sources in a category, the quantity of emissions, the toxicity of the HAPs, the potential for individual and population exposures and risks, the geographical distribution of the sources and the reasonableness of control measures."[14] Although EPA is not aware of any previous section 112(c)(3) adverse effect finding that specifically considered environmental justice factors, the range of factors identified above could include consideration of potential adverse health effects to minority, low-income, and indigenous populations.

### *E. Residual Risk*

Section 112(f) of the CAA requires EPA within eight years after promulgation of each technology-based emission standard for major sources under section 112(d) to review and revise

[13] S. Rep. No. 101-228 (1989).

[14] Proposed Rule: National Emission Standards for Hazardous Air Pollutants (NESHAP) (Secondary Lead Smelters), 59 Fed. Reg. 29750, 29754-29755 (June 9, 1994).

such standards, if necessary to protect public health with an ample margin of safety and to prevent adverse environmental effects, taking into consideration costs, energy, safety, and other relevant factors. In recent rulemakings, EPA has included an environmental justice analysis that provides information on the demographic impacts of proposed rules. If EPA determined that additional controls were necessary to protect public health with an ample margin of safety, EPA would promulgate regulations to provide such protection. In making such determinations, EPA can consider demographics where, for example, it determines that a particular demographic category is a population that is more vulnerable to the pollutants emitted by the source category at issue.

## IV. NATIONAL AMBIENT AIR QUALITY STANDARDS (NAAQS)

Section 109(d) of the CAA provides that EPA periodically review and revise, as appropriate, the NAAQS, which are designed "to protect the public health" and the public welfare. In setting the NAAQS, EPA focuses on the health effects on population groups that are at higher risk of adverse health effects. Thus, the NAAQS inherently take certain environmental justice factors into account as part of the standard-setting process. The legislative history of section 109 indicates that a primary (health-based) standard is to be set at "the maximum permissible ambient air level . . . which will protect the health of any [sensitive] group of the population," and that for this purpose "reference should be made to a representative sample of persons comprising the sensitive group rather than to a single person in such a group."[15] This can include, for example, groups that are more susceptible to harm from a given exposure to a pollutant like ozone, such as persons with asthma or pre-existing respiratory conditions, or groups that are more exposed to the pollution, such as children's or outdoor workers' exposure to ozone, or exposure of children to lead.

Similarly, in establishing a monitoring network to support a NAAQS, EPA may use its discretion to site some monitors in locations to protect susceptible and vulnerable populations. For example, in the final rule on the Primary National Ambient Air Quality Standards for Nitrogen Dioxide, the Administrator required the Regional Administrators to use their discretionary authority to site a specific number (40) of monitors with a primary focus on susceptible and vulnerable populations, which include asthmatics and disproportionately exposed groups.[16] EPA determined that it was necessary and appropriate to site monitors in such locations to address the risk of increased exposure to these populations. It is important to recognize, however, that the consideration of at-risk populations is, as it must be, treated as part of EPA's statutory responsibility to protect public health, whether or not environmental justice is at issue.

[15] S. Rep. No. 91-1196, at 10 (1970); *see also Coalition of Battery-Recyclers Ass'n v. EPA*, 604 F.3d 613 (D.C. Cir. 2010) ("this court has held that 'NAAQS must protect not only average healthy individuals, but also "sensitive citizens"' such as children, and '[i]f a pollutant adversely affects the health of these sensitive individuals, EPA must strengthen the entire national standard.'" (quoting *Am. Lung Ass'n v. EPA*, 134 F.3d 388, 389 (D.C. Cir. 1998)).

[16] 75 Fed. Reg. 6474, 6509-11 (Feb. 9, 2010).

## V. MOBILE SOURCES

### *A. Fuel Controls or Prohibitions*

Section 211(c) of the CAA provides that EPA may control or prohibit the manufacture or sale of any fuel or fuel additive that causes or contributes to air pollution that may reasonably be anticipated to endanger public health or welfare. As with other regulations implementing health-based standards, EPA can take into account impacts on sensitive populations. EPA used the predecessor of current section 211(c) to control the use of lead in gasoline to protect the public health, considering among other factors the impact of ambient lead and related blood-lead levels on children, including urban children and children living in substandard housing.[17] In the 1977 amendments to the CAA, Congress cited this example in support of its revisions to section 211(c) and various other CAA provisions. The current language on endangerment to public health or welfare in section 211(c) and other provisions is designed, among other things, "[t]o assure that the health of susceptible individuals, as well as healthy adults, will be encompassed in the term 'public health,'. . . ."[18]

### *B. Motor Vehicles and Nonroad Engines and Vehicles*

Section 213(a) of the CAA provides for the regulation of emissions from new nonroad engines and vehicles that cause or contribute to air pollution that may reasonably be anticipated to endanger public health or welfare. Similar language is found in section 202(a)(1). Again, EPA has the latitude to take into account impacts on sensitive populations.

# NAAQS IMPLEMENTATION

## I. GENERAL CONFORMITY DETERMINATIONS FOR FEDERAL AGENCY ACTIONS

General conformity requires federal agencies to demonstrate that the emissions from a federal action will conform to the purposes of the appropriate state, tribal or federal implementation plan for attaining clean air and will not otherwise cause or contribute to a violation of or interfere with the ability to attain and maintain the NAAQS. EPA could issue guidance to federal agencies recommending that environmental justice considerations such as impacts on minority, low-income, or indigenous populations be addressed in completing their general conformity determinations, although section 176(c)(1) of the CAA does not provide clear authority to rely specifically upon environmental justice factors to find that an activity does not conform. Such guidance could recommend that federal agencies address environmental justice factors regarding impacts on or participation by overburdened communities both in the process of finalizing those determinations (such as by allowing for extended public comment periods or having specific public meetings with affected communities to discuss the activity under consideration) and in the substance of those determinations (such as considering protection of overburdened communities when evaluating project mitigation options or selecting locations for acquiring offsets).

[17] *Ethyl v. EPA*, 541 F.2d 1, 40, 44, 47-48 (D.C. Cir. 1978).

[18] H.R. Rep. No. 95-294, at 50 (1977).

### II. FEDERAL IMPLEMENTATION PLANS AND NEW PLANNING AFTER FAILURE TO ATTAIN THE NAAQS

Under section 110(c) of the CAA, EPA must promulgate a Federal Implementation Plan (FIP) for an area within two years of making a finding that a state has failed to submit a complete State Implementation Plan (SIP) or disapproving a submitted SIP. Where EPA takes such an action with regard to a broad planning SIP, such as an attainment demonstration or reasonable further progress plan, EPA could consider environmental justice factors in determining which sources to regulate in order to meet the goal of attainment or reasonable further progress.

Under section 179(d) of the CAA, if EPA determines that a state failed to attain the NAAQS by the applicable attainment date, EPA must require the state to submit a SIP revision including "such additional measures as the Administrator may reasonably prescribe, including all measures that can be feasibly implemented in the areas in light of technological achievability, costs, and any non-air quality and other air quality-related health and environmental impacts." EPA could consider environmental justice factors in determining whether to require regulation of particular sources of air pollution or require adoption of specific programs due to "non-air quality and other air quality-related health and environmental impacts."

In addition, consistent with the provisions of sections 301(a) and 301(d)(4) of the CAA, EPA promulgates FIP provisions as are necessary or appropriate to protect air quality in Indian country where tribal efforts do not result in adoption and approval of tribal plans or programs.[19] EPA has promulgated FIPs for Indian country at the national, regional, and source-specific levels.[20]

## PERMITTING

### I. NEW SOURCE REVIEW

New Source Review (NSR) is a preconstruction permitting program. If a new major source or a major modification to an existing major source will increase emissions by an amount large enough to trigger NSR requirements, then the source must obtain a permit before it can begin construction. The NSR provisions are set forth in sections 110(a)(2)(C), 165(a) (PSD permits), 172(c)(5) and 173 (NSR permits) of the Clean Air Act. Under the CAA, states have primary responsibility for issuing permits, and they can customize their NSR programs within the limits of EPA regulations. EPA's primary role is to approve state programs and to review, comment on, and take any other necessary actions on draft and final permits to assure consistency with EPA's rules, the state's implementation plan, and the CAA. Citizens also play a role in the permitting decision and must be afforded an opportunity to comment on each construction permit before it is issued. In addition, EPA directly issues permits in certain situations (*e.g.*, in states that have declined to fully

[19] *See* 63 Fed. Reg. 7254, 7265 (Feb.12, 1998); 40 C.F.R. § 49.11.

[20] *See*, *e.g.*, 76 Fed. Reg. 38748 (July 1, 2011) (New Source Review permitting rule for Indian country); 75 Fed. Reg. 10174 (March 5, 2010) (Source-Specific FIP for Navajo Generating Station, Navajo Nation); 70 Fed. Reg. 18074 (April 8, 2005) (FIPs for Indian Reservations in Idaho, Oregon and Washington).

implement an NSR program, in Indian country, and in Outer Continental Shelf areas) and, through the EPA Environmental Appeals Board, adjudicates appeals of EPA permits and permits issued by states and local districts with delegated federal programs.[21]

The NSR permit program for major sources has two different components – one for areas where the air is dirty or unhealthy, and the other for areas where the air meets health-based standards or is unclassified. Under the CAA, geographic areas (*e.g.*, counties or metropolitan statistical areas) are designated as "attainment" or "nonattainment" with the NAAQS – the air quality standards that are set to protect human health and the environment. Permits for sources located in attainment (or unclassifiable) areas are called Prevention of Significant Deterioration (PSD) permits and those for sources located in nonattainment areas are called nonattainment NSR permits.

The requirements of these permit programs are somewhat distinct. One notable difference in the two programs is that the control technology requirement in nonattainment areas is called the Lowest Achievable Emission Rate (LAER), which is defined as the most stringent emission limitation required under a state implementation plan or achieved in practice for a class of category of sources. In PSD areas, a source must apply Best Available Control Technology (BACT), and the statute allows the consideration of cost and other factors in weighing BACT options. Also, in keeping with the goal of progress toward attaining the NAAQS, sources in nonattainment areas must always provide or purchase "offsets" – decreases in emissions that compensate for the increases from the new source or modification. In PSD areas, offsets are not required, but sources must demonstrate that they will not cause or contribute to a violation of the NAAQS or the PSD increments, the latter of which are margins of "significant" air quality deterioration above a baseline concentration that establish an air quality ceiling, typically below the NAAQS, for each PSD area. Sources can typically make this demonstration based on the BACT level of control or by accepting tighter air quality-based limitations, but permitting authorities have the discretion to require mitigation measures in a PSD permit that are comparable to offsets if such measures are necessary to meet this "cause or contribute" standard.

EPA's opportunities to advance environmental justice in NSR and PSD permitting differ depending on whether EPA or the state is the permitting authority. When EPA is the permitting authority, the Agency controls both the content of the permit and the permit review process. Control over the review process gives EPA opportunities to enhance environmental justice by facilitating increased public participation in the formal permit consideration process (*e.g.*, by granting requests to extend public comment periods or hold multiple public meetings, or by providing translation services at hearings in areas with limited English proficiency). EPA can also take informal steps to enhance participation even earlier in the process, such as inviting community groups to meet with EPA and express their concerns before a draft permit is issued. And when EPA makes permit decisions, the Agency has sufficient legal authority to consider potential disproportionate environmental burdens on a case-by-case basis, with no need to amend existing regulations or guidance documents. In fact, EPA is already following this case-by-case approach in issuing PSD permits consistent with its legal authority.

[21] *See* 40 C.F.R. §§ 52.21(u) and 124.19.

When a state is the permitting authority, EPA's role includes commenting on individual permits during the comment period. This presents an opportunity for EPA to advance environmental justice by focusing the state's consideration on potential disproportionate environmental burdens in determining that the permits comply with applicable requirements. EPA can offer comments to states regarding disproportionate burdens arising from permits (although states would not necessarily need to accept and act on such comments). EPA routinely comments on proposed permits, but has not previously emphasized such issues in comments.

Another EPA role in state permitting is writing the regulations that establish the minimum criteria for PSD and NSR permitting programs implemented by state permitting authorities. EPA has promulgated the minimum requirements for an approvable state PSD permitting program in 40 C.F.R. § 51.166, and similar state program requirements for nonattainment NSR are contained in 40 C.F.R. § 51.165. At present, these rules do not explicitly discuss environmental justice considerations and thus do not directly require state permitting authorities to reflect these considerations in their permitting decisions. If EPA were to interpret the Clean Air Act to provide the Agency with the discretion to require more direct consideration of these factors in permitting decisions by EPA and the states, the Agency could consider revising the criteria applicable to state permitting programs in order to make environmental justice considerations more explicit in one or more aspects of the permitting criteria.

### *A. Nonattainment NSR Permitting Authority*

Section 173(a)(5) of the CAA requires a permitting authority reviewing a nonattainment NSR permit to determine whether "an analysis of alternative sites, sizes, production processes, and environmental control techniques for such proposed source demonstrates that benefits of the proposed source significantly outweigh the environmental and social costs imposed as a result of its location, construction, or modification." Thus, this provision calls for consideration of siting issues.

Under the regulations at 40 C.F.R. § 51.161, state implementation plans must require the state or local permitting agency to provide an opportunity for public comment on information submitted by a source owner or operator who is seeking a nonattainment NSR permit. This opportunity must include the following: (1) a 30-day public comment period; (2) public availability of the information provided by the permit applicant (and the permitting authority's analysis of the effects of the proposed source seeking the permit), in at least one location in the affected area; and (3) a prominent advertisement of the availability of the information.

Implementation of the nonattainment NSR programs meeting these core requirements is primarily a state responsibility. In light of some differences in the statutory provisions applicable to the nonattainment NSR program and the PSD program, EPA has assumed responsibility for issuing nonattainment NSR permits less frequently than PSD permits. Given the primacy of state legal authority as the foundation for implementing this program, and the focus of this document principally on circumstances in which EPA is the implementing authority, further analysis of opportunities to incorporate environmental justice considerations into nonattainment NSR permitting decisions by states is beyond the scope of this exercise. However, further analysis of these issues may well be beneficial in the context of future undertakings.

### *B. PSD Program Permitting Authority and Implementation History*

Section 165(a)(2) of the CAA provides that a PSD permit may be issued only after "a public hearing has been held with opportunity for interested persons including representatives of the Administrator to appear and submit written or oral presentations on the air quality impact of [the proposed] source, alternatives thereto, control technology requirements, and other appropriate considerations." Likewise, one purpose of the PSD program is "to assure that any decision to permit increased air pollution in any area to which this section applies is made only after careful evaluation of all the consequences of such a decision and after adequate procedural opportunities for informed public participation in the decisionmaking process."[22] In addition to requiring an opportunity for public participation in permitting decisions, the "alternatives" and "other appropriate considerations" language in section 165(a)(2) can be interpreted to provide the Agency with discretion to incorporate environmental justice considerations when issuing PSD permits. EPA has recognized that this language provides a potential statutory foundation in the Clean Air Act for this discretion.[23] However, EPA has never explicitly based a PSD permit condition solely on such discretion or section 165(a)(2) alone, and the full contours of such discretion have not yet been defined.

Nevertheless, section 165(a)(2) could be construed to provide EPA with discretion (but not a mandatory obligation) to impose permit conditions on the basis of environmental justice considerations raised in public comments regarding the air quality impacts of a proposed source. EPA has argued that this provision authorizes the incorporation of plant siting considerations into PSD permitting decisions. The ability to condition a permit due to environmental justice considerations would further the purpose of part C of title I of the Clean Air Act "to protect public health and welfare from any actual or potential adverse effect . . . from air pollution . . . notwithstanding the attainment and maintenance of all [NAAQS]."[24]

The EPA Environmental Appeals Board (EAB) first addressed environmental justice considerations under the CAA in 1993.[25] In its initial Order Denying Review in Part and Remanding in Part in *Genesee Power*, the EAB stated that the CAA did not allow for consideration of environmental justice and siting issues in air permitting decisions. In response, EPA's Office of General Counsel filed a Motion for Clarification on behalf of the Office of Air and Radiation and Region V. The Motion pointed out, among other things, that the CAA requirement to consider alternatives to the proposed source and the statutory definition of "best available control technology" provided opportunities for consideration of environmental justice in PSD permitting. The Motion also referenced legislative history that suggests Congress intended for the Clean Air Act to provide for examination of the air quality impact of particular site location decisions. In an amended opinion and order issued on October 22, 1993, the EAB deleted the controversial language but did not decide whether

[22] CAA section 160(5).

[23] *See* Memorandum from Gary S. Guzy, EPA General Counsel, entitled "EPA Statutory and Regulatory Authorities Under Which Environmental Justice Issues May Be Addressed in Permitting" (Dec. 1, 2000).

[24] CAA section 160(1).

[25] *In the Matter of Genesee Power Station*, PSD Appeal Nos. 93-1 through 93-7 (EAB Sept. 8, 1993).

it is permissible to address environmental justice considerations under the PSD program.[26] Thus, EPA has asserted arguments that support the authority to condition or deny PSD permits based on environmental justice, siting, or other considerations not explicitly addressed by other provisions in part C of title I of the Clean Air Act, but the Agency has never attempted to establish permit conditions based directly and exclusively on such authority.

Subsequently, based on Executive Order 12898 on environmental justice, the EAB has held that environmental justice considerations must be considered in connection with the issuance of federal PSD permits issued by EPA Regional Offices or states acting under delegations of federal authority.[27] In the *Knauf Fiber Glass* matter, the EAB remanded a PSD permit to the delegated permitting authority for failure to provide EPA's environmental justice analysis in the administrative record in response to comments raising the issue.[28] In these cases, the EAB did not specifically cite section 165(a)(2) or any other provision of the CAA as the basis for EPA discretion to consider environmental justice. But the EAB has recognized that consideration of the need for a facility is within the scope of section 165(a)(2) when a commenter raises the issue.[29]

Based on these EAB decisions, EPA Regional Offices or their delegates in the States routinely conduct an environmental justice analysis in conjunction with the review of PSD permit applications. Indeed, the EAB "has held that environmental justice must be considered in connection with the issuance of PSD permits," and "has . . . encouraged permit issuers to examine any 'superficially plausible' claim that a minority or low-income population may be disproportionately affected by a particular facility."[30] EPA guidance or EAB decisions do not call for integrating environmental justice considerations into any individual component of the PSD permitting review, such as the determination of BACT. Rather, the practice of EPA Regional Offices and delegated states has been to conduct a largely freestanding environmental justice analysis for PSD permits.

EPA has not issued any formal guidelines for the scope and content of an environmental justice analysis on PSD permits, but has developed some general parameters through individual actions. Such an analysis has generally involved an assessment of the impacts a source may have on minority or low-income communities, which is typically informed by the analysis of whether a source will cause or contribute to a violation of the health-based NAAQS in any area. The EAB has often deferred to the judgments of EPA

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[26] 4 E.A.D. 832, 833 n. 1 (EAB 1993).

[27] *In re Prairie State Generating Company*, 13 E.A.D. 1, 123 (EAB 2006) (citing *In re Knauf Fiber Glass, GmbH*, 8 E.A.D. 121, 174-75 (EAB 1999)); *see also In re AES Puerto Rico, L.P.*, 8 E.A.D. 324, 351 (EAB 1999) (order denying review based in part on the thorough environmental justice analysis), *aff'd sub nom Sur Contra La Contaminacion v. EPA*, 202 F.3d 443 (1st Cir. 2000); *In re EcoEléctrica, L.P.*, 7 E.A.D. 56, 67-69 (EAB 1997); *In re Puerto Rico Electric Power Authority*, 6 E.A.D. 253, 254-58 (EAB 1995) (citing *In re Chemical Waste Management of Indiana*, 6 E.A.D. 66 (EAB 1995) (examining for the first time the general policy directive set out in EO 12898 and the EAB's role in implementing it in the context of a RCRA permit)).

[28] *In re Knauf Fiber Glass, GmbH*, 8 E.A.D. at 174-75.

[29] *See In re Prairie State Generating Company*, 13 E.A.D. at 32.

[30] *In re Shell Gulf of Mexico, Inc.*, 15 E.A.D. __, slip op. at 63 and n. 71 (EAB Dec. 30, 2010) (internal citations omitted).

Regional Offices that the NAAQS provide a useful benchmark for assessing potential adverse impacts on the health of members of affected communities.[31]

However, in *In re Shell Gulf of Mexico, Inc.*, the EAB remanded an environmental justice analysis as inadequate when the record contained no document designated as an environmental justice analysis, and no "information or other evidence" that the analysis of environmental justice issues undertaken solely in response to public comments "considered anything beyond compliance with the NAAQS" in effect when the permit was issued.[32] The EAB considered this insufficient under the circumstances because, before the permit was issued, EPA had announced that it was revising the relevant NAAQS effective shortly after the permit was issued because the unrevised NAAQS was not adequately protective of public health.[33] In a later case, *In re Avenal Power Center, LLC,* the Board explained that its remand in the *Shell* case was because of "the region's scant environmental justice analysis, which provided no examination or analysis of [specified environmental justice] impacts *whatsoever*."[34]

In the *Avenal* case, the EAB rejected a challenge to a dedicated environmental justice analysis that "collected and analyzed demographic, health-related, and air quality data" regarding the impacts of emissions from a proposed facility.[35] The EAB noted that the Region made the environmental justice analysis available for public comment. The EAB recognized that "[t]he plain language of the Executive Order" allows agencies "considerable leeway . . . in determining how to comply with the letter and spirit of the Executive Order."[36] Thus, a "substantive environmental justice analysis that endeavors to include and analyze data that is germane to the environmental justice issue raised during the comment period" may comply with the Executive Order even if it does not reach a definitive conclusion if "the permit issuer demonstrates that it exercised its considered judgment when determining that it could not reach a determinative conclusion due to the insufficiency of available valid data."[37] The EAB further noted that petitioners bear a "particularly heavy burden [in] demonstrating that the Agency clearly erred in making its technical judgments" regarding what data to consider in an environmental justice analysis.[38]

Notwithstanding the lack of formal rules or guidance under the PSD program, in the decisions discussed above that postdate issuance of Executive Order 12898, the EAB

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[31] *See generally In re Knauf Fiber Glass, GmbH,* 9 E.A.D 1, 15-17 (EAB 2000) (upholding Agency finding that facility "will not have disproportionately high and adverse human health or environmental effects on a minority or low-income population" based on finding of attainment of relevant NAAQS, citing 40 C.F.R. § 50.2(b) (NAAQS set at level to protect the public health and welfare)); *AES Puerto Rico, L.P.*, 8 E.A.D. at 351 (affirming environmental justice analysis based on reasoning that NAAQS are health-based and protect sensitive populations).

[32] *Shell,* 15 E.A.D. at __, slip op. at 75-76 & n. 83.

[33] *Id.*

[34] *In re Avenal Power Center, LLC,* 15 E.A.D. __, slip op. at 24-25 (EAB Aug. 18, 2011) (emphasis added).

[35] *Id.* at 20.

[36] *Id.* at 24.

[37] *Id.* at 25-26.

[38] *Id.* at 27.

acknowledged that EPA can address environmental justice considerations in PSD permit reviews and evaluated the adequacy of EPA's environmental justice analyses as a matter of compliance with the Executive Order. Notably, the EAB has recognized that EPA has authority to use its discretion under PSD program regulations to establish permit conditions on the basis of environmental justice considerations:

> In support of environmental justice for this community, the Region took steps to require that many elements of the air quality analyses performed during the permit process be reconfirmed after the permit is issued. As conditions of the permit, [the permittee] is required to conduct ambient $SO_2$ monitoring and to perform a multi-source air quality analysis for $SO_2$. These permit conditions are a testament to the role of public participation in the permit process. Because of the concerns raised during the public comment period, this permit contains additional conditions that are not mandated by the PSD regulations but are within the Region's discretion to require. The Region incorporated the conditions into the permit as a tangible response to the community's concerns about air quality and to fulfill the goals of the Executive Order.[39]

The additional conditions in this instance involved post-construction monitoring requirements (discussed further below) that are within the discretion of the permitting authority to impose under express authority in EPA regulations.[40]

Under section 165(a)(7) of the CAA, one requirement of a PSD permit review is that a permit applicant "conduct such monitoring as may be necessary to determine the effect which emissions from any such facility may have, or is having, on air quality in any area which may be affected by emissions from such source." This provision and section 165(e)(2) have been applied by permitting authorities to require collection of pre-construction monitoring data on ambient air quality conditions in the area to inform the air quality analysis needed to determine whether the permit may issue. In practice, most permit applicants have not been required to collect new site-specific monitoring data but have been allowed to use previously collected data from another location that is shown to be representative of the area affected by the proposed construction. However, to support an environmental justice analysis, EPA could use this authority to gather site-specific data as appropriate to evaluate potential impacts on particular minority, low-income, and indigenous populations.

Moreover, EPA has interpreted section 165(a)(7) to provide a permitting authority with the discretion to require post-construction monitoring to determine the effect a source is actually having on air quality in any area.[41] Thus, a permitting authority has the discretion to require post-construction monitoring in a PSD permit to provide assurance that there will not be a disproportionate impact on air quality in a minority, low-income, or indigenous community. The EAB has affirmed the discretion of a permitting authority to establish post-construction

[39] *In re AES Puerto Rico, L.P.*, 8 E.A.D. at 351 (internal citations omitted).

[40] 40 C.F.R. § 52.21(m)(2).

[41] 40 C.F.R. §§ 51.166(m)(2) and 52.21(m)(2).

monitoring requirements on the basis of environmental justice considerations.[42] Such monitoring can verify the source's actual impact.

The role of environmental justice considerations in addressing hazardous air pollutant impacts in PSD permitting is not straightforward. In the 1990 CAA Amendments, Congress provided in section 112(b)(6) of the CAA that the PSD provisions do not apply to hazardous air pollutants (HAPs). Due to this provision, BACT limits are not required to be set for HAPs in PSD permits. However, the Administrator ruled prior to the 1990 Amendments that in establishing BACT for criteria pollutants (pollutants directly regulated under PSD), analysis of control technologies for criteria pollutants could also consider their relative ability to control emissions of pollutants *not* directly regulated under PSD.[43] In EPA's view, the 1990 Amendments did not change this limited authority, and it could be viewed as a basis for addressing environmental justice considerations derived from collateral impacts of air toxics emissions. In addition, EPA may have authority to take into account effects of HAPs that are also criteria pollutants, such as volatile organic compounds.

## II. TITLE V

All major stationary sources of air pollution and certain other sources are required to apply for CAA title V operating permits that include emission limitations and other conditions as necessary to assure sources' compliance with applicable requirements of the CAA, including the requirements of the applicable implementation plan.[44] Unlike PSD/NSR permitting, the title V operating permit program does not generally impose new substantive air quality control requirements (which are referred to as "applicable requirements"), but does require permits to contain monitoring, recordkeeping, reporting, and other conditions to assure compliance by sources with applicable requirements.[45] One purpose of the title V program is to enable the source, EPA, states, and the public to better understand the applicable requirements to which the source is subject and whether the source is complying with those requirements. Thus, the title V operating permit program is a vehicle for ensuring that existing air quality control requirements are appropriately applied to facility emission units and that the units comply with these requirements.

Section 502(d)(1) of the CAA calls upon each state to develop and submit to EPA an operating permit program intended to meet the requirements of CAA title V. Under section 505(a) of the CAA and the relevant implementing regulations at 40 C.F.R. § 70.8(a), states and other permitting authorities are required to submit each proposed title V permit to EPA for review. Upon receipt of a proposed permit, EPA has 45 days to object to final issuance of the permit if it is determined not to be in compliance with applicable requirements or the requirements of title V.[46] If EPA does not object to a permit on its own initiative, section 505(b)(2) of the CAA provides that any person may petition the Administrator, within 60 days of

[42] *In re AES Puerto Rico, L.P.*, 8 E.A.D. at 351.

[43] *In re North County Resource Recovery Assoc.*, 2 E.A.D. 229, 230 (Adm'r 1986).

[44] CAA sections 502(a), 504(a), and 504(c).

[45] 57 Fed. Reg. 32250, 32251 (July 21, 1992) (EPA final action promulgating Part 70 rules).

[46] 40 C.F.R. § 70.8(c).

the expiration of EPA's 45-day review period, to object to the permit.[47] In response to such a petition, section 505(b)(2) of the CAA requires the Administrator to issue an objection if a petitioner demonstrates that a permit is not in compliance with the requirements of the CAA.

Because title V generally does not authorize the direct imposition of substantive emission control requirements, title V permitting does not appear to be an effective mechanism for establishing new, substantive control requirements to address environmental justice considerations regarding impacts on or participation by minority, low-income, or indigenous populations. The title V process, however, can allow public participation to serve as a motivating factor for applying closer scrutiny to a title V source's compliance with applicable CAA requirements. By providing significant public participation opportunities, title V can serve as a vehicle by which citizens can raise environmental justice considerations that arise under other provisions of the CAA. Communities can use the title V process to help ensure that each title V permit contains all of a source's applicable requirements, and other conditions necessary to assure the source's compliance with those requirements.

Under the 40 C.F.R. Part 70/71 permitting process, EPA has exercised its CAA authority to require extensive opportunities for public participation in permitting actions. For example, 40 C.F.R. § 70.7(h) requires that all permit proceedings (except for modifications qualifying for minor permit modification procedures) "provide adequate procedures for public notice including an opportunity for public comment and a hearing on the draft permit." This provision also specifies steps permitting authorities must take to allow for adequate public participation.

Under section 505(c) of the CAA, title V permits must contain provisions, including monitoring requirements, to assure compliance with permit terms and conditions. EPA has made clear in several recent title V orders responding to citizen petitions that permitting authorities need to evaluate monitoring requirements in title V permits, and must supplement monitoring in title V permits where necessary to assure compliance with permit terms and conditions. In the *CITGO* and *Premcor* Orders,[48] EPA summarized the title V monitoring requirements. EPA explained that the Part 70 monitoring rules[49] are designed to satisfy the statutory requirement in section 504(c) of the CAA that "[e]ach permit issued under [title V] shall set forth . . . monitoring . . . requirements to assure compliance with the permit terms and conditions."

As a general matter, permitting authorities must take three steps to satisfy the monitoring requirements in EPA's Part 70 regulations. First, under 40 C.F.R. § 70.6(a)(3)(i)(A), permitting authorities must ensure that monitoring requirements contained in applicable requirements are properly incorporated into the title V permit. Second, if the applicable requirement contains no periodic monitoring, permitting authorities must add "periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source's compliance with the permit."[50] Third, if there is some periodic monitoring in the applicable requirement, but that monitoring is not sufficient to assure compliance with permit terms and conditions, permitting

[47] *See also* 40 C.F.R. § 70.8(d).

[48] *In the Matter of CITGO Refining and Chemicals Company L.P.*, Petition VI-2007-01 (May 28, 2009) (*CITGO* Order); *In the Matter of Premcor Refining Group, Inc.*, Petition VI-2007-2 (May 28, 2009) (*Premcor* Order).

[49] 40 C.F.R. §§ 70.6(a)(3)(i)(A) & (B) and 70.6(c)(1).

[50] 40 C.F.R. § 70.6(a)(3)(i)(B).

authorities must require supplemental monitoring or perform such monitoring itself in order to assure such compliance.[51]

In addition, in all cases, the rationale for the selected monitoring requirements must be clear and documented in the permit record.[52] Further, permitting authorities have a responsibility to respond to significant comments.[53] This principle applies to significant comments on the adequacy of monitoring.[54]

Further, title V and EPA's implementing regulations also contain requirements regarding other types of conditions necessary to ensure compliance, such as reporting requirements. Section 504(c) of the CAA requires that each permit set forth "inspection, entry, monitoring, compliance certification, and reporting requirements to assure compliance with the permit terms and conditions." Further, 40 C.F.R. § 70.6(c)(1) requires that title V permits contain "compliance certification, testing, monitoring, reporting, and recordkeeping requirements sufficient to assure compliance with the permit terms and conditions." There are also several specific provisions in Part 70 addressing these other types of requirements, such as 40 C.F.R. § 70.6(a)(3)(ii) on recordkeeping.[55]

As the *CITGO* and *Premcor* Orders illustrate, EPA can use its role in overseeing and implementing the title V permitting process to help ensure that a title V permit contains all of the source's applicable requirements, and other conditions – including provisions for monitoring and recordkeeping – necessary to assure the source's compliance with those requirements. The process for public petitions to the Administrator on state-issued permits under section 505(b)(2) of the CAA and 40 C.F.R. § 70.8(d) allows an opportunity for the public to raise to EPA concerns regarding particular title V permits. In addition, EPA has authority to comment on whether a title V permit assures compliance with requirements of the CAA. Further, under CAA section 505(b), EPA must object if the Agency determines a permit is not in compliance with the requirements of the CAA.

As stated above, title V requires permitting authorities to submit proposed permits to EPA for a 45-day review period before the title V permits may be issued. EPA Regional Offices review only some of the proposed title V permits that are submitted by the permitting authorities because the resources available for such review and the statutory time frame provided for review of proposed permits are not sufficient to allow review of all proposed title V permits. In some instances, Regional Offices have prioritized title V permit review based on factors related to environmental justice. One way that EPA could address environmental justice considerations under title V more systematically would be for the Agency to direct its resources available for review of proposed title V permits to the review of such permits where they impact overburdened communities. Thorough EPA review would protect public health by potentially

[51] 40 C.F.R. § 70.6(c)(1).

[52] 40 C.F.R. § 70.7(a)(5).

[53] *See, e.g., In the Matter of Onyx Environmental Services,* Petition V-2005-1 (Feb. 1, 2006) ("it is a general principle of administrative law that an inherent component of any meaningful notice and opportunity for comment is a response by the regulatory authority to significant comments").

[54] *See, e.g., Premcor Order* at 7.

[55] *Premcor Order* at 8.

identifying any deficiencies with proposed permits and help ensure that the title V permits affecting these populations include all applicable requirements and adequate monitoring, recordkeeping, and reporting requirements to assure compliance with the applicable requirements.

Where EPA has not approved a state or tribal title V program (*e.g.*, in most of Indian country), EPA directly implements the title V permit program under 40 C.F.R. Part 71. In reviewing and acting on permit applications under Part 71 in Indian country and other areas, EPA can exercise the legal authorities discussed above to promote meaningful public involvement and ensure that title V permits contain adequate provisions to assure compliance with applicable requirements.

## NATIVE AMERICAN COMMUNITIES AND FEDERALLY RECOGNIZED INDIAN TRIBES

As discussed in more detail in Chapter Five, Executive Order 12898 on environmental justice specifically addresses Native American communities and federally recognized Indian Tribes by providing that "[e]ach Federal agency responsibility set forth under this order shall apply equally to Native American programs."[56] In addition, the CAA provides opportunities for EPA to work with Indian tribes, and for EPA and tribes to consider and address impacts on Native American communities.

In 1998, EPA promulgated the Tribal Authority Rule (TAR), 40 C.F.R. Part 49, which implements the directive in section 301(d)(2) of the CAA that EPA promulgate regulations identifying the CAA provisions for which eligible tribes may be treated in the same manner as states. Under the TAR, an eligible tribe may be treated in the same manner as a state for all of the core CAA programs, including the establishment of implementation plans, the Prevention of Significant Deterioration program, and title V permitting programs. Many of these programs provide significant opportunities and responsibilities for tribes to work with affected communities in implementing the CAA. Tribes may also apply to EPA under CAA section 105 and the TAR for access to funds to implement tribal clean air programs for their areas. To date, 37 tribes have received treatment-as-a-state (TAS) status for various CAA provisions. Three of those tribes have EPA-approved tribal implementation plans (TIPs) to address air quality issues on their reservations, with several more TIPs under development, and one tribe has been approved to implement on EPA's behalf the federal title V operating permit program under 40 C.F.R. Part 71 for its reservation.

In addition, under section 164 of the CAA, states and Indian tribes have the authority to modify the classifications for their attainment areas, which will determine the level of significant deterioration allowable under the PSD increments. Several tribes have decided to provide their reservations the enhanced protection of air quality provided by Class I status and have obtained EPA approval to redesignate their reservations as Class I.

[56] Executive Order 12898, Section 6-606.

Further, EPA has authority under CAA section 301(d)(4) to directly implement provisions of the CAA in Indian country in the absence of EPA-approved programs.[57] When EPA undertakes direct implementation of the CAA in Indian country, EPA generally consults and works closely with the relevant tribal governments. EPA tribal programs are discussed more fully in Chapter Five.

# MISCELLANEOUS

## I. ACCIDENT PREVENTION AUTHORITIES

The Chemical Accident Prevention Provisions, 40 C.F.R. Part 68, implement CAA section 112(r)(7)(B). These rules require the preparation of risk management plans (RMPs) that summarize steps stationary sources take to prevent catastrophic toxic airborne releases, fires, and explosions. The RMPs include an assessment and disclosure of potential areas and populations that may be affected by worst-case accidents and other more likely events, as well as an accident history and a summary of accident prevention measures and emergency response programs. Portions of the RMPs could be made available to the public via an on-line database, although by statute EPA may not allow the general public access to certain off-site consequence information (*e.g.,* worst-case scenarios and more likely release scenarios) and rankings of facilities by scenario. During the rule's development, commenters asked for opportunities for local input into source prevention programs, including public meetings with sources during program development and the right to trigger audits or inspections. While the final rule does not provide for local input, EPA could amend its rules to create public input opportunities.

EPA has rulemaking authority under CAA section 112(r)(7)(A) to require additional monitoring and recordkeeping related to accidental release prevention, and to distinguish among sources by location. EPA has not exercised this authority. This authority applies to the same substance list as the rules under CAA section 112(r)(7)(B) discussed above and is similar to other CAA monitoring and recordkeeping authorities summarized in this document, except its focus is on accidental releases. Therefore, EPA has the authority to establish additional release monitoring requirements in overburdened communities if needed to prevent and address accidental releases.

In addition to the regulatory authority in CAA section 112(r)(7), the statute directly establishes a "general duty" to assess hazards, design and maintain a safe facility, and respond to accidents. This authority in CAA section 112(r)(1) is not limited to a set list of chemicals. Instead, it applies to any stationary source handling substances that are extremely hazardous due to use and properties. EPA has the authority to provide guidance on this duty.

## II. RADIATION

EPA has examined the potential use of RCRA Subtitle C landfills for the risk-based disposal of radioactive waste containing low concentrations of radionuclides. These efforts are in the preliminary stages. However, environmental justice considerations regarding impacts on or

[57] *See also* 40 C.F.R. Part 49.

participation in decision-making by minority, low-income, and indigenous populations may arise in a manner similar to those under RCRA (siting of disposal facilities, monitoring, closure, land use). See Chapter Three.

## III. INDOOR AIR POLLUTION

EPA has authority to do research and disseminate information concerning indoor air pollution pursuant to the Radon Gas and Indoor Air Quality Research Act of 1986.[58] EPA does not have regulatory authority to address indoor air pollution. In the past, EPA has addressed indoor air pollution such as second-hand smoke, otherwise known as "environmental tobacco smoke" (ETS), through means such as issuance of an ETS Risk Assessment and informational programs to advise the public about the risks of exposure to ETS. Such techniques could potentially be brought to bear with other indoor air pollutants that have disproportionate impacts on at-risk populations, potentially including minority, low-income, or indigenous populations.

## IV. INFORMATION AUTHORITIES

EPA has a range of information-gathering and dissemination authorities that it can use to promote environmental justice. These authorities relating to research, monitoring and reporting can be implemented to focus attention on, and enhance participation in decision-making by, minority, low-income, and indigenous populations in ways that enable those populations to obtain information they can use to safeguard their health and environment.

As discussed above, EPA and state permitting agencies can impose monitoring requirements in individual permits. In addition, CAA section 114(a) authorizes certain record-keeping and reporting requirements, and section 114(c), in general, requires public availability of the information obtained pursuant to those requirements. EPA also has authority under CAA section 112(*l*)(3) to establish an air toxics clearinghouse to provide technical and other information about air toxics. EPA may also promulgate regulations under CAA section 112(r)(7) to impose monitoring, recordkeeping, reporting and other requirements in connection with the accidental release of regulated substances.

Further, under section 103 of the CAA, EPA has authority to conduct research relating to the causes, effects, extent, prevention, and control of air pollution. Clean Air Act section 112(*l*)(3) directs the Agency to use this authority to examine methods for preventing, measuring, and controlling emissions and evaluating associated health and ecological risks. Finally, CAA section 112(m) requires EPA to monitor the deposition of hazardous air pollutants onto the Great Lakes, the Chesapeake Bay, Lake Champlain, and coastal waters. EPA could focus that authority on collecting information relevant to the communities that depend on these water resources for fishing and other uses.

[58] 42 U.S.C. § 7401 note (1986).

# CHAPTER TWO: WATER PROGRAMS

## INTRODUCTION

This chapter addresses three statutes: the Clean Water Act,[59] the Safe Drinking Water Act,[60] and the Marine Protection, Research, and Sanctuaries Act.[61] The primary opportunities for advancing environmental justice exist under the Clean Water Act and Safe Drinking Water Act because they regulate a broad range of activities that could potentially affect minority, low-income, and indigenous communities that are or may be disproportionately impacted by environmental pollution. Under both of these statutes, EPA has discretionary authorities that could provide opportunities to advance environmental justice.

## CLEAN WATER ACT

### I. INTRODUCTION

The Clean Water Act (CWA) was adopted "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[62] To achieve this objective, Congress prohibited the discharge from a point source of any pollutant into a water of the United States unless that discharge complies with specific requirements of the CWA. In addition, Congress directed states to adopt water quality standards for their waters identifying the desired uses and acceptable levels of pollution in their waters. The CWA provides EPA broad authorities to establish regulations to implement the CWA's programs and gives EPA oversight authority of state programs. This chapter discusses the primary statutory and regulatory programs established under the CWA and identifies EPA's discretionary authorities to advance environmental justice under the CWA's various programs. The CWA's grant-related authorities and the oil spill program under section 311 are discussed separately in Chapters Seven and Three, respectively. Because states and authorized tribes[63] have primary responsibility to implement many of the CWA's regulatory programs, EPA may have limited authority to influence state and tribal decisions.

### II. WATER QUALITY CRITERIA GUIDANCE AND WATER QUALITY STANDARDS

Water quality standards are the foundation of the water quality-based control programs mandated by the CWA. Water quality standards define the goals for a waterbody by designating

[59] 33 U.S.C. §§ 1251-1387.

[60] 42 U.S.C. §§ 300f -300j-26.

[61] 33 U.S.C. §§ 1401-1445.

[62] CWA section 101(a).

[63] As discussed in Section VII below and in Chapter Five, federally recognized Indian tribes may assume responsibility for administering many CWA programs under CWA section 518(e). However, eligible tribes are not required to do so. Currently, the water quality standards program is the only CWA regulatory program that is administered by some tribes.

its uses, setting criteria to protect those uses and establishing antidegradation protections to maintain existing uses and high water quality. Because water quality standards set the foundation for what level of water quality must be met by other CWA programs, they provide particular opportunities for ensuring protection of water quality in areas used by minority, low-income, and indigenous populations.

### *A. Water Quality Criteria Guidance*

It is the national goal of the CWA that wherever attainable an interim goal of water quality that provides for the protection and propagation of fish, shellfish and wildlife and provides for recreation in and on the water be achieved.[64] Section 304(a)(1) of the CWA provides that EPA shall develop and publish criteria for water quality accurately reflecting the latest scientific knowledge on a variety of factors including "the kind and extent of all identifiable effects on health and welfare" that may be expected from the presence of pollutants in any body of water, including ground water. Pursuant to this authority, EPA has for 30 years developed and published water quality criteria guidance for protection of human health from consumption of fish and drinking water as well as exposure to bacteria through recreation in and on the water. States often adopt regulatory water quality standards pursuant to section 303(c) of the CWA based on EPA's recommended section 304(a) criteria.

#### (1) *EPA Authorities to Issue Recommended Criteria Guidance for Protection of Populations Consuming High Levels of Fish and Shellfish*

EPA's recommended water quality criteria generally are expressed as ambient numeric pollutant levels that EPA considers to be protective of the intended use of the water (*e.g.*, consumption of fish). EPA currently has recommended water quality criteria for protection of human health for over 100 individual pollutants. An important element of EPA's criteria recommendations for protection of human health is that they reflect EPA's assumptions regarding fish consumption. EPA's current recommended human health criteria reflect an assumption that the general population to be protected at the criteria level will consume 17.5 grams per day of fish (the national average value) and 100% of human exposure will be through surface water exposure pathways.

EPA's use of 17.5 grams per day reflects EPA's current methodology for deriving water quality criteria to protect human health, which EPA revised and published in 2000.[65] In the methodology, EPA "recommends a default fish intake rate of 17.5 grams/day to adequately protect the general population of fish consumers."[66]

For the protection of overburdened communities, EPA's methodology specifically considered "the States' and Tribes' need to provide adequate protection from adverse health effects to highly exposed populations such as recreational and subsistence fishers."[67] EPA recommends default fish consumption rates for recreational fishers and subsistence fishers of

[64] CWA section 101(a)(2).

[65] USEPA, Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human Health (2000) (EPA-822-B-00-004 (October 2000)) at 4-25.

[66] *Id.*

[67] *Id.*

17.5 grams/day and 142.4 grams/day, respectively.[68] EPA's broad authorities under CWA sections 304(a)(1) and (2) would support the Agency's issuance of additional guidance to advance environmental justice if EPA determines that such guidance would help to protect populations consuming higher levels of fish and shellfish. Such guidance might provide additional recommended default consumption levels for a broader range of highly exposed populations beyond the current recommendations for recreational and subsistence fishers.

Recognizing that the level of fish intake in highly exposed populations varies by geographical location, EPA's methodology also suggests a four-preference hierarchy for states and authorized tribes to follow when deriving consumption rates. The four-preference hierarchy, which encourages use of the best local, state, and regional data available, consists of: (1) use of local data; (2) use of data reflecting similar geography/population groups; (3) use of data from national surveys; and (4) use of EPA's default intake rates.[69]

EPA has the opportunity and statutory authority when reviewing new or revised state and tribal water quality standards to ensure that states and tribes are appropriately considering all relevant data in determining if their water quality standards are providing adequate protection for highly exposed populations. For example, when one state adopted revised human health criteria for toxic pollutants in 2011, EPA evaluated the revised criteria to ensure that the state considered all available and relevant local and regional data respecting fish consumption rate. EPA determined that the revised criteria – which were based on a ten-fold increase in fish consumption patterns among tribal populations in the state – were derived in a manner consistent with EPA's recommended methodology for the protection of highly exposed populations. If the Agency determines that states and authorized tribes are not adequately considering available data or implementing EPA's four-preference hierarchy, EPA has broad statutory authority to issue additional guidance clarifying that the Agency expects them to address all fish consumption data in developing their water quality standards and to use default assumptions in the absence of local data. EPA could then use the guidance in its review of state and tribal water quality standards.

(2) *Authorities to Issue Guidance for Protection of Populations Swimming and Recreating in Waters of the United States, Including Urban Waters*

In 1986, EPA issued recommended water quality criteria guidance on the acceptable levels of indicators of fecal contamination in waters designated for primary contact recreation (*e.g.*, swimming). The Beaches Environmental Assessment and Coastal Health Act of 2000 (BEACH Act) amended the CWA to direct EPA to publish revised water quality criteria recommendations for protection of all coastal and Great Lakes waters designated for primary contact recreation.[70] EPA is required to publish its revised criteria recommendations in October 2012 pursuant to a consent decree. EPA has completed a research effort pursuant to CWA section 104(v) and the consent decree to develop the scientific support for the Agency's water quality criteria recommendations. In implementing its clear statutory authority to publish recommended criteria for protection of primary contact recreation uses, EPA will have the

[68] *Id.*

[69] *Id.*

[70] CWA section 304(a)(9).

opportunity to address what EPA believes to be the appropriate level of protection for people that swim in coastal and Great Lakes waters.

Although the BEACH Act amendments do not direct EPA to develop updated water quality criteria recommendations for waters other than coastal and Great Lakes waters, EPA has authority under CWA section 304(a) to update its 1986 recommendations for all inland waters. The knowledge gained through the research developed to support issuance of revised water quality criteria recommendations pursuant to the BEACH Act amendments could be considered in deciding whether to issue revised criteria for inland waters. The new data could help EPA to ensure that its recommendations for those waters are based on the best science available and reflect levels of risk the Agency currently believes appropriate. While updated water quality criteria recommendations could benefit all populations of swimmers, those populations would include communities in urban areas whose primary recreational opportunities may be in urban waters.

### *B. State or Tribal Water Quality Standards*

The CWA requires states and authorized tribes to review their water quality standards every three years and submit the results of their reviews to EPA.[71] EPA must approve or disapprove all new or revised state or tribal water quality standards pursuant to section 303(c)(3). If EPA disapproves a state or tribal standard and the state or tribe does not revise its disapproved standard as necessary, EPA is required to promulgate a revised standard.[72] The Administrator is also required to promulgate a new or revised standard for a state or tribe whenever she determines that such a standard is necessary to meet the requirements of the CWA and the state or tribe does not act to adopt an appropriate standard.[73]

#### (1) *EPA Authorities for Providing Protection from Adverse Effects from Fish Consumption by Overburdened Populations*

EPA has issued guidance interpreting CWA section 101(a)(2) uses to include, at a minimum, uses providing for the protection of aquatic communities and human health related to consumption of fish and shellfish. In other words, EPA views "fishable" to mean not only that fish and shellfish can thrive in a water body, but also that, when caught, fish and shellfish can safely be eaten by humans.[74]

##### *(a) Designated Fishing Uses*

EPA regulations currently provide that all waters must be designated for the protection of aquatic life (which would include fishing), unless the state or tribe documents to EPA's satisfaction that such uses are not attainable.[75] Designated fishing uses generally do not specify

[71] CWA section 303(c)(1).

[72] CWA section 303(c)(4)(A).

[73] CWA section 303(c)(4)(B).

[74] Letter from Geoffrey H. Grubbs, Director, EPA Office of Science and Technology, and Robert H. Wayland, III, Director, EPA Office of Wetlands, Oceans and Watersheds (Oct. 24, 2000).

[75] 40 C.F.R. § 131.10(j).

the level of fish consumption to be protected. The level of fish consumption to be protected is generally identified by states and tribes in their adoption of water quality criteria.

*(b) Water Quality Criteria to Protect Fishing Uses*

As discussed above, EPA's guidance recommends that states and tribes, when adopting designated uses to protect fish consumption, adjust the fish consumption levels or values used to develop criteria to protect the "fishable" use, so that it will protect fish consumption by recreational and subsistence fishers. Protecting recreational and subsistence fishing can be an important element of advancing environmental justice where recreational and/or subsistence fishing is common among minority, low-income, and indigenous populations. Executive Order 12898 on environmental justice, Section 4-4, expressly addresses subsistence consumption of fish.

Under EPA's regulations, in reviewing state or tribal water quality standards, EPA would have the discretionary authority to consider all available information to determine if the state or tribal standards are adequately protecting overburdened communities. EPA Regional Offices could disapprove criteria adopted to protect designated fishing uses if EPA deemed the criteria insufficiently protective of highly exposed populations fishing, or expected to fish, in such waters. In the event EPA disapproves a state or tribal submission, EPA is authorized, and directed, to promulgate a new or revised standard for the state or tribe if the state or tribe does not adopt the necessary standard.

As early as 1995, EPA promulgated water quality criteria regulations for the Great Lakes based on protection of a population more highly exposed than the general population. EPA based its human health criteria on protecting consumption that "represents the mean consumption rate of regional fish caught and consumed by the Great Lakes sport fishing populations."[76] While that rulemaking did not address overburdened communities, it is an example of EPA's exercise of its authority to promulgate criteria to protect more highly exposed populations.

(2) *EPA Authorities for Providing Protection for Populations Recreating in Urban Waters*

Ensuring that urban waters are appropriately designated to protect recreational uses could be an important element in advancing environmental justice where recreational uses are common among minority, low-income, and indigenous populations in urban waters. In 2009, EPA exercised its CWA statutory authority to safeguard primary contact recreation uses for the Mississippi River, including segments of the river that flow past St. Louis, Missouri. EPA exercised its authority under CWA section 303(c)(4)(B) in determining that new or revised designated uses were necessary for those segments, because the state had failed to demonstrate that the primary contact recreation uses were not attainable. More recently, in May 2011, EPA exercised its CWA section 303(c)(4)(B) authority with respect to primary contact recreation uses for certain waters within the Chicago Area Waterways in Illinois. EPA could give high priority when reviewing state or tribal standards to ensuring that urban waters (or other waters where it is known that highly exposed populations may recreate) are designated for primary contact recreation unless the state or tribe has demonstrated such use is unattainable.

[76] 60 Fed. Reg. 15374 (Mar. 23, 1995).

(3) *CWA Authorities for Establishing Water Quality Standards in Indian Country*

EPA has considered opportunities for increasing protection of surface waters in Indian country in the context of establishing water quality standards under the CWA. To date, EPA and tribes primarily have used two CWA authorities to establish CWA water quality standards for Indian country surface waters: promulgation by EPA of federal standards for such waters, and approval by EPA of tribal standards submitted by authorized Indian tribes for reservation waters. For federal promulgation, EPA has authority under section 303(c)(4)(B) of the CWA to make a determination that Indian country waters need new or revised standards even in the absence of a tribal submission. EPA used this authority in 1989 to promulgate federal water quality standards for one reservation: the Colville Indian Reservation located in the State of Washington.[77] In 1998 and 2003, EPA considered promulgating federal water quality standards for Indian country surface waters where such waters did not have EPA-approved water quality standards. EPA never finalized such standards for a variety of reasons, including the resource-intensive nature of this type of rulemaking and the many competing perspectives encountered regarding the standards that were being considered. For example, some Indian tribes affirmed their interests in preserving their sovereign prerogatives over their waters.

EPA has continued to consider issues relating to promulgating federal water quality standards for Indian country waters. Based on EPA's experience, however, it has become clear that such efforts can be extremely resource intensive and may not ultimately be successful given significant existing constraints on Agency resources as well as the need to balance the many competing perspectives that are necessarily raised regarding tribal sovereignty as well as significant public policy and technical issues that often accompany rulemaking. Subject to availability of resources, EPA remains open to considering promulgation of federal standards at the request of individual tribes.

EPA believes that more promising opportunities exist to address the issue by enhancing the ability of tribes to seek authorization to establish water quality standards under the CWA for reservation waters. As described below in Section VII.A of this Chapter and also in Section II.B of Chapter Five, section 518(e) of the CWA authorizes EPA to treat eligible Indian tribes in a similar manner as states (TAS) for a variety of CWA programs, including establishing water quality standards. To date, 47 federally recognized tribes have obtained TAS eligibility for water quality standards, and 38 of those tribes have adopted standards that EPA has approved for the tribes' reservation waters. EPA believes that such direct tribal involvement is best suited to implementing tribal sovereign decision-making and most effectively ensures that tribal needs and uses of water are addressed in the CWA water quality standards program. Many tribes have found, however, that the TAS process can be challenging and time-consuming. To address this problem, in Section II.B of Chapter Five, EPA discusses several possible options to streamline the process to enhance the ability of tribes to obtain TAS status for the water quality standards program.

Ultimately, when considering legal tools under the CWA authorities referenced in this document that may affect tribal interests, EPA will first consult with tribal governments before

[77] 40 C.F.R. § 131.35.

any decisions are made, consistent with the *EPA Policy on Consultation and Coordination with Indian Tribes*, which is discussed in Chapter Five.

(4) *EPA Authorities to Promote Greater Public Participation*

Consistent with CWA section 101(e), EPA also has discretionary authority to encourage states to improve public participation processes in the development of state water quality standards through greater outreach, including to minority, low-income, and indigenous populations, and by translating crucial public documents and notices for limited English speaking populations consistent with Section 5-5(b) of Executive Order 12898 on environmental justice.

## III. IDENTIFYING IMPAIRED WATERS AND ESTABLISHING TMDLS

Section 303(d) of the CWA requires states to identify waters not expected to meet water quality standards after implementation of existing pollution control requirements, and to establish total maximum daily loads (TMDLs) for such waters on a priority basis. TMDLs calculate the total pollutant load that can be introduced to a water body consistent with attainment of water quality standards, and allocates that load among known pollution sources. NPDES permits issued subsequent to TMDL development must include limitations consistent with the TMDL. EPA must approve or disapprove state lists and TMDLs and, if it disapproves, must establish lists and TMDLs for the states.[78] Some courts have held that EPA has a mandatory duty to establish TMDLs where states fail to act.

EPA has an obligation to ensure that states: (1) identify waters on section 303(d) lists that do not meet water quality standards; and (2) establish TMDLs for those waters. Section 303(d)(1)(A) of the CWA requires states to establish priority rankings that take into account the severity of the pollution and the uses to be made of the waters. States have broad discretion in prioritizing waters. Although EPA reviews state submissions to confirm that states have prioritized waters according to the statutory factors, the Agency does not approve the States' prioritizations.

EPA could examine the need to improve public participation in the section 303(d) process (*e.g.*, through greater outreach, including to minority, low-income, and indigenous populations, and by translating crucial public documents and notices for limited English speaking populations). EPA would have clear authority to carry out these actions when the Agency is providing for public participation.

EPA could also take impacts on minority, low-income, and indigenous populations into account in deciding how to allocate the waste load and load allocations when establishing TMDLs. EPA's long-standing position is that states (and EPA) have broad discretion in deciding how to assign allocations when establishing TMDLs. If pollutant loads would particularly affect overburdened communities, possibly because of significant exposures to other pollutants, it might be reasonable for EPA to exercise its discretion by reducing load allocations to sources that would directly impact those communities. It might also be possible for EPA to amend existing regulations to require consideration of impacts on overburdened communities in

[78] 40 C.F.R. § 130.7; *see* CWA section 303(d).

allocating loads. Because EPA's position has been that states and EPA have broad discretion in setting load allocations, promulgating regulations that would constrain such discretion and require consideration of impacts on overburdened communities would be a new and untested requirement.

## IV. NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM PERMIT PROGRAM

National Pollutant Discharge Elimination System (NPDES) permits are the primary way discharges of pollutants to waters of the United States are regulated. Currently, 46 states are authorized to issue NPDES permits, while EPA remains the permitting authority in four states, the District of Columbia, and U.S. territories. EPA is also the permitting authority on most tribal lands and for federal facilities in many states.

NPDES permits must contain: (1) technology-based limitations that reflect the pollution reduction achieved through particular equipment or process changes, without reference to the effect on the receiving water; and (2) where necessary, more stringent limitations representing that level of control necessary to ensure that the receiving waters achieve water quality standards. The Clean Water Act does not appear to provide any general authority to impose conditions on permits based on environmental justice considerations that are unconnected to water quality impacts or technology-based limitations. The CWA does, however, authorize the permit writer to impose monitoring, reporting, and recordkeeping requirements in permits as necessary to assure compliance with those permit limitations. Monitoring, reporting, and recordkeeping requirements can be useful tools to promote public understanding of the pollutant loadings discharged by the facility.

Environmental justice considerations could also be taken into account in setting permitting priorities and improving public participation in the permitting process. In addition, in implementing the NPDES statutory and regulatory authorities, EPA would have discretionary authority to take environmental justice considerations into account in the following ways:

- Provide technical assistance to Indian tribes on water pollution prevention programs, where appropriate (CWA section 104(a)).

- Conduct public investigations concerning pollution of any navigable waters and report on the results of such investigations (CWA section 104(a)(3)).

- Consider whether to include additional reporting requirements, such as requiring additional reports to be submitted to EPA where they can be made publicly available, to address environmental justice issues and focus attention on minority, low-income, and indigenous populations, where appropriate (CWA section 402(a)).

- Provide guidance to Regional Offices on how to consider environmental justice when conducting oversight of state NPDES programs. For example, provide guidance on changes to the Memorandums of Agreement between EPA and authorized states to ensure review of permits in overburdened communities.

- Consider cumulative impacts to impaired waters, focusing attention on waters affecting minority, low-income, and indigenous populations when new permits are proposed (CWA section 402(a)).

- Consider impacts on minority, low-income, and indigenous populations when deciding whether to object to a state-issued permit for failure to comply with the CWA (CWA section 402(d)).

- Where EPA issues permits, continually evaluate whether new information regarding human health impacts, especially among populations who are already overburdened, constitutes cause to modify permits.

- Focus attention on minority, low-income, and indigenous populations when determining whether to designate a small municipal separate storm sewer system for coverage under the NPDES storm water discharge program[79] or an animal feeding operation as a "significant contributor of pollution to the waters of the United States" and therefore a concentrated animal feeding operation.[80]

- Under CWA section 302, EPA is authorized to establish effluent limitations for one or more point sources if the applicable technology-based requirements will not assure protection of public health and other concerns. This determination requires findings of a reasonable relationship between costs and benefits. The Agency has never used this authority, but could evaluate whether this authority could be used with respect to pollutants of concern to minority, low-income, and indigenous populations. EPA could use its authority under CWA section 402(a)(1) to incorporate such limitations in specific NPDES permits issued by EPA.

An example of how environmental justice factors could be considered in the NPDES permitting program is the memorandum entitled "Improving EPA Review of Appalachian Surface Coal Mining Operations under the Clean Water Act, National Environmental Policy Act, and the Environmental Justice Executive Order" (Surface Coal Mining Memorandum).[81] That memorandum, which was issued on July 21, 2011, provides guidance regarding how to apply the current regulatory and statutory requirements of the NPDES permitting program to surface coal mining projects in Appalachia, an area of concern for the environmental justice community. The guidance is intended to enhance the consideration of environmental justice factors when EPA Regional Offices are conducting oversight of the authorized state NPDES programs.

## V. STORM WATER PROGRAMS AND REQUIREMENTS

Heavy precipitation and wet weather can have a big impact on minority, low-income, and indigenous populations, especially in urban centers. Combined sewer overflows are discharges from combined sewer systems that are designed to collect rainwater runoff, domestic sewage, and industrial wastewater in the same pipe. They are subject to NPDES permit requirements,

[79] 40 C.F.R. § 123.35.

[80] CWA section 402; 40 C.F.R. § 122.23.

[81] The memorandum is available at http://water.epa.gov/lawsregs/guidance/wetlands/mining.cfm#memo20100401.

including both technology-based and water quality-based requirements of the CWA.[82] Sanitary Sewer Overflows (SSO) are discharges from sanitary sewer systems that collect and transport sewage that flows into a publicly owned treatment works (POTW). Sanitary Sewer Systems are part of the CWA definition of publicly owned treatment works and are therefore subject to secondary treatment requirements and more stringent limits as necessary to meet water quality standards.[83] Municipal separate storm sewer systems (MS4), regulated under CWA section 402(p), are conveyances or systems of conveyances that are: owned by a state, city, town, village, or other public entity that discharges to waters of the United States; designed or used to collect or convey storm water (including storm drains, pipes, ditches, etc.); and are neither a combined sewer nor part of a POTW (sewage treatment plant). MS4 permittees are required to reduce pollutants in storm water discharges "to the maximum extent practicable" under CWA section 402(p)(3)(B)(iii), which also provides authority for MS4s permits to require additional pollutant controls. In addition, CWA section 402(p)(6) authorizes EPA to identify additional storm water discharges and to regulate such discharges to protect water quality.

Storm water discharges from point sources are treated differently from other point source discharges under the CWA. In 1987, Congress amended the CWA to add CWA section 402(p). This provision, which is specific to point source storm water discharges, requires implementation of a comprehensive approach to addressing storm water. Among other things, section 402(p)(1) created a temporary moratorium on NPDES permits for point source storm water discharges, except for storm water discharges listed in section 402(p)(2). Section 402(p)(6) instructed EPA to subsequently designate additional point source storm water discharges for regulation under the statute. EPA implemented sections 402(p)(2) and (6) through what are known as the Phase I and Phase II storm water regulations.[84] Once EPA identifies a discharge under those sections as requiring a permit, the discharge can be subject to applicable technology-based and water quality-based effluent limitations.

EPA has authority under the CWA to establish new, more stringent storm water requirements and standards for urban areas, which may result in substantial improvements for minority, low-income, and indigenous populations. Such efforts could include controlling combined sewer overflows, infiltration and inflow into sanitary sewers, discharges from municipal separate storm sewer systems, and EPA's new effort to designate storm water discharges not yet designated for inclusion in the storm water program.

### *A. Combined Sewer Overflows (CSOs)*

During periods of rainfall or snowmelt, wastewater volume in a combined sewer system can exceed the capacity of the sewer system or treatment plant. When this happens, the excess wastewater flows directly into nearby streams, rivers or other water bodies, potentially exceeding applicable water quality standards and exposing populations to raw sewage. CSOs can contain storm water, untreated human and industrial waste, toxic pollutants and debris. CSOs have been a cause of water quality impairment as documented in CWA section 305(b) reports, and may

[82] CWA sections 301(b)(1)(A), 301(b)(2)(A), and 402(p) and (q).

[83] CWA section 301(b)(1)(B).

[84] *See* 40 C.F.R. §§ 122.26 and 122.30-37; *see also* 64 Fed. Reg. 68722 (Dec. 8, 1999); 55 Fed. Reg. 47990 (Nov. 16, 1990).

occur in streams or rivers frequented by the public, thus representing a potential hazard to human health and the environment.

CSOs are subject to permitting under the CWA. EPA's 1994 CSO Control Policy specifies the technology-based and water quality-based effluent limits that should be included in NPDES permits for CSOs.[85] Congress subsequently added section 402(q) to the CWA, which provides in part that "each permit, order or decree issued pursuant to this chapter after December 21, 2000 for a discharge from a municipal combined storm and sanitary sewer shall conform to the Combined Sewer Overflow Policy signed by the Administrator on April 11, 1994." That policy specified that NPDES permitting authorities issue or reissue permits to require compliance with the technology-based and water quality-based requirements of the CWA. Technology-based requirements include implementation of "nine minimum controls." In addition, permittees are required to develop "Long Term Control Plans" in order to meet water quality standards. EPA expects a permittee's long-term control plan to give the highest priority to controlling overflows in sensitive areas. Sensitive areas include outstanding national resource waters, national marine sanctuaries, waters with threatened or endangered species or their habitat, waters with primary contact recreation, public drinking water intakes or their designated protection areas, and shellfish beds.[86] For such areas, the CSO Long Term Control Plan should prohibit new or significantly increased overflows, eliminate or relocate overflows wherever physically possible and economically achievable, and provide for treatment where necessary to meet applicable water quality standards.

There are approximately 836 permits in the United States for combined sewer systems. Affected communities are located in 32 states (including the District of Columbia), primarily concentrated in the Northeast and Midwest, and serve approximately 46 million people. EPA can bring additional focus to CSO-related issues in minority, low-income, and indigenous populations to advance environmental justice. EPA could evaluate existing Long Term Control Plans to see if they adequately address environmental justice considerations and seek modification of those Plans found to be lacking. Specifically, EPA could focus on whether the locations of overflows are causing water quality impairments that pose a particular risk to minority, low-income, and indigenous populations. This could be a significant resource issue for the Regional Offices and states. Further EPA could provide technical assistance where Long Term Control Plans are still being developed, with an eye toward environmental justice. Strengthening the oversight of the implementation of CSO controls could have a beneficial impact in urban population centers.

### *B. Sanitary Sewer Overflows (SSOs)*

In 2010, EPA estimated that there are between 23,000 and 75,000 sanitary sewer overflow events per year. Of these, EPA estimated that 50% are caused by blockages and 25% are caused by wet weather infiltration or inflow into the pipes. EPA estimated that these overflows accounted for a total volume of between three and ten billion gallons of sanitary sewer wastewater discharged per year. They may overflow into areas that the public frequents, such as parks, beaches, backyards, city streets, and playgrounds.

[85] 59 Fed. Reg. 18688 (April 19, 1994).

[86] 59 Fed. Reg. at 18692.

Under the CWA, sanitary sewers are part of the definition of publicly owned treatment works. Therefore, they are subject to secondary treatment requirements and more stringent limits as necessary to meet applicable water quality standards. As such, overflows are generally prohibited. EPA and state NPDES inspectors assess collection systems and treatment plants to evaluate compliance with permit conditions, including proper operation and maintenance practices. These permit conditions are based on 40 C.F.R. § 122.41(e), which provides: "The permittee shall at all times properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) which are installed or used by the permittee to achieve compliance with the conditions of this permit."

Some suburban and exurban systems, called "satellite" systems, connect to urban systems but are generally not covered by the same permit. The unpermitted or separately permitted satellite systems may contribute large flows to urban systems or may be improperly operated or maintained. Yet they may not be co-permittees with the treatment plants and frequently do not bear a proportionate burden of the sewage treatment costs. In January 2005, EPA issued a "Guide for Evaluating Capacity, Management, Operation, and Maintenance (CMOM) Programs at Sanitary Sewer Collection Systems,"[87] which recommends practices for permittees and EPA and state inspectors to consider in assessing permit compliance or in writing settlement agreements. The guidance advises that satellite communities should not be allowed to contribute excessive flow to wastewater treatment plants, which are often located in financially stressed urban areas that may have an impact on minority, low-income, and indigenous urban populations.

In 2001, EPA proposed regulations codifying many of the suggested CMOM practices, including restrictions on satellite flow to sanitary sewer systems, but the rulemaking was never completed. Authority to regulate satellite flows into a sanitary sewer collection system can be predicated on the theory that either the satellite is itself discharging through the treatment works to a water of the United States or that the satellite and the downstream collection systems are both part of the POTW under the definition of "treatment works" in CWA section 212(2)(A) and, as such, certain effluent limitations could be placed on each entity that is part of the POTW. Pursuing a regulation to strengthen the requirements for satellite systems could be an important opportunity to level the playing field between suburban/exurban collections systems and communities and downstream urban communities. The regulation could potentially also address the problem of "basement backups," which may occur often in the homes of minority, low-income, and indigenous populations.

### *C. Municipal Separate Storm Sewer Systems (MS4s)*

Section 402(p)(2)(C) and (D) of the CWA requires EPA to issue NPDES permits for storm water discharges from certain municipal separate storm sewer systems (MS4s). In plain terms, MS4s are discrete conveyances of storm water to waters of the United States. "Municipal separate storm sewer" means, among other things, "a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains) . . . [o]wned or operated by a . . . county. . . or other public

[87] The Guide is available at http://nepis.epa.gov/Exe/ZyPURL.cgi?Dockey=30006OW9.txt.

body (created by or pursuant to State law) . . . [and] [d]esigned or used for collecting or conveying storm water . . . ." [88]

EPA or states issue permits to regulated MS4s to control their discharges. Such permits "shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and systems, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants."[89]

Under section 402(p)(3)(B)(iii), EPA can focus attention on minority, low-income, and indigenous populations in establishing more specific requirements for MS4 permits. For example, where an overburdened community uses a particular resource, such as engaging in subsistence fishing in urban waters, the permitting authority could impose requirements tailored to the need of that particular community.

### *D. Other Storm Water Point Source Discharges Not Yet Regulated*

EPA has the legal authority under the CWA to regulate discharges of storm water from impervious surfaces or developed property based on the findings described in CWA section 402(p)(6).

Section 402(p)(6) provides:

> Not later than October 1, 1993, the Administrator, in consultation with State and local officials, shall issue regulations (based on the results of studies conducted under paragraph (5)) which designate stormwater discharges, other than those discharges described in paragraph (2), to be regulated to protect water quality and shall establish a comprehensive program to regulate such designated sources. The program shall, at a minimum, (A) establish priorities, (B) establish requirements for State stormwater management programs, and (C) establish expeditious deadlines. The program may include performance standards, guidelines, guidance, and management practices and treatment requirements, as appropriate.

EPA has broad discretion to identify discharges of storm water as requiring regulation under CWA section 402(p)(6). Under this provision, EPA can regulate long-term storm water discharges from development/impervious surfaces by making a finding that discharges from development/impervious surfaces warrant regulation in order "to protect water quality."

EPA also has broad discretion to determine how to control those designated discharges.[90] The last sentence of section 402(p)(6), which states that "[t]he program may include performance standards, guidelines, guidance, and management practices and treatment requirements, as appropriate[,]" gives EPA discretion to determine what kinds of program elements to establish. EPA has the authority to issue guidance or a rule that would be directly applicable to point

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[88] 40 C.F.R. § 122.26(b)(8).

[89] CWA section 402(p)(3)(B)(iii).

[90] *See Envtl. Defense Ctr. v. EPA*, 344 F.3d 832, 844 (9th Cir. 2003); *see also Conservation Law Found. v. Hannaford Bros. Co.*, 327 F.Supp.2d 325, 330-32 (D. Vt. 2004), *aff'd*, 2005 WL 1712899 (2d Cir. 2005).

source discharges rather than be implemented through NPDES permits. Also, the express reference to "establishing priorities" in section 402(p)(6) gives EPA a basis to decide what discharges are most important to regulate, and it may decide not to address all discharges at one time. EPA could use the broad discretion that section 402(p)(6) provides to advance environmental justice in taking actions under section 402(p)(6).

Under CWA section 402(p)(2)(E), EPA has authority to designate through informal adjudication additional point sources of storm water discharges to be regulated under the NPDES program. EPA has implemented this "residual designation" authority in regulations at 40 C.F.R. §§ 122.26(a)(9)(C) and (D). These regulations provide that the permitting authority or the Regional Administrator may designate and require operators of storm water discharges or a category of discharges to obtain a permit if the authority determines that the discharge or category of discharges contributes to a water quality standards violation or is a significant contributor of pollutants to waters of the United States. Alternatively, a designation may be based on finding that storm water controls are needed for the discharge based on waste load allocations that are part of a TMDL that address the pollutants of concern.

EPA could choose to make greater use of its residual designation authority in affected areas to advance environmental justice. For example, in an overburdened community, EPA could decide that currently unregulated sources of storm water, *e.g.*, parking lots or impervious surfaces over a certain size, would be designated for regulation under the NPDES permit program. This could result in such facilities needing to make changes in order to better control their storm water. These controls could result in healthier urban streams, thereby providing benefits not only to the ecosystem itself, but also to the surrounding communities. Storm water controls yield the additional benefit of transforming gray urban environments into more inviting green spaces, enhancing recreational opportunities and enhancing quality of life.

Like the residual designation authority described in the preceding paragraphs, EPA has authority to designate an animal feeding operation (AFO) as a "concentrated animal feeding operation" (CAFO) requiring an NPDES permit. A CAFO is a "point source" under section 502(14) of the CWA. EPA regulations at 40 C.F.R. § 122.23(c) authorize the State Director or Regional Administrator in some circumstances to designate a CAFO upon a determination that it is a significant contributor of pollutants to waters of the United States. The regulations list factors to be considered in designating CAFOs, including "[o]ther relevant factors."[91] Although EPA has not yet exercised its CAFO designation authority to a significant extent, EPA could increase designations and consider potential impacts on minority, low-income, and indigenous populations as a "relevant factor." Such designation currently requires an onsite inspection and, if the AFO contains fewer than a specified number of animals, a determination that pollutants are discharged to waters of the United States through a manmade ditch, flushing system, or other similar manmade device or that pollutants are discharged directly into waters of the United States that originate outside the facility and pass over, across or through the facility or otherwise come into contact with the animals confined in the operation.[92]

[91] 40 C.F.R. § 122.23(c)(2)(v).

[92] 40 C.F.R. § 122.23(c)(3).

## VI. SECTION 404 WETLANDS PROGRAM

Section 404 permits authorize the discharge of "dredged or fill material" to waters of the United States. The types of activities regulated under section 404 include filling of wetlands to create dry land for development, construction of berms or dams to create water impoundments and discharges of material dredged from waterways to maintain or improve navigation. Section 404 permits issued by the U.S. Army Corps of Engineers must satisfy two sets of standards: the Corps' "public interest review" and the CWA section 404(b)(1) guidelines promulgated by EPA. The public interest review is a balancing test that requires the Corps to consider a number of factors, including economics, fish and wildlife values, safety, food and fiber production and, in general, the needs and welfare of the people.[93] The section 404(b)(1) guidelines provide that no permit shall issue if: (1) there are practicable, environmentally less damaging alternatives; (2) the discharge would violate water quality standards or jeopardize threatened or endangered species; (3) the discharge would cause significant degradation to the aquatic ecosystem; or (4) if all reasonable steps have not been taken to avoid or minimize adverse effects of the discharge.[94] The 2011 Surface Coal Mining Memorandum provides the following guidance to the relevant Regional Administrators:

> [W]e recommend that Regions work collaboratively with the Corps to analyze the potential for disproportionately high and adverse human health or environmental effects on low-income and minority populations, including impacts to water supplies and fisheries, from issuance of a permit for surface coal mining activities in waters of the U.S. . . . .[95]

The broadest potential authority to consider environmental justice in the CWA section 404 program rests with the U.S. Army Corps of Engineers, which conducts a broad "public interest review" in determining whether to issue a section 404 permit. In evaluating the "probable impacts of the proposed activity and its intended use on the public interest," the Corps is authorized to consider, among other things, aesthetics, general environmental concerns, safety, and the needs and welfare of the people.[96] This public interest review could include environmental justice considerations. As part of the permit-issuance process, EPA may comment on and encourage the U.S. Army Corps of Engineers to consider cultural, social subsistence, "way of life," historic values and cumulative impacts when conducting public interest review.[97]

EPA has discretionary oversight authority over the Corps' administration of the section 404 program (*i.e.*, EPA comments on permit applications, can elevate regional Corps permit decisions to the Washington, D.C. level, and can "veto" Corps permit decisions under section 404(c) that would have "an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas."

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[93] 33 C.F.R. § 320.4(a).

[94] 40 C.F.R. § 230.10.

[95] Surface Coal Mining Memorandum at 39. See, *supra*, Section IV of this Chapter.

[96] 33 C.F.R. § 320.4(a).

[97] 33 C.F.R. § 320.4(a)(1).

EPA can use these authorities in response to potential degradation of these public resources (*e.g.*, recreational or fishing areas that are important to at-risk populations) from impacts of surface coal mining in Appalachia that may have an adverse health or environmental effect on a minority, low-income, or indigenous population. Such impacts can be addressed when they result directly from a discharge of dredged or fill material (*e.g.*, the filling of a water body), or are a secondary effect of the permitted activity (*e.g.*, the fill will allow construction of an industrial facility that will cause water pollution due to runoff). EPA can raise these concerns when sending Agency comments during the Corps' public comment period and can include consideration of these issues when exercising the discretion to "veto" under section 404(c). EPA has used this authority to completion 12 times and has discussed environmental justice considerations in some of its final 404(c) determinations.[98]

EPA also may consider environmental justice relating to aquatic ecosystem degradation when determining whether to exercise veto authority or object to state-issued permits under CWA section 404(j).

## VII. AUTHORIZATION OF TRIBAL PROGRAMS

### *A. Treatment in the Same Manner as States*

Section 518 of the CWA and its implementing regulations provide that EPA may treat eligible Indian tribes in the same manner as states for purposes of many programs under the Clean Water Act, including for grants, adoption of water quality standards, issuance of water quality certifications and issuance of CWA section 402 and 404 permits. EPA has issued regulations implementing the treatment-as-a-state (TAS) provisions in section 518(e) and has granted applicant tribes TAS status for various programs under the CWA. Notably, a number of tribes have TAS status for purposes of CWA grants under section 106 and for water quality standards and certifications under sections 303(c) and 401 of the CWA. Currently, 47 tribes have TAS status for the water quality standards program and 38 of those tribes have EPA-approved water quality standards for their reservation waters.

EPA's implementation of TAS statutory authority over the past 20 years and its support of the adoption of environmental protections on Indian lands have allowed the Agency to advance environmental justice. As discussed in Chapter Five, EPA is exploring other ways to encourage and support tribal applications for TAS and adoption of tribal water quality standards for reservation waters.

### *B. Grants to Alaska to Improve Sanitation in Rural and Native Villages*

CWA section 113 authorizes EPA to enter into agreements with the State of Alaska to carry out demonstration projects for the provision of safe water and elimination of pollution in native villages in Alaska. EPA tribal programs are discussed more fully in Chapter Five and tribal grants programs are discussed in Chapter Seven.

[98] *See, e.g.*, Final Determination of the Assistant Administrator for Water Pursuant to Section 404(c) of the Clean Water Act Concerning the Proposed Yazoo Backwater Area Pumps Project in Issaquena County, MS, September 19, 2008.

## VIII. TOXIC POLLUTANT EFFLUENT STANDARDS AND PROHIBITIONS

Section 307(a)(2) of the CWA authorizes the Administrator to propose and promulgate an effluent standard or prohibition for a toxic pollutant applicable to a class or category of point sources taking into account a number of factors about the pollutant, including its toxicity, persistence, degradability, and potential presence in aquatic organisms. The Agency last used this authority in 1979. Pursuant to CWA section 307(a)(4), EPA promulgated effluent standards and prohibitions following "formal" rulemaking on the record. Promulgated effluent standards and prohibitions exist for six classes of toxic pollutants including pesticides and polychlorinated biphenyls (PCBs).[99] For example, the effluent standards and prohibitions for pesticides generally apply to manufacturers and formulators of the named pesticides and set either stringent allowable effluent discharge standards or prohibitions on discharge.

Section 307(a) of the CWA differs from the Agency's technology-based effluent limitations guidelines because it does not require that the Agency consider technological feasibility, cost or economic impact in setting effluent standards or prohibitions (although the Agency did consider such factors during the 1970's hearings). The onerous requirement that section 307(a) standards and prohibitions be promulgated through "formal" rulemaking (essentially a trial with cross-examination of expert witnesses) led the Agency to abandon the use of section 307(a) and instead simply promulgate effluent limitations guidelines pursuant to CWA sections 301 and 304. The burdens associated with formal rulemaking would continue to exist if the Agency chose to pursue use of section 307(a). The Agency, however, could explore whether the discretionary authorities in section 307(a) might be uniquely appropriate for addressing concerns about environmental protection of minority, low-income, and indigenous populations.

## IX. SEWAGE SLUDGE

Section 405 of the CWA establishes the framework for sewage sludge management and disposal. The regulations are found at 40 C.F.R. Part 503. EPA issued standards for sewage sludge in 1993 that apply to ten metals and one pathogen (salmonella) and indicators of fecal contamination. The standards also specify requirements for biosolids land application, incineration and surface disposal.

EPA conducts biennial reviews of the standards as required by the CWA. EPA staff have identified additional work that may be appropriate for biosolids, including working on analytical methods for emerging contaminants found in biosolids, evaluating the risk assessment for biosolids and improving the Agency's understanding of treatment effectiveness. EPA could consider whether the current risk assessment, based on a sensitive child's exposure, is a sufficient surrogate for exposure of the members of overburdened communities.

## X. RESEARCH, INVESTIGATIONS, TRAINING AND INFORMATION

The CWA provides broad authority for EPA to gather data, conduct research, and provide technical and grant assistance that could be used to advance environmental justice by focusing attention on, and promoting participation in, environmental decision-making by minority, low-income, and indigenous populations. Among these authorities are: (1) section 104(b) – collect and disseminate information on chemical, physical and biological effects of varying water

[99] *See* 40 C.F.R. Part 129.

quality and other information pertaining to pollution and the prevention, reduction and elimination thereof; (2) section 104(*l*) – collect and disseminate scientific knowledge on effects and control of pesticides in water; (3) section 104(p) – study and research methods of preventing, reducing, or eliminating pollution from agriculture; and (4) section 104(q) – research and investigation of methods of preventing, reducing, storing, collecting, treating or otherwise eliminating pollution from sewage in rural areas

An example of how EPA has used these authorities in recent years is EPA's issuance of fish consumption advisories pursuant to the authorities in section 104(b). Using the authorities in CWA section 104(b), EPA collected information on pollutant levels in both surface water and fish tissue, and issued information regarding risks associated with consumption of certain fish species. EPA has discretionary authority to consider environmental justice when deciding whether and what type of fish consumption advisories to issue in the future.

## SAFE DRINKING WATER ACT

The Safe Drinking Water Act (SDWA) includes two separate regulatory programs. The public water supply (PWS) program establishes requirements for the quality of drinking water supplied by public water systems. This program establishes federal requirements that are directly implemented by EPA and approved states or tribes; there is no federal permit requirement. The underground injection control (UIC) program establishes controls on the underground injection of fluids in order to protect underground sources of drinking water. This program is implemented through permits (including permits by rule) issued by EPA or approved states or tribes.[100] The following section analyzes how EPA may address environmental justice considerations under both of these programs.

### I. PUBLIC WATER SUPPLY PROGRAM

Under the SDWA PWS program, the Administrator is to establish national primary drinking water regulations that set either maximum levels or treatment requirements for contaminants that may occur in public water systems and have adverse effects on public health. The SDWA applies only to public water systems, defined in the SDWA as systems providing water through constructed conveyances to at least 15 service connections or regularly serving at least 25 individuals. The PWS program does not apply to systems smaller than the criteria above. Upon application of states and eligible tribes, the Administrator may authorize them to administer the PWS program. All but one state have authority (or "primacy") to administer the program. EPA administers the program in that state and in the District of Columbia. In addition, one tribe has primacy. EPA administers the program in all other situations.

[100] Like the CWA, the SDWA allows federally recognized Indian tribes to assume responsibility for administering SDWA regulatory programs. Specifically, under section 300j-11 of the SDWA, eligible tribes may administer both the PWS and UIC programs, as discussed further in Chapter Five.

### *A. Unregulated Contaminant Monitoring Rules*

The Agency issues a new unregulated contaminant rule every five years with a new list of up to 30 contaminants.[101] This rulemaking provides crucial information for EPA's decision whether to regulate new contaminants. EPA can use this authority to gather information that may help to identify possible environmental justice considerations associated with currently unregulated contaminants, including those that may pose a special risk to minority, low-income, or indigenous populations.

### *B. Public Notification/Consumer Confidence Reports*

The Agency is implementing public notification regulations and other right-to-know provisions of the SDWA, which were amended to ensure greater public notice of noncompliance problems and which already require notices in plain English and other relevant languages. EPA could consider updating these rules or provide guidance on these requirements to promote more aggressive outreach to these populations, particularly those with limited English proficiency.

### *C. Lead Rules*

EPA promulgated a stringent rule for controlling lead in drinking water, and has updated this rule multiple times, including amendments made in 2007 to address concerns arising from exposure to lead in drinking water in the District of Columbia. Through continued implementation of this rule, and the next phase of revisions EPA is considering to the rule, EPA can help address the health concerns of minority, low-income, or indigenous populations exposed to high lead levels. In addition, EPA can provide outreach concerning the newly amended definition of "lead-free" in the SDWA to promote lowered levels of lead in consumer plumbing fixtures. [102]

### *D. Ground Water Rule*

In 2006, EPA promulgated the Ground Water Rule to provide for increased protection against microbial pathogens in public water systems that use ground water sources, which are typically smaller and/or more rural water systems.[103] EPA did so in accordance with the SDWA as amended, which requires EPA to promulgate National Primary Drinking Water Regulations requiring disinfection as a treatment technique for all public water systems, including surface water systems and, as necessary, ground water systems. In the Ground Water Rule, EPA established a risk-targeted approach to target ground water systems that are susceptible to fecal contamination to take corrective action to reduce cases of illnesses and deaths due to exposure to microbial pathogens. EPA could evaluate how implementation of the Ground Water Rule has impacted overburdened communities, and consider changes or additional guidance accordingly.

### *E. Operator Certification and Capacity Development*

EPA has authority to revise operator certification guidelines. Such revisions could be designed to enhance the development of better drinking water operator training programs for systems serving overburdened communities. EPA could also review state capacity development

[101] SDWA section 1445(a)(2).

[102] SDWA sections 1412 and 1417.

[103] The rule, which was published at 71 Fed. Reg. 65574 (Nov. 8, 2006) and amended by 71 Fed. Reg. 67427 (Nov. 21, 2006), is codified at 40 C.F.R. Part 141, Subpart S.

strategies to focus additional attention on improving the technical, managerial and financial capacity of small water systems.[104]

## II. UNDERGROUND INJECTION CONTROL (UIC) PROGRAM

Under the Underground Injection Control (UIC) program, there may be opportunities to protect drinking water for minority, low-income, and indigenous populations through permit conditions, scrutiny of aquifer exemptions, and revisions to rules and guidance.

Under the UIC program, the Administrator must establish requirements for state UIC programs that will prevent the endangerment of drinking water sources by underground injection. EPA has promulgated a series of such requirements beginning in 1980. The SDWA also provides that states and eligible tribes may apply to EPA for primary enforcement responsibility ("primacy") to administer the UIC program. EPA must establish a UIC program in states that do not seek this responsibility or fail to meet the minimum requirements established by EPA. EPA also generally implements the program in Indian country since only two tribes currently have primacy for the program.

### *A. Permitting*

Underground injection must be authorized by permit or rule. Where EPA issues a permit, it may include conditions to protect drinking water for minority, low-income, and indigenous populations. The SDWA provides that EPA can deny permits or establish permit limits where such injection may "endanger" public health. "Endangerment" is defined to include any injection that may result in the presence of a contaminant in a drinking water supply that "may . . . adversely affect the health of persons."[105] As a result, in those states, territories, and federal lands where EPA issues UIC permits, EPA may establish any necessary permit requirements under 40 C.F.R. § 144.52 when EPA finds that injection activity may result in drinking water supply contamination that may adversely affect the health of persons, including minority, low-income, and indigenous populations. Based on its analysis of the effect of Executive Order 12898, the Environmental Appeals Board (EAB) has considered the scope of EPA's authority to address environmental justice in the UIC permitting program.[106] Notably, in the *Envotech, L.P.* decision, the EAB recognized that under the UIC permitting program EPA may expand public participation and exercise its discretion under the SDWA to "impose on a case-by-case basis, permit conditions 'necessary to prevent the migration of fluids into underground sources of drinking water'" in order to protect underground sources of drinking water "upon which the minority or low-income community may rely."[107]

EPA may impose permit conditions on a case-by-case basis to ensure that proposed injection wells do not threaten the drinking water of minority, low-income, and indigenous populations. EPA's authority applies in all cases, "regardless of the composition of the

[104] SDWA sections 1419 and 1420.

[105] SDWA section 1421(d).

[106] *See generally In re Envotech, L.P.*, 6 E.A.D. 260, 278-82 (EAB 1996) (citing *In re Chemical Waste Management of Indiana*, 6 E.A.D. 66 (EAB 1995) and the similar permitting processes in RCRA and the SDWA).

[107] *Id. at 281* (citing 40 C.F.R. §144.52(a)(9)).

community surrounding the proposed injection site."[108] Nevertheless, in response to an environmental justice concern, the EAB has stated EPA may and "should, as a matter of policy, exercise its discretion under 40 C.F.R. § 144.52(a)(9) to include within its assessment of the proposed well an analysis focusing particularly on the minority or low-income community whose drinking water is alleged to be threatened."[109]

### *B. Aquifer Exemptions*

EPA rules allow states to affirmatively exclude certain aquifers from UIC protection, where the aquifer has no real potential to be used as a drinking water source (*e.g.*, because of the high level of solids content).[110] In evaluating aquifer exemption requests from states (where states have primacy) or permit applicants (where EPA has primacy), EPA may be able to consider environmental justice issues. Public notice must be provided before EPA approves an aquifer exemption request. EPA could consider the importance of promoting meaningful participation in decision-making by minority, low-income, and indigenous populations in determining whether the public notice was adequate to reach them. In addition, EPA could consider implications for minority, low-income, and indigenous populations when determining whether the aquifer exemption request meets the criteria for exempted aquifers in 40 C.F.R. § 146.4, *e.g.*, whether there has been an adequate investigation as to whether the aquifer is currently serving as a source for drinking water for overburdened communities.

### *C. Regulatory and Guidance Revisions*

EPA could revise the current regulations and guidance for all types of UIC wells to ensure focused attention on minority, low-income, and indigenous populations with regard to potential endangerment of drinking water supplies by injection. For example, EPA could review its regulations and guidance to determine whether changes to its regulations are necessary to address mountaintop mining risks to underground sources of drinking water, in response to allegations that such operations result in discharges of mining effluent into injection wells that may be contaminating groundwater.

## III. SOURCE WATER PROTECTION PROGRAMS

Section 1424(e) of the SDWA allows EPA to determine that an area has an aquifer which is the sole or principal drinking water source for the area and would create a significant health hazard if contaminated. Once EPA has made this determination and provided notice of it, no commitment for federal financial assistance may be entered into for any project EPA determines might contaminate the designated aquifer through a discharge zone so as to create a significant hazard to public health. Under this authority, EPA could solicit participation in identification, designation, and protection of sole source aquifers. EPA could use this authority to identify and protect aquifers that serve overburdened communities.

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[108] *Id.*

[109] *Id.* at 282.

[110] 40 C.F.R. § 144.1(g).

### IV. RESEARCH, REPORTING, INFORMATION GATHERING, TECHNICAL ASSISTANCE

The SDWA gives EPA authority to perform activities in the following areas:

- Research (SDWA section 1442(a)): Research and investigate concerns for minority, low-income, and indigenous populations.

- Research (SDWA section 1458): Conduct a continuing program of studies to identify groups "that may be at greater risk than the general population of adverse health effects from exposure to contaminants in drinking water," focusing attention on minority, low-income, and indigenous populations where they face greater risks.

- Monitoring (SDWA section 1445(g)): Establish and maintain a database of the occurrences of regulated and unregulated contaminants in public water systems in a manner that is widely accessible and easy to use by minority, low-income, and indigenous populations.

- Technical Assistance (SDWA section 1442(a)): Provide technical assistance to public water systems, including those serving minority, low-income, and indigenous populations.

## MARINE PROTECTION, RESEARCH, AND SANCTUARIES ACT

The Marine Protection, Research, and Sanctuaries Act (MPRSA), commonly known as the Ocean Dumping Act, establishes a permitting program that covers the dumping of material into ocean waters. The ocean disposal of sewage sludge and industrial waste is expressly prohibited.

EPA administers permits for the dumping of all material other than dredged material, which is permitted by the U.S. Army Corps of Engineers subject to EPA review and concurrence. When issuing MPRSA permits, EPA is to determine whether the proposed dumping will "unreasonably degrade or endanger human health, welfare, or amenities, or the marine environment, ecological systems, or economic potentialities."[111] EPA also is charged with designating sites at which permitted disposal may take place; these sites are to be located wherever feasible beyond the edge of the Outer Continental Shelf.

In considering permit applications and designating ocean dumping sites, EPA is authorized to take into account a variety of factors, including "[t]he effect of such dumping on human health and welfare, including economic . . . values," and, as such, could take into account the potential for disproportionate impacts on minority, low-income, and indigenous populations (particularly those that include subsistence consumers of sea food) from the proposed

[111] MPRSA section 102(a).

dumping.[112] In addition, the MPRSA provides specifically that EPA is to consider land-based alternatives to ocean dumping and the probable impact of requiring use of these alternatives "upon considerations affecting the public interest."[113] EPA could take impacts on these populations into account in evaluating alternative locations and methods of disposal of the material that is proposed to be dumped at sea. Ocean dumping permits also designate and include "such other matters as the Administrator . . . deems appropriate," which may include environmental justice considerations.[114]

[112] MPRSA section 102(a)(B).

[113] MPRSA section 102(a)(G).

[114] MPRSA section 104(a)(6).

# CHAPTER THREE: SOLID WASTE AND EMERGENCY RESPONSE PROGRAMS

## INTRODUCTION

This chapter discusses the Resource Conservation and Recovery Act,[115] the Emergency Planning and Community Right-to-Know Act,[116] and the Comprehensive Environmental Response, Compensation, and Liability Act,[117] As explained below, these statutes provide EPA various legal authorities to address environmental justice considerations.

## RESOURCE CONSERVATION AND RECOVERY ACT

### I. GENERAL AUTHORITY FOR ADDRESSING ENVIRONMENTAL JUSTICE – HAZARDOUS WASTE MANAGEMENT

The Resource Conservation and Recovery Act (RCRA) authorizes EPA to regulate the generation, transportation, treatment, storage, and disposal of hazardous wastes. RCRA requires EPA to promulgate regulations establishing such standards, applicable to generators, transporters, and owners and operators of hazardous waste treatment, storage, and disposal facilities "as may be necessary to protect human health and the environment."[118] RCRA section 7004(b) requires EPA to provide for "public participation in the development, revision, implementation, and enforcement of any regulation, guideline, information, or program." EPA may use these authorities to advance the fair treatment and meaningful participation of minority, low-income, and indigenous populations in the development of regulations, standards, and guidelines for hazardous waste management.

### II. PERMITTING OF HAZARDOUS WASTE TREATMENT, STORAGE AND DISPOSAL FACILITIES

#### *A. Omnibus Authority – RCRA Section 3005(c)(3)*

The primary area of RCRA where environmental justice considerations have surfaced is in the permitting of hazardous waste treatment, storage, and disposal facilities (*e.g.*, incinerators, fuel blenders, and landfills). Pursuant to RCRA section 3005, EPA issues permits to such facilities if they demonstrate compliance with EPA regulations. Upon application by a state, EPA may authorize a state's hazardous waste program to operate in lieu of the federal program,[119] and to issue permits. The "omnibus" authority in RCRA section 3005(c)(3) provides

[115] 42 U.S.C. §§ 6901-6992k.

[116] 42 U.S.C. §§ 11001-11050.

[117] 42 U.S.C. §§ 9601- 9675.

[118] *See* RCRA sections 3002(a) (standards applicable to generators), 3003(a) (standards applicable to transporters), and 3004(a) (standards applicable to owners and operators of hazardous waste treatment, storage and disposal facilities).

[119] The state's program must be equivalent to the federal program to obtain and retain authorization. When EPA adopts more stringent RCRA regulations (including permit requirements), authorized states are required to revise

that "[e]ach permit issued under this section shall contain such terms and conditions as the Administrator (or the State) determines necessary to protect human health and the environment."

The scope of EPA's authority to address environmental justice issues in RCRA hazardous waste permits was directly addressed by the Environmental Appeals Board (EAB) in 1995.[120] In the *Chemical Waste Management* decision, the EAB found that within the RCRA permitting scheme EPA has significant discretion to implement the environmental justice mandates of Executive Order 12898 through public participation mechanisms and the "omnibus" authority.[121] In the area of public participation, the EAB made three relevant findings. First, it recognized that public comments can affect a permitting decision if they relate to issues about compliance with RCRA's statutory or regulatory requirements or otherwise relate to protection of human health and the environment.[122] Second, the EAB reaffirmed that EPA can provide opportunities for public involvement in the permitting process beyond those required by 40 C.F.R. Part 124.[123] Third, it held "that when the Region has a basis to believe that operation of the facility may have a disproportionate impact on a minority or low-income segment of the affected community, the Region should, as a matter of policy, exercise its discretion to assure early and ongoing opportunities for public involvement in the permitting process."[124]

The EAB also examined the breadth of EPA's discretion to promote environmental justice under the "omnibus" authority. As stated by the EAB, the clause authorizes permit conditions or denial as follows:

> Under the omnibus clause, if the operation of a facility would have an adverse impact on the health or environment of the surrounding community, the Agency would be required to include permit terms or conditions that would ensure that such impacts do not occur. Moreover, if the nature of the facility and its proximity to neighboring populations would make it impossible to craft a set of permit terms that would protect the health and environment of such populations, the Agency would have the authority to deny the permit. *See In re Marine Shale Processors, Inc.*, 5 E.A.D. 751, 796 n.64 (EAB 1995) ("[T]he Agency has traditionally read [section 3005(c)(3)] as authorizing denials of permits where the Agency can craft no set of permit conditions or terms that will ensure protection of human health and the environment."). In that event, the facility would have to

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their programs within one year after the change in the federal program or within two years if the change will necessitate a state statutory amendment. 40 C.F.R. § 271.21(e).

Normally, state programs do not apply in Indian country unless a state seeks to have its program apply in Indian country within the state borders and EPA has made a finding that the state has the requisite authority for such program applicability. Therefore, responsibility for ensuring protection of human health and the environment in Indian country under the provisions of RCRA typically falls to EPA.

[120] *See In re Chemical Waste Management of Indiana, Inc.*, 6 E.A.D. 66 (EAB 1995).

[121] *Id*. at 73-74.

[122] *Id*. at 73.

[123] *Id*.

[124] *Id*. at 73-74.

> shut down entirely. Thus, under the omnibus clause, if the operation of a facility truly poses a threat to the health or environment of a low-income or minority community, the omnibus clause would require the Region to include in the permit whatever terms and conditions are necessary to prevent such impacts. This would be true even without a finding of disparate impact.[125]

The EAB also found that RCRA allows the Agency to "tak[e] a more refined look at its health and environmental impacts assessment, in light of allegations that operation of the facility would have a disproportionately adverse effect on the health or environment of low-income or minority populations."[126] The EAB noted that "a broad analysis might mask the effects of the facility on a disparately affected minority or low-income segment of the community" whereas a close evaluation could, in turn, justify permit conditions or denials based on disproportionately high and adverse human health or environmental effects.[127] However, while acknowledging the relevance of disparities in health and environmental impacts, the EAB also cautioned that "'there is no legal basis for rejecting a RCRA permit application based solely upon alleged social or economic impacts upon the community.'"[128]

Thus, the "omnibus" authority of RCRA section 3005(c)(3) may allow EPA to address cumulative risks due to exposure from pollution sources beyond the applicant facility in areas that may be disproportionately burdened. EPA may also use the "omnibus" authority where appropriate to craft permit conditions addressing unique exposure pathways and scenarios (*e.g.*, subsistence fishers or farming communities) or sensitive populations with pre-existing vulnerabilities at a particular hazardous waste management facility. EPA could also consider factors such as cumulative risk, unique exposure pathways, or sensitive populations in establishing priorities for the permit and corrective action programs.[129]

### *B. Contingency Plans*

RCRA-permitted facilities are required under RCRA section 3004(a) to maintain "contingency plans for effective action to minimize unanticipated damage from any treatment, storage or disposal of . . . hazardous waste." Under this provision, EPA has the authority to require facilities to prepare and/or modify their contingency plans to reflect the needs of proximate minority, low-income, or indigenous populations that have limited resources to prepare for or respond to emergency situations. For example, contingency plans may need to account for the cumulative impacts of multiple facilities on local communities or pre-existing vulnerabilities in specific populations.

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[125] *Id*. at 74.

[126] *Id*.

[127] *Id*. at 74-75.

[128] *Id*. at 73 (citation omitted).

[129] The statutory authority for EPA's corrective action programs is found in RCRA sections 3004(u), 3004(v), and 3008(h).

### *C. Public Participation*

RCRA section 7004(b)(2) established public participation requirements for RCRA permitting. In 1995, EPA promulgated the "RCRA Expanded Public Participation" rule.[130] As a part of this rule, certain facilities "must hold at least one meeting with the public in order to solicit questions from the community and inform the community of proposed hazardous waste management activities."[131] RCRA is sufficiently flexible to allow for further exploration of whether the public participation process for RCRA permits could be expanded to allow for more meaningful participation by minority, low-income, and indigenous populations, including at hazardous waste management facilities to be located in or near their communities. In this regard, EPA also would have authority under RCRA to expand the application of those procedures to the permitting of: (a) publicly owned treatment works, which are regulated under the Clean Water Act; (b) underground injection wells, which are regulated under the Safe Drinking Water Act; and (c) ocean disposal barges or vessels, which are regulated under the Marine Protection, Research, and Sanctuaries Act, discussed more fully in Chapter Two. These facilities are subject to RCRA's permit-by-rule regulations[132] and are deemed to have a RCRA permit if they meet certain conditions set out in those regulations.

### *D. Review of State Permits*

EPA's authority to review state-issued RCRA permits may also provide opportunities for consideration of environmental justice factors. EPA could provide comments on these factors (in appropriate cases) during the comment period on the state's proposed permit on a facility-by-facility basis, particularly where state law includes an analog to the RCRA "omnibus" authority.[133] If a state does not have "omnibus" authority analogous to RCRA section 3005(c)(3), EPA may address any necessary additional conditions under the "omnibus" authority in any federal portion of the RCRA permit. These conditions become part of the facility's RCRA permit.

### *E. Monitoring, Analysis and Testing*

EPA may require a permittee or an applicant to submit information in order to establish permit conditions necessary to protect human health and the environment.[134] RCRA section 3013(a) provides that if the Administrator determines that "the presence of any hazardous waste at a facility or site at which hazardous waste is, or has been, stored, treated, or disposed of, or the release of any such waste from such facility or site may present a substantial hazard to human health or the environment," EPA may order a facility owner or operator to conduct reasonable monitoring, testing, analysis, and reporting to ascertain the nature and extent of such hazard. In appropriate circumstances, EPA could use its authority under section 3013 or 40 C.F.R. § 270.10(k) to compel a facility owner or operator to carry out necessary studies or risk assessments, so that, pursuant to the "omnibus" authority, EPA can establish permit terms or conditions as part of the permit application process as necessary to protect human health and the

[130] 60 Fed. Reg. 63417 (Dec. 11, 1995); 40 C.F.R. Part 124, Subpart B.

[131] 40 C.F.R. § 124.31(b).

[132] 40 C.F.R. § 270.60.

[133] 40 C.F.R. § 271.19(a).

[134] 40 C.F.R. § 270.10(k).

environment and reduce the potential for disproportionate impacts on overburdened communities.

RCRA section 3019 provides EPA with authority to require applicants for land disposal permits to provide exposure information and to request that the Agency for Toxic Substances and Disease Registry conduct health assessments at such land disposal facilities. This authority could be used to enhance the availability of information relating to areas with substantial minority, low-income, or indigenous populations.

### *F. Facility Siting Standards*

Another example of where EPA might incorporate environmental justice considerations is under RCRA section 3004(o)(7). This section provides EPA with authority to issue location standards for hazardous waste treatment, storage, and disposal facilities as necessary to protect human health and the environment. Using this authority, EPA could, for example, revise the location standards to establish minimum buffer zones around hazardous waste management facilities to minimize clustering of schools, residential areas, and other community activities around such facilities.[135] Facilities would need to comply with these requirements to receive a permit.

## III. HAZARDOUS WASTE REGULATION

RCRA authorizes EPA to promulgate regulations applicable to facilities that manage hazardous waste "as may be necessary to protect human health and the environment."[136] Consistent with the EAB's decision in *Chemical Waste Management*, RCRA's regulatory standard allows EPA to take a "refined look" at the risks posed by the management of hazardous waste to ensure that RCRA regulations are fashioned in a manner that does not "have a disproportionately adverse effect on the health or environment of low-income or minority populations."[137]

This regulatory latitude may have meaning not only with respect to permitting regulations, but also to regulations that determine whether materials are hazardous wastes. For example, in determining whether materials are solid wastes and, therefore, subject to regulation, EPA needs to determine whether materials are "discarded."[138] EPA issued a Definition of Solid Waste rule on October 28, 2008,[139] in which it established a number of conditions under which material would not be considered discarded and, therefore, not a solid waste.

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[135] Local zoning and planning regulations may also be a significant factor in facility siting decisions.

[136] RCRA sections 3002(a), 3003(a), and 3004(a).

[137] *In re Chemical Waste Management of Indiana, Inc.*, 6 E.A.D. at 74.

[138] RCRA defines the term "solid waste" to mean "any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities . . . . " RCRA section 1004(27). Courts have held that under this definition the ordinary plain-English meaning of the term "discard" controls. *See American Mining Congress v. EPA*, 824 F.2d 1177 (D.C. Cir. 1987). The ordinary plain-English meaning of the term "discarded" means "disposed of," "thrown away," or "abandoned."

[139] 73 Fed. Reg. 64668 (Oct. 28, 2008).

On July 22, 2011, in response to an administrative petition to amend or repeal this rule, EPA proposed further revisions to the definition of solid waste. [140] This proposal included an expanded environmental justice analysis, which identified gaps in the 2008 Definition of Solid Waste final rule that could result in risk to human health and the environment from discarded material, including the potential for disproportionate impacts to minority and low-income populations. The July 2011 proposal requested comment on revisions to the 2008 final rule that could increase environmental protection, including in minority and low-income populations, while still appropriately defining when a hazardous secondary material being reclaimed is a solid waste and subject to hazardous waste regulation.

## IV. INDIAN COUNTRY

It is long-standing Agency policy that, absent Congressional intent to the contrary, the Nation's environmental laws are meant to apply equally nationwide. The Agency interprets this nationwide consistency to mean that, where there is no EPA-approved program in Indian country, EPA implements the relevant environmental program there. States generally lack authority to implement federal environmental laws in Indian country. Although other environmental statutes provide for Indian tribes to implement their provisions in a manner similar to states, RCRA lacks such a provision.[141] Thus, EPA implements the RCRA Subtitle C and I programs in Indian country.

## V. UNDERGROUND STORAGE TANKS

Subtitle I of RCRA provides EPA with authority to regulate underground storage tanks (USTs) containing regulated substances, as defined in RCRA section 9001(2). RCRA section 9003 authorizes UST regulations "necessary to protect human health and the environment." It also allows the use of the Leaking Underground Storage Tank Trust Fund (the LUST Trust Fund) to undertake certain corrective actions with respect to releases of petroleum from USTs. There are three corrective action programs in this area. First, there is a regulatory program (including corrective action) in 40 C.F.R. Part 280 that applies to both petroleum and hazardous substance USTs. States can be authorized to operate a program that is no less stringent than the federal program. Second, the LUST Trust Fund can be used for some cleanups for releases from petroleum USTs.[142] Third, corrective action orders can be issued pursuant to RCRA section 9003(h)(4) covering USTs containing regulated substances. States operating pursuant to a cooperative agreement can utilize the federal authorities for the latter two categories.[143] EPA, and states operating pursuant to cooperative agreements, "shall give priority in undertaking corrective actions . . . and in issuing orders requiring owners or operators to undertake such actions, to releases of petroleum from underground storage tanks which pose the greatest threat to human health and the environment."[144]

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[140] 76 Fed. Reg. 44094 (July 22, 2011).

[141] *Backcountry Against Dumps v. EPA*, 100 F.3d 147 (D.C. Cir. 1996).

[142] RCRA section 9003(h)(2).

[143] RCRA section 9003(h)(7).

[144] RCRA section 9003(h)(3).

In evaluating releases from USTs in disproportionately impacted minority, low-income, or indigenous communities for possible response actions, EPA or the state can take into account such things as unique exposure pathways and scenarios and sensitive populations in determining whether the release in question is among those which pose the greatest threat to human health and the environment.

### VI. GENERAL AUTHORITY FOR ADDRESSING ENVIRONMENTAL JUSTICE – STATE SOLID WASTE MANAGEMENT PLANS

Under RCRA Subtitle D,[145] states are the primary implementing authority for managing nonhazardous solid waste. EPA issues guidelines and recommendations to state solid waste permitting programs under RCRA sections 1008(a), 4002, and 4004. RCRA section 1008(a) expressly provides that solid waste management guidelines shall describe levels of performance that provide "protection of public health and welfare" and shall include, where appropriate, consideration of "demographic" factors. Guidelines for state solid waste management plans developed under RCRA section 4002(c) may include consideration of factors such as "population density, distribution, and projected growth" and the "political, economic, organizational, financial, and management problems affecting comprehensive solid waste management." These provisions give EPA the legal authority to address environmental justice considerations in the development of regulations, standards, and guidelines for solid waste management. EPA could, for example, develop guidelines that encourage states to consider demographic and socio-economic factors such as the density and distribution of minority, low-income, and indigenous populations, as well as disproportionate burdens on minority, low-income, or indigenous populations when siting new solid waste management facilities.

RCRA section 7004(b) requires EPA and the States to provide for, encourage and assist in "public participation in the development, revision, implementation, and enforcement of any regulation, guideline, information, or program." EPA promulgated the "RCRA Expanded Public Participation" rule on December 11, 1995.[146] While these regulations describe the public participation process for RCRA permitting, EPA has the authority to promulgate similar regulations or issue guidelines for states to provide meaningful participation by minority, low-income, and indigenous populations in the development of solid waste management guidelines and plans and in the implementation of state solid waste programs.

## EMERGENCY PLANNING AND COMMUNITY RIGHT-TO-KNOW ACT

Section 303 of the Emergency Planning and Community Right-to-Know Act (EPCRA) requires local emergency planning committees to prepare emergency response plans for facilities that contain certain amounts of designated extremely hazardous substances. The national response team could publish guidance under Section 303(f) on considering environmental justice issues in preparing and implementing emergency plans.

[145] RCRA sections 4001-4010.

[146] 60 Fed. Reg. 63417 (Dec. 11, 1995); 40 C.F.R. Part 124, Subpart B.

For a discussion of EPCRA section 313 and of the role of Indian tribes under EPCRA, see Chapters Four and Five, respectively.

# SUPERFUND

## I. GENERAL AUTHORITY FOR ADDRESSING ENVIRONMENTAL JUSTICE

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), commonly referred to as Superfund, authorizes the federal government to respond to releases and threats of releases into the environment of hazardous substances or pollutants or contaminants. EPA does so by taking response measures, generally consistent with the National Oil and Hazardous Substances Pollution Contingency Plan (NCP),[147] deemed "necessary to protect the public health or welfare or the environment."[148] EPA's authority to take actions "necessary to protect the public health or welfare or the environment" authorizes EPA to ensure fair treatment and meaningful participation in environmental decision-making for minority, low-income, and indigenous populations that are disproportionately impacted. For instance, EPA's authority to consider "public health or welfare or the environment" could be the basis for considering cumulative risk in taking response actions. [149] However, all response activities must generally be consistent with the NCP.

Impacts on minority, low-income, and indigenous populations could be considered a factor in setting clean-up priorities among non-National Priorities List (NPL) sites. EPA could implement a policy to prioritize sites where these populations have disproportionate environmental burdens. This can be done at non-NPL sites without rulemaking, as there is currently no defined system of "priorities" for non-NPL sites. EPA may simply choose to study and/or clean up any contaminated non-NPL sites, focusing on environmental justice considerations to the extent it finds appropriate.

Finding this same flexibility would be very difficult for NPL sites. NPL sites are listed mainly by application of the hazard ranking system (HRS), which uses exclusively numerical inputs to rank sites. The challenge is to quantify environmental justice considerations in a manner that is usable under the existing HRS ranking scheme. For example, to date EPA has not been able to quantify tribal considerations so as to use them under the HRS.

However, in assessing remedial alternatives, EPA considers nine factors, many of which (including "overall protectiveness of human health and the environment" and "community acceptance") can accommodate environmental justice considerations relating to impacts on, and participation by minority, low-income, and indigenous populations.[150] Addressing such

[147] 40 C.F.R. Part 300.

[148] CERCLA section 104(a)(1).

[149] See definitions of the terms "response," "removal," and "remedial action" at CERCLA sections 101(25), 101(23), and 101(24), respectively.

[150] *See* 40 C.F.R. § 300.430(e)(9)(iii).

environmental justice considerations through application of the nine factors set out in the NCP could, in turn, influence the final remedy selection decision.

## II. PUBLIC PARTICIPATION

CERCLA section 117(a) provides for public participation before EPA's adoption of any plan for remedial action. This is consistent with the environmental justice goal of ensuring meaningful participation by communities in decisions that affect them. CERCLA section 117(e)(1) also provides EPA the discretionary authority to provide technical assistance grants (TAGs) to affected groups or individuals to help them interpret information about Superfund sites.

EPA has the legal ability to revise its guidance on public participation to enhance opportunities for participation of minority, low-income, or indigenous communities in remedy selection. EPA could also examine the regulations governing TAGs to determine whether they can be revised to enhance participation and better address the concerns of underrepresented communities, with appropriate revisions where it appears that improvements could be made. This could be done for public participation, and to some extent also for TAGs, without rulemaking.

## III. TRIBES

CERCLA section 126(a) provides for a tribal role in Superfund actions for certain purposes. It specifies that "[t]he governing body of an Indian tribe shall be afforded substantially the same treatment as a State" with respect to various provisions of CERCLA, including provisions relating to notification of releases, consultation on remedial actions, access to information, and roles and responsibilities of states under the NCP.[151]

CERCLA also contains other provisions that provide for a tribal role. CERCLA authorizes tribes to enter into cooperative agreements and receive financial assistance to carry out response actions pursuant to section 104(d). For cleanups on land held by a tribe, land held in trust for Indians, land held by an Indian if subject to a trust restriction on alienation, or land otherwise within an Indian reservation, CERCLA exempts tribes from the requirements that apply to states to pay a share of response costs and to give certain assurances regarding hazardous waste disposal capacity pursuant to section 104(c)(3). Further, CERCLA authorizes tribes to recover costs incurred in carrying out response actions from persons responsible for releases and to act as trustees for tribal natural resources and seek recovery for damages to such resources. Thus, CERCLA provides many mechanisms for tribal participation in the Superfund process. And tribes are eligible for various types of EPA grants to assist in such participation.

Moreover, EPA has adopted regulations that define "State" to generally include tribes under the NCP, which governs most CERCLA response activities.[152] This enables tribes to carry out many of the functions of states and participate meaningfully in the decision-making and clean-up process.[153] Consistent with the NCP, tribal standards are potential "applicable or

[151] CERCLA sections 103(a), 104(c)(2), 104(e), and 105, respectively.

[152] 40 C.F.R. § 300.5 (also defining the term "Indian tribe," which is defined in CERCLA section 101(36)).

[153] 40 C.F.R. § 300.500(a).

relevant and appropriate requirements" (ARARs) for CERCLA response actions taken on tribal lands. Tribal standards can be treated in the same manner as state requirements provided they qualify as ARARs.

Participation of tribes in the Superfund process is generally governed by the text of CERCLA as well as EPA regulations found at 40 C.F.R. Part 35, Subpart O and Part 300, Subparts F and G. Tribes can enter into cooperative agreements with EPA and receive financial assistance to participate in cleanups as the lead or support agency. Tribes also may receive core program cooperative agreements that fund non-site specific activities that support a tribe's involvement in CERCLA responses and help develop tribal infrastructure. Further, like states, CERCLA directs EPA to consult with tribes when they are "affected" by a CERCLA response action.[154]

Additionally, in 2007, EPA amended subpart O to reduce obstacles to tribal involvement in CERCLA and "to fulfill CERCLA's mandate in sections 121 and 126" to provide tribes with substantial and meaningful involvement in Superfund.[155] The amended regulations authorize grants to intertribal consortia, as well as individual tribes, thereby reducing burdens on smaller tribes. The amendments also eliminate potentially burdensome requirements for tribes to show jurisdiction as a prerequisite to receiving financial assistance under core program cooperative agreements and most agreements to participate in response activities as support (rather than lead) agency. Finally, the amendments removed requirements for tribes to provide a cost share for core or support agency agreements, and eliminated requirements for tribes relating to property acquisition.

EPA could examine ways to better promote tribal participation in the Superfund process. EPA could enhance tribal outreach and communication with measures to ensure that tribes have an opportunity to participate in all stages of cleanups carried out on tribal lands. Furthermore, EPA could interpret CERCLA to facilitate broader participation by federally recognized Indian tribes.

## IV. COOPERATIVE WORK WITH THE AGENCY FOR TOXIC SUBSTANCES AND DISEASE REGISTRY

Pursuant to CERCLA section 104(i), the Agency for Toxic Substances and Disease Registry (ATSDR) has responsibility to implement certain health-related authorities of CERCLA in cooperation with EPA and other federal agencies. EPA could explore with ATSDR the idea of giving priority to health concerns in areas where communities may be experiencing disproportionate health impacts. For instance, CERCLA requires ATSDR to consult with EPA on health issues related to exposure to hazardous or toxic substances and to prioritize health assessments in consultation with EPA, taking into consideration NPL schedules and the needs of EPA.[156] Health assessments conducted by ATSDR may be used to determine if a site should be listed on the NPL or to increase a site's priority upon the recommendation of the Administrator

[154] CERCLA sections 104(c)(2) and 126(a).

[155] 72 Fed. Reg. 24496 (May 2, 2007).

[156] CERCLA section 104(i)(6)(c).

of ATSDR.[157] In addition, an ATSDR health advisory that recommends protecting people from a release may be the basis for listing a release on the NPL.[158]

## V. GRANTS AND COOPERATIVE AGREEMENTS

Pursuant to section 104(d) of CERCLA, EPA may enter into cooperative agreements or contracts authorizing states, political subdivisions, and Indian tribes to carry out activities authorized under section 104 of CERCLA, and may provide funding to states and tribes for program support and implementation (*e.g.*, core grants). EPA has the legal latitude to impose grant limitations or conditions to address environmental justice considerations relating to fair treatment and meaningful participation in environmental decision-making by minority, low-income, and indigenous populations.

[157] CERCLA section 104(i)(6)(H).

[158] 40 C.F.R. § 300.425(c)(3)(i).

# CHAPTER FOUR: PESTICIDES AND TOXICS PROGRAMS

## INTRODUCTION

This chapter discusses the Federal Insecticide, Fungicide, and Rodenticide Act,[159] the Federal Food, Drug, and Cosmetic Act,[160] the Toxic Substances Control Act,[161] and Section 313 of the Emergency Planning and Community Right-To-Know Act (EPCRA).[162] Section 303 of EPCRA is discussed in Chapter Three. As discussed below, these statutes and their implementing regulations provide various opportunities to address environmental justice considerations by focusing attention on minority, low-income, and indigenous populations (*e.g.*, subpopulations with unique diets). Most of the opportunities described herein are available under current law.

## FEDERAL INSECTICIDE, FUNGICIDE, AND RODENTICIDE ACT

The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) provides a broad framework for the regulation of pesticides. Generally, FIFRA requires that all pesticides that are sold or distributed in the United States be "registered" by EPA. EPA may only register a pesticide if, among other things, the pesticide "will perform its intended function without unreasonable adverse effects on the environment," and if, "in accordance with widespread and commonly recognized practice[,] it will not generally cause unreasonable adverse effects on the environment."[163] In making a determination as to whether a pesticide causes unreasonable adverse effects on the environment, EPA is required to consider the economic, social, and environmental costs and benefits associated with the use of a pesticide. The burden of providing EPA with the necessary information to determine whether the standard for registration is met rests at all times with the registrant or applicant for registration. FIFRA is structured to provide for risk/benefit balancing. In making the risk/benefit determination, EPA relies on the authority under FIFRA and its implementing regulations to mitigate risks through various restrictions on labeling, conditioning registrations, and cancelling or suspending registrations. Additionally, there are regulations to protect workers and prescribe requirements for training and certification.

### I. ACTIONS UNDER FIFRA SECTIONS 2, 3, 4 AND 6

The Agency's authority to register pesticides is found in section 3 of FIFRA. The standard for registration under section 3, *i.e.*, that a pesticide will perform its function without causing unreasonable adverse effects on the environment, is defined as "any unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of the use of any pesticide."[164] The statute does not restrict the scope of economic,

[159] 7 U.S.C. §§ 136-136y.

[160] 21 U.S.C. §§ 301-399a.

[161] 15 U.S.C. §§ 2601-2695d.

[162] 42 U.S.C. §§ 11001-11050.

[163] FIFRA section 3(c)(5).

[164] FIFRA section 2(bb).

social and environmental factors to be weighed in the cost/benefit analysis beyond the requirement that the cost or benefit be tied to the pesticide use.[165] To make the finding that a pesticide does or does not cause unreasonable adverse effects requires a full consideration of the risks and benefits of its use.[166]

Section 2(bb) of FIFRA provides that *any* unreasonable risk from pesticide use warrants consideration. This has been interpreted broadly to allow EPA to factor economic, social and environmental considerations into the cost/benefit analysis.[167] The Fifth Circuit Court of Appeals has found that "a significant risk of bird kills, *even if birds are actually killed infrequently*, may justify the Administrator's decision to ban or restrict diazinon use."[168]

Given the Congressional mandate to consider a wide range of factors in balancing costs against benefits, it is reasonable for the Agency to consider environmental justice considerations in its decision whether to register, retain, or cancel a pesticide. If there is a particular population that the Agency believes is disproportionately affected by or exposed to the pesticide, the Agency may take this into account in its assessment of social or human health costs associated with a given pesticide. EPA could also consider whether the people bearing the risks from the use of a pesticide are receiving any of the benefits from the use of the pesticide. In the past, EPA has considered similar issues in its risk assessments and regulatory decisions for lindane, endosulfan, soil fumigants, and rodenticides.

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[165] *In re Lethelin Products Co., Inc.*, FIFRA Docket No. 392, 5 (1977); *In re Chapman Chemical Co.*, FIFRA Docket No. 246, 7 (1976).

[166] FIFRA section 3(c)(5); *accord Love v. Thomas*, 858 F.2d 1347 (9th Cir. 1988); *In re Chapman Chemical Co.*, FIFRA Docket No. 246, 7 (1976).

The legislative history of section 3(c)(5) directly supports reading the statute expansively. The Senate Committee on Agriculture and Forestry, in commenting on the amendments to section 2(bb) proposed by the Senate Committee on Commerce, noted that:

> [T]he balancing of benefit against risk is supposed to take every relevant factor that the Administrator can conceive of into account. The question he must decide is "Is it better for man and the environment to register this pesticide or is it better that this pesticide be banned?" He must consider hazards to farm workers, hazards to birds and animals and children yet unborn. He must consider the need for food and clothing and forest products, forest and grassland cover to keep the rain where it falls, prevent floods, provide clear water. He must consider aesthetic values, the beauty and inspiration of nature, the comfort and health of man. All these factors he must consider, giving each its due.

S. Comm. on Agriculture and Forestry, 92d Cong., Supp. Rep. (to accompany H.R. 10724) 10 (1972). The Conference Committee subsequently adopted the Senate's version of section 2(bb) in the final bill. *See* H.R. Rep. No. 92-1540, at 10, 30 (1972).

[167] *E.g.*, *Ciba-Geigy Corp. v. EPA*, 874 F.2d 277 (5th Cir. 1989); *In re Chapman Chemical Co,*, FIFRA Docket No. 246, 7.

[168] 874 F.2d at 279-80 (emphasis added); *accord In re Chapman Chemical Co.*, FIFRA Docket No. 246, 7 (a finding of *any* risk from the use of a particular pesticide, if the risk is "unreasonable" in relation to the benefits of its continued use, is sufficient to warrant cancellation. The standards for canceling and registering a pesticide are mirror images – both depend upon whether the pesticide causes unreasonable adverse effects).

### *A. Public Notice Prior to Registration of New Active Ingredient*

Prior to registration, FIFRA requires public notice of the receipt of applications for registration of pesticides containing a new active ingredient or pesticides that would entail a changed use pattern.[169] The information required to be in the notice is relatively nominal and no risk assessment information is required to be provided.

Starting in October 2009, the Agency initiated an enhanced public participation process to provide information and an opportunity to comment on certain pesticide applications before they are registered. For new active ingredients, first food uses, first residential uses, first outdoor uses and any others that may have significant public interest, the Agency will post a risk assessment and a proposed decision for 30 days of public comment before making a decision on the registration. Generally, the Agency doesn't expect any of the information to be posted to involve claims of confidentiality, but posting will be done in accordance with appropriate confidential business information procedures. Should there be environmental justice considerations regarding a particular pesticide application, the public will have the opportunity to raise them through this process.

### *B. Regulatory Process After Registration*

Once registered, pesticides must continue to meet the standard for registration. If they do not, the Agency may pursue cancellation or suspension under FIFRA section 6; as stated above, those steps would make it unlawful to sell and, possibly, use the pesticide. In 1996, Congress amended FIFRA to add section 3(g), which set forth the goal of periodically reviewing all pesticides on a 15-year cycle. To accomplish this, in 2006, EPA initiated a new program called "registration review." The program's goal is to review each pesticide active ingredient every 15 years to make sure that as the ability to assess risks to human health and the environment evolves and as policies and practices change, all pesticide products in the marketplace can still be used safely. In 2007, Congress again amended FIFRA section 3(g) to mandate the 15-year time period for subsequent pesticide registration review.

The same unreasonable adverse effects standard used for registering pesticides, which allows for consideration of environmental justice considerations, applies to FIFRA section 4 reregistration decisions, section 6 actions, and section 3(g) registration review actions. And, in suspension, cancellation, reregistration, and registration review, the public is provided with opportunities to participate in the process.

### *C. Information Available to the Public after Registration*

Under FIFRA section 3(c)(2)(A), information is to be made available to the public once a pesticide is registered. Because of trade secret and related restrictions in FIFRA section 10, requests for such information must be made in accordance with the FOIA regulations at 40 C.F.R. Part 2.

### *D. Labeling of Pesticide Products*

The Agency currently considers, and in appropriate circumstances imposes, certain locale-specific restrictions on pesticide uses. Such restrictions are often due to a pesticide's expected impacts when used in a particular climate or geographic area or when used in areas where certain endangered species may reside. Risk factors associated with minority, low-

[169] FIFRA section 3(c)(4).

income, and indigenous populations can be considered, where appropriate, in FIFRA section 3, 4, or 6 actions. In fact, in certain actions, EPA takes into consideration major identifiable subpopulations, as discussed more fully below.

FIFRA and its implementing regulations at 40 C.F.R. Part 156 provide EPA authority to require labeling restrictions on pesticide products. Labeling restrictions can be imposed to mitigate risks to specific populations or areas, by requiring that affected populations be made aware of the risks. Text on labels could include communicating risk reduction measures in ways appropriate to the circumstances of minority, low-income, and indigenous populations, including those with low English-language or general literacy rates.[170] The Agency has the authority to require that more extensive information about particular risks be shared with specific groups or communities, including factors that may reduce or increase risk of harm from exposure, and measures people can take to protect themselves.

### *E. Adverse Effects Reporting*

In 1997, EPA promulgated a rule codifying EPA's interpretation regarding FIFRA section 6(a)(2), which requires pesticide registrants to report information concerning unreasonable adverse effects of their products to EPA.[171] The purpose of the rule is to clarify what information to submit and how and when to submit it. In addition, in situations when a pesticide registrant fails to report information or delays in reporting that information, the rule specifies which failures will be regarded by EPA as violations of FIFRA section 6(a)(2), and subject to action under FIFRA sections 12(a)(2)(B)(ii) and 12(a)(2)(N). These reports are used in the registration and subsequent periodic review of registrations to determine if further regulatory action is necessary. These reports sometimes include information on specific subpopulations that could inform future regulatory actions to mitigate adverse effects, and could be used to implement other strategies identified in paragraph D above.

### *F. Requests for Additional Data*

The Agency has broad authority to require data generation and submission by registrants after a pesticide is registered. Under FIFRA section 3(c)(2)(B), EPA can require registrants to submit data that it determines are "required to maintain in effect an existing registration." The data could include focused information about the adverse effects on minority, low-income, and indigenous populations. The data could also include more focused information on exposure to pesticides of farm workers and their children; minority, low-income, and indigenous populations; or animals, water, land and other resources that are of special importance to particular populations.

Should the Agency determine that registrants need to develop and submit data relating to exposure of, or adverse effects on, minority, low-income, and indigenous populations in order to maintain an existing pesticide registration, section 3(c)(2)(B) of FIFRA can be used to impose the data requirement. Once the data are obtained, the Agency can use them in its regulatory decision-making.

[170] For example, 40 C.F.R. § 156.206(e) requires certain warning statements be in Spanish, as well as English.

[171] 40 C.F.R. Part 159. *See also* 62 Fed. Reg. 49370 (Sept. 19, 1997).

### *G. Improvements to Human Health Risk Assessment Procedures*

In February 2010, EPA announced its intent to use important risk assessment techniques developed in the implementation of the Food Quality Protection Act of 1996 (FQPA) in all pesticide risk assessments. The FQPA, which rewrote section 408 of the Federal Food, Drug, and Cosmetic Act (FFDCA) (see discussion below), required EPA to aggregate pesticide exposures from all sources – from food, from drinking water, and from use of pesticides in the home – and also mandated that EPA take into account the cumulative effects from exposures to multiple pesticides that have a common mechanism of toxicity. Further, the FQPA amendments directed that an additional safety factor be used to protect infants and children from the risks of pesticides given the lack of complete data on the potentially increased sensitivity to pesticides in the young. Risk assessment techniques developed over the last 13 years in the wake of these mandates have progressed from cutting-edge procedures to well-established scientific practice.

Currently, many risk assessment techniques are now used in assessing risks to agricultural workers from pesticide exposures on the job or to the general public from pesticides that are used in homes but not in growing food. Some techniques will undergo external, scientific peer-review. The revisions to EPA's risk assessment methods ensure that EPA, in assessing risk, treats all pesticide exposures – and all people who are exposed to pesticides – the same.

## II. FIFRA WORKER PROTECTION STANDARD IN 40 C.F.R. PART 170

### *A. Overview*

All agricultural employers, owners, and managers, as well as labor contractors, are required to comply with the worker protection standards (WPS) when using pesticides with labeling that refers to the WPS on an agricultural establishment. Most WPS requirements apply to agricultural workers or pesticide handlers, but there are some requirements that apply to all persons and some that apply only to certain persons such as those who handle pesticide application equipment or clean pesticide-contaminated personal protective equipment.

Currently, the regulation includes numerous safeguards ranging from protective clothing and precautionary field reentry limits to requirements for warning and worker training. The safeguards promote environmental justice to the extent they are used to mitigate risks to minority, low-income, and indigenous workers that are disproportionately exposed to risks of harm from the pesticides due to their work. EPA is completing draft revisions to the worker safety regulations. The draft revisions are intended to improve protections for agricultural workers, including workers in minority, low-income, and indigenous populations. Likewise, the Agency is completing draft revisions to the certification regulations.[172] The certification revisions may include, for example, changes to the certification plans in Indian country.

The Agency might also examine other related areas that were not covered in the WPS. One such area is the potential pesticide exposure of farm workers and their families who live near treated fields. Under the current regulations, pesticide labels may contain (and some already do contain) restrictions on applications to avoid potential pesticide exposure from pesticide drift to those who live in or near treated fields.

[172] 40 C.F.R. Part 171 sets forth the requirements for certifying applicators of restricted use pesticides as required by FIFRA section 11.

Pesticide drift is a major concern. Frequently, workers and their families live near the treated fields, and they may be impacted by airborne pesticide residues following application. EPA is considering additional safeguards, which could afford such people greater protection. For example, the Pesticide Programs Dialogue Committee has a subcommittee that has been addressing the issue of pesticide spray drift. As an outcome of this subcommittee's work, EPA issued a draft Pesticide Registration Notice for public comment to address many of the concerns discussed at these meetings. Recommendations in the Pesticide Registration Notice promote environmental justice through recommending language for pesticide labeling to reduce spray drift, and thereby further protecting human health in general and affected minority, low-income, and indigenous populations, in particular, from the adverse effects of the pesticides. EPA is finalizing the Pesticide Registration Notice, taking into account the numerous comments the Agency received during the comment period.

### *B. Examples of How EPA Implements FIFRA Authorities to Advance Environmental Justice*

Over the past decade, OPP has engaged in a number of activities to enhance the protections provided by the worker protection standards. For example, in 2005, a collaborative partnership with the Association of Farmworker Opportunity Programs was formed to improve pesticide safety training for farm workers and their families. EPA works with the association to increase the number of farm workers and families trained in pesticide safety. New pesticide training efforts are being undertaken to prevent take-home exposures to farm worker children.

Between 2002 and 2004, worker protection assessment workshops were held around the country. These workshops included public meetings with worker advocacy groups, agricultural interest groups, regulators, health care providers, and pesticide safety trainers in Texas, California, Florida, and the District of Columbia to evaluate the agricultural worker protection regulation and potential changes to the regulation and the program. Also, focused work group meetings were held to develop more detailed responses and recommendations for potential changes. In Texas, Florida, and California, work group members had field experience with hazard communication, worker and handler training scenarios, and constraints on posting and decontamination recommendations. In addition to these workshops, there have been numerous training courses created that specifically focus on the applicability and practicability of potential regulatory change options. Field tours are standard for such courses.

## III. TREATMENT OF TRIBES AND INDIAN COUNTRY UNDER FIFRA

With the notable exception of FIFRA section 23, which is discussed below, FIFRA does not explicitly reference federally recognized Indian tribes or implementation in Indian country. The term "Indian tribe" is not defined in FIFRA, and the current definition of the term "State" in section 2(aa) of FIFRA does not mention tribes or Indian country. Because states generally lack authority to regulate in Indian country, the absence of explicit references to tribes and Indian country in several sections of FIFRA raises issues about implementation of those provisions in Indian country, which may include areas with overburdened communities.

While the pesticide registration program is generally national in scope, section 18 of FIFRA authorizes states to request that EPA grant exemptions from the requirements of FIFRA to allow use of pesticides that would otherwise not be authorized under that statute in order to respond to a pest-related emergency situation in the state. And states have the authority under

section 24(c) of FIFRA to register additional uses of pesticides in order to respond to special local needs. Because tribes are not explicitly referenced in either of these sections, they have not generally had the benefits of these provisions of FIFRA even in situations where they, like their non-tribal neighbors, may have special local pest-related needs or emergencies.

EPA has, however, used other authorities available in FIFRA to help ensure that the statute's benefits are available to communities in Indian country. On November 28, 2008, the Administrator approved a three-year pilot program under the auspices of section 2(ee)(6) of FIFRA that allowed the use of registered pesticides in Indian country consistent with the use allowed under an emergency exemption or special local-needs registration where such exemption or section 24(c) registration is in effect in the same state as the areas of Indian country (or, if the exemption or registration is limited to particular counties within a state, in the same county as the areas of Indian country).[173] This section 2(ee)(6) finding minimized any programmatic gap in the event of special local needs or emergencies in Indian country.

As noted above, FIFRA section 23 contains the only explicit reference to Indian tribes in the statute. It authorizes EPA to enter into cooperative agreements with Indian tribes for specified purposes to carry out FIFRA. Consistent with section 23, EPA enters into cooperative agreements with tribes (often relating to inspections). EPA interprets FIFRA sections 11 and 23 to authorize EPA approval of tribal certification and training programs for applicators of restricted use pesticides.[174] Currently, the Agency is working on revisions to 40 C.F.R. § 171.10 to improve options for certifying applicators in Indian country.

## IV. INTEGRATED PEST MANAGEMENT

Under 7 U.S.C. § 136r-1, EPA, in coordination with the U.S. Department of Agriculture, "shall implement research, demonstration, and education programs to support adoption of Integrated Pest Management." Additionally, the two agencies "shall make information on Integrated Pest Management widely available to pesticide users, including Federal agencies. Federal agencies shall use Integrated Pest Management techniques in carrying out pest management activities and shall promote Integrated Pest Management through procurement and regulatory policies, and other activities." Integrated Pest Management (IPM) is an effective and environmentally sensitive approach to pest management that relies on a combination of common-sense practices. IPM programs use current, comprehensive information on the life cycles of pests and their interaction with the environment. This information, in combination with available pest control methods, is used to manage pest damage by the most economical means, and with the least possible hazard to people, property, and the environment.

EPA recommends that schools use IPM to reduce pesticide risk and exposure to children and is advancing national implementation. EPA also supports IPM use in public housing. EPA

[173] Section 2(ee)(6) of FIFRA allows the Administrator to determine that certain uses of a registered pesticide should not be considered violative of FIFRA notwithstanding the fact that the uses are not specifically authorized by the labeling of the registered pesticide. In this particular instance, the Administrator used this authority to determine that use in areas of Indian country that is similar to use authorized under section 18 or 24(c) on neighboring lands is not inconsistent with the purposes of FIFRA and will thus no longer be considered unlawful under FIFRA (unless a tribe declines to be included in the pilot program).

[174] *See* 40 C.F.R. § 171.10.

further encourages growers to use IPM to identify pests before they use pesticides to ensure that the proper control method is used. EPA can consider whether IPM practices constitute necessary labeling restrictions when assessing the risks and benefits of a pesticide.

### V. INFORMATION AND TRAINING

FIFRA section 23(c) authorizes EPA, in cooperation with the U.S. Department of Agriculture (USDA), to use the services of cooperative state extension services to inform and educate pesticide users. When registering or reviewing already-registered products, EPA can place training and information requirements on a registration and labeling to help ensure that there are no unreasonable adverse effects on the environment.

### VI. PACKAGING STANDARDS

Under FIFRA section 25(c)(3), EPA has the authority to establish standards for package, container, or wrapping in order to protect children and adults from serious injury or illness due to accidental ingestion or contact with the pesticide. For example, under this authority, EPA has required that certain products contain child-resistant packaging to reduce the potential exposure of children to a pesticide.

### VII. IDENTIFICATION OF PUBLIC HEALTH PESTS

FIFRA section 28(d) provides EPA with the authority to identify pests of significant public health importance and develop and implement programs to improve and facilitate the safe and necessary use of pesticides to control such pests. Public health pests – such as insects that carry vector-borne diseases, rodents, and microbes – can cause serious risks to public health. Because such pests may be prevalent in overburdened communities, addressing such prevalence would advance environmental justice. EPA provides information to the public about the safe use of such pesticides in homes and schools. Providing the information discussed above to minority, low-income, and indigenous populations will further advance environmental justice.

## FEDERAL FOOD, DRUG, AND COSMETIC ACT (FFDCA)

In addition to the general licensing and registration scheme in FIFRA, EPA also exercises statutory authority over pesticides under the FFDCA. The FFDCA contains provisions addressing pesticide residues in foods. EPA is authorized to set tolerances (maximum residue regulations) for pesticides in food under the FFDCA. The Food and Drug Administration and the U.S. Department of Agriculture monitor the food supply to enforce compliance with EPA-established tolerances.

EPA sets tolerances for pesticide residues in food under section 408 of the FFDCA. Its provisions require EPA to determine that the tolerances will be safe. "Safe" means there is a reasonable certainty of no harm. Unlike FIFRA, which balances risks and benefits, this is a risk-only standard. Importantly, the FFDCA's risk-only standard has been written into FIFRA for pesticides used on food.

In implementing the reasonable certainty of no harm standards in the setting of tolerances, as well as in the FIFRA registration process, EPA considers consumption patterns of

major identified subpopulations to determine the degree of risk posed by pesticide residues. If certain groups have a common diet, that factor can be taken into account in ruling on pesticide tolerances and registrations. More specifically, if the data are available, EPA can take into account different exposures or dietary consumption patterns for an identifiable minority, low-income, and indigenous population (*e.g.,* Inuit dietary consumption patterns). EPA's ability to consider the diets of subpopulations is limited by data availability. EPA relies on surveys done every decade or so for consumption information. To further the use of its ability to consider dietary consumption patterns, EPA could seek to ensure that future consumption surveys adequately sample individuals from overburdened communities. Also, EPA could solicit additional information on this subject in notices it publishes in allowing for public comment in FFDCA proceedings.

Under FFDCA section 408(b)(2)(C), EPA must specifically consider the exposure of infants and children when determining if the pesticide residue is safe. Dietary consumption patterns of children and infants are considered in the tolerance setting process.

Under FFDCA sections 408(d) and (e), the public may participate in the establishment, modification, suspension or revocation of a pesticide tolerance. Unlike FIFRA section 3(c)(4), mentioned above, where the notice is nominal (usually the name of the new active ingredient), in general, under the FFDCA the public is provided more information, including risk assessments. However, the rulemaking requirements under FFDCA section 408 are unique, and tolerances may be established, modified, or revoked in response to a petition. Although EPA must publish notice of the petition and make available a summary of the petition, EPA may issue a final rule acting on the petition without issuing a proposed rule or making other information available prior to issuance of the final rule. Final rules are subject to an administrative objection and hearing process.

## EPCRA SECTION 313 AND RELATED AUTHORITIES

The Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA) was enacted in response to incidents involving major chemical releases, including the 1984 release of methyl isocyanate in Bhopal, India. (See Chapter Three for a discussion of EPCRA section 303.) The statute provides for emergency planning and emergency release notification at the state and local level. The Toxics Release Inventory (TRI) was established pursuant to EPCRA section 313, which provides for reporting requirements for facilities within certain industry groups that manufacture, process or use toxic chemicals. Under EPCRA section 313 and its implementing regulations at 40 C.F.R. Part 372, covered facilities must report releases to all environmental media. The Pollution Prevention Act of 1990 (PPA)[175] significantly expanded the information required to be reported by facilities that are subject to EPCRA section 313 reporting requirements. In addition, Executive Order 12856[176] requires federal agencies to comply with the planning and reporting provisions of EPCRA and the PPA.

[175] 42 U.S.C. §§ 13101-13109.

[176] The Executive Order is entitled "Federal Compliance With Right-to-Know Laws and Pollution Prevention Requirements" and was published at 58 Fed. Reg. 41981 (Aug. 6, 1993).

## I. EPCRA

Under section 313 of EPCRA, specified facilities must report annually to EPA and the states on releases of listed toxic chemicals. The reporting requirements apply to owners and operators of facilities that have ten or more full-time employees and that are in a covered Standard Industrial Classification (SIC) Code or North American Industry Classification System (NAICS) Code as listed in 40 C.F.R. § 372.23. These facilities must report if they manufacture, process or otherwise use a listed toxic chemical in quantities that exceed specified thresholds. The required information, typically submitted on EPA "Form R," includes whether the chemical is manufactured, processed or used; the maximum amounts of toxic chemical present at the facility in the preceding year; waste treatment and disposal methods used; and the annual quantity of chemical released to the environment.

Section 313(h) states that the annual release report forms required under EPCRA "are intended to provide information to the Federal, State, and local governments and the public, including citizens of communities surrounding covered facilities." Section 313(j) provides that EPA must make these annual release reports publicly accessible in a computer data base, which EPA has established as the TRI, which can be accessed through web tools such as TRI Explorer.[177] EPA also annually compiles, analyzes, and publishes the data.

The various tools the TRI program uses to communicate TRI data to the public may provide excellent opportunities to communicate valuable information about releases in overburdened communities. Because data can be sorted on a facility-by-facility basis, release information can be organized around socio-economic factors such as race or income. Information about potential exposure to toxic chemicals in overburdened communities may be useful to EPA, other agencies and members of the community. The TRI program could choose to focus education and outreach activities for minority, low-income, and indigenous populations. Future efforts to make data available to communities could consider the particular needs of overburdened communities in decisions regarding how to present the information.[178] Moreover, EPA might bring greater focus to environmental justice considerations as it prioritizes chemicals or industry sectors to be added to TRI. For example if certain chemicals or chemical-intensive industries are disproportionately present in overburdened communities, the Agency may consider adding those chemicals or industries through rulemaking under EPCRA sections 313(d) and 313(b)(1)(B), respectively.

In addition, EPA has discretionary authority under EPCRA section 313(b)(2) to add individual facilities to those that must report their releases of toxic chemicals:

[177] Fulfilling this requirement of EPCRA section 313(j) is consistent with the directive in the Presidential memorandum accompanying Executive Order 12898 that provides for agencies to "ensure that the public, including minority communities and low-income communities, has adequate access to public information relating to human health . . . when required . . . under [EPCRA]." 30 Weekly Comp. Pres. Doc. at 280.

[178] However, data users should also be made aware that the TRI data has several important limitations. For example, it does not provide a comprehensive data set of all toxic chemical releases, nor does it provide actual exposure information.

> The Administrator, on his own motion or at the request of a Governor of a State (with regard to facilities located in that State), may apply the requirements of this section to the owners and operators of any particular facility that manufactures, processes, or otherwise uses a toxic chemical listed under subsection (c) of this section if the Administrator determines that such action is warranted on the basis of toxicity of the toxic chemical, proximity to other facilities that release the toxic chemical or to population centers, the history of releases of such chemical at such facility, or such other factors as the Administrator deems appropriate.

One potential consideration in identifying additional facilities for reporting could be location in overburdened communities, including those that are minority, low-income, or indigenous. The TRI program has begun a preliminary effort to identify types of facilities that might be good candidates for the use of this tool.

EPA may also set different (lower or higher) thresholds for reporting from certain facilities under EPCRA section 313(f)(2). At the Administrator's discretion, these thresholds may apply to classes of chemicals or to categories of facilities. Presumably, a category of facilities could be characterized based on proximity to overburdened communities.

### II. POLLUTION PREVENTION ACT OF 1990

Under section 6607(a) of the PPA, each owner or operator of a facility is required to annually file a toxic chemical release form under EPCRA section 313. They must include with the annual report a toxic chemical source reduction and recycling report for the preceding calendar year. Section 6607(b) of the PPA details the information that is required to be included in the toxic chemical source reduction and recycling report. As a result of these PPA provisions, there are seven additional categories of pollution prevention and recycling data that must be reported annually under EPCRA section 313.

### III. EXECUTIVE ORDER 12856

Owing to Executive Order 12856, all federal facilities are now required to adhere to the same planning and reporting provisions of federal right-to-know and pollution prevention laws that cover the private sector. This Executive Order goes beyond EPCRA requirements in an attempt to set a new standard for federal facilities to adhere to right-to-know principles and a pollution prevention ethic. On January 26, 2007, Executive Order 13423[179] superseded EO 12856 regarding federal facility reporting. Instructions on implementing the Executive Order confirm that federal facilities continue to report under EPCRA section 313 and PPA section 6607.

## TOXIC SUBSTANCES CONTROL ACT

The Toxic Substances Control Act (TSCA) gives EPA broad authority to gather information about and to regulate any part of the life cycle of chemical substances and mixtures

[179] The Executive Order is entitled "Strengthening Federal Environmental, Energy, and Transportation Management" and was published at 72 Fed. Reg. 3919 (Jan. 26, 2007).

to protect human health and the environment from unreasonable risks of injury. Subchapter I sets out general authorities applicable to the entire universe of chemical substances and mixtures; it also specifies requirements for PCBs and mercury. Subchapter II addresses asbestos in schools and other public and commercial buildings; Subchapter III sets up a program for addressing indoor exposure to radon; Subchapter IV establishes extensive regulation of the hazards of lead in paints and homes; Subchapter V provides authority for EPA to provide grants and issue guidance to promote healthy, high-performance schools; and Subchapter VI establishes formaldehyde standards for composite wood products and requires EPA to promulgate implementing regulations. The core of TSCA is principally designed to regulate through three basic themes: (1) a program of federal scrutiny of new chemicals before they are distributed in commerce; (2) information-gathering authorities (including authority to require testing of chemicals and mixtures); and (3) substantive regulation at any or all stages of a chemical's or mixture's life cycle.

## I. FINDINGS AND INTENT

When Congress enacted TSCA, it set out its findings, policy, and intent in section 2. This section expresses a broad concern over potential risks to human health and the environment, and a desire to vest in EPA "adequate authority" to regulate chemical substances and mixtures that present an "unreasonable risk of injury to health or the environment." In addition, section 2(c) clearly states that Congress intended EPA to "consider the environmental, economic, and social impact of any action" taken under TSCA. This explicit statement of intent – particularly the broad reference to "social impact" – could provide the opportunity for EPA to consider and apply environmental justice considerations to all regulatory actions under TSCA. The statute does not provide a definition for "social impact," nor has EPA defined this term in its regulations. However, EPA has specifically considered disproportionately impacted populations during rulemaking under TSCA. For example, EPA removed an "opt-out" provision from its Renovation, Repair and Painting Rule in part because of concerns related to minority and low-income populations.[180]

## II. TSCA SUBCHAPTER I

In general, Congress gave EPA broad discretion to select which chemical substances or mixtures to investigate and regulate. This suggests that EPA can consider the interests of minority, low-income, and indigenous populations when setting priorities concerning which chemical substances or mixtures warrant EPA's attention for assessment and possible regulatory action.

Most of EPA's general regulatory authority flows from sections 4, 5, and 6 of TSCA. Each of these sections serves a different regulatory purpose, and therefore each applies the "unreasonable risk" standard in a different way. Section 4 allows EPA to require testing to determine the effects of a chemical substance or mixture on health or the environment where EPA determines that there are insufficient data and experience to determine those effects, and where EPA finds that the substance or mixture "*may present* an unreasonable risk of injury" (emphasis added), or that the substance or mixture is produced in substantial quantities and may enter the environment "in substantial quantities" or pose "significant or substantial human

[180] *See* 75 Fed. Reg. 24802, 24804-05 (May 6, 2010).

exposure." Because this section addresses risks that are uncertain, the threshold for regulatory action is less difficult to meet than the threshold for substantive regulation under section 6 (see below). EPA has generally prioritized chemical substances to investigate for possible section 4 testing based on volume or suspected hazard, but the Agency has substantial discretion to select chemical substances; considering impacts on overburdened communities also would appear to fit within the Congressional intent that EPA consider "social impacts" of regulatory actions. In addition, because the "unreasonable risk" standard entails a balancing of the costs and benefits of regulation, EPA might be able to consider whether a risk is borne disproportionately by minority, low-income, and indigenous populations in evaluating whether it may be "unreasonable."

TSCA section 5, among other things, prevents the commercial manufacture or import of any new chemical substance in the United States until 90 days after EPA is notified of the intended manufacture or import. EPA can also, by rule, require similar notification from manufacturers, importers, and processors of significant new uses of existing chemical substances. During the notification period, EPA reviews information in the notice. As under section 4, EPA can regulate new chemicals or significant new uses pending the development of information based on a lower threshold of certainty; if a substance "may present an unreasonable risk," EPA can impose restrictions on the manufacture, processing, distribution in commerce, use, or disposal of the substance, or requirements to conduct tests on the substance. In addition to the impacts that may be caused by the chemical substance generally, this broad pre-market entry review can take into account the submitting company's circumstances such as a manufacturing plant's location, thus presenting another possible opportunity for considering impacts on minority, low-income, and indigenous populations.

TSCA section 6 gives EPA its broadest authority to regulate any chemical substance or mixture if there is "a reasonable basis to conclude" that the substance or mixture "presents or will present an unreasonable risk of injury to health or the environment." This provision allows EPA to address risks in all environmental media – water, air, land, or any combination of media. Similarly, TSCA section 6 gives EPA the authority to address the unreasonable risk that occurs from a broad range of activities – manufacturing, processing, distribution in commerce, use, or disposal. EPA can establish TSCA section 6 requirements that are limited to specified geographic areas.

Although the standard for acting under section 6, *i.e.*, that a substance "presents or will present" an unreasonable risk, is stricter than the "may present" standard in sections 4 and 5, it does not require factual certainty that a risk is unreasonable, but rather a "reasonable basis" for that conclusion. The legislative history of TSCA makes it clear that EPA may take regulatory action to prevent risk even though there are uncertainties as to the threshold level of risk. In making the unreasonable risk determination, TSCA section 6(c)(1) requires EPA to consider:

A. The effects of the chemical on health and the magnitude of its exposure to humans;

B. The effects of the chemical on the environment and the magnitude of its exposure to the environment;

C. The benefits of the chemical for various uses and the availability of substitutes; and

D. The reasonably ascertainable consequences of regulation, after consideration of the effect on the national economy, small businesses, technological innovation, the environment, and public health.

In essence, the finding of unreasonable risk involves a balancing of the probability that risk will occur and the magnitude and severity of that risk, against the adverse effects on society of proposed Agency action to reduce the risk. As stated above, EPA could argue that the determination of whether a risk is unreasonable could include consideration of whether it is disproportionately borne by minority, low-income, or indigenous populations, including an examination of potential cumulative exposures of such populations. Further, EPA could base regulation under section 6 on consideration of the most vulnerable or exposed populations.

The broad discretion vested in EPA to administer this standard through regulations means that the Agency could potentially consider the impacts of such regulations on minority, low-income, and indigenous populations. For example, if EPA had information about manufacturing or processing of a chemical presenting an unreasonable risk of injury to health or the environment with respect to a particular area with a significant minority, low-income, or indigenous population, EPA may be able to address the risk through a regulation under TSCA section 6.

As mentioned above, TSCA directly regulates the manufacture, processing, distribution in commerce, use and disposal of PCBs under section 6(e). Because of the specific statutory prohibitions on PCBs, EPA does not have to demonstrate that PCBs "present or will present" an unreasonable risk to impose regulatory conditions. In fact, to allow an ongoing use of PCBs, EPA must find that it will pose "no unreasonable risk" of injury to health or the environment. The implementing regulations[181] for section 6(e) establish disposal requirements for PCBs and regulatory conditions for continuing to use remaining PCB-containing equipment to ensure its safe operation. Under these rules, EPA reviews applications for approval of PCB disposal facilities, applying the "no unreasonable risk" standard. It is possible that EPA could consider the interests of minority, low-income, and indigenous populations in the "no unreasonable risk" analysis for such facility-specific approvals.

## III. TSCA SUBCHAPTER II: ASBESTOS

Subchapter II of TSCA, the Asbestos Hazard Emergency Response Act (AHERA),[182] was enacted to establish a uniform program for addressing the presence of asbestos in school buildings. Pursuant to TSCA section 212, EPA has appointed an Asbestos Ombudsman who is tasked with receiving "complaints, grievances, and requests for information submitted by any person with respect to any aspect of [AHERA]" and with rendering "assistance with respect to the complaints, grievances, and requests received." The Asbestos Ombudsman also is responsible for making any recommendations to the Administrator that he or she feels are appropriate. Owing to this defined role, the Asbestos Ombudsman can serve as a useful interface between the Agency and any community dealing with environmental justice considerations that relate to or fall within the scope of AHERA. In addition, the Asbestos Ombudsman is uniquely

[181] 40 C.F.R. Part 761.

[182] 15 U.S.C. §§ 2641-2656.

situated to recommend and promote actions on the part of EPA that might address any such concerns.

## IV. TSCA SUBCHAPTER III: INDOOR RADON

Subchapter III of TSCA established various cooperative relationships between EPA, the U.S. Department of Housing and Urban Development, and states to develop and implement programs to assess and reduce indoor exposure to radon. There are two separate provisions concerning federal assistance to state radon programs that explicitly call for application of a criterion that could be implemented to advance environmental justice. First, TSCA section 305 describes technical assistance that EPA must provide to state radon programs. Both sections 305(a)(5) and 305(a)(6) include statements that, to the maximum extent practicable, "homes of low-income persons" should be selected for projects that evaluate homes and demonstrate radon mitigation methods. Second, TSCA section 306(i)(2) establishes a limitation on financial assistance (grants) that a recipient state "should make every effort, consistent with the goals and successful operation of the State radon program, to give a preference to low-income persons."

## V. TSCA SUBCHAPTER IV: LEAD-BASED PAINT HAZARDS

Subchapter IV was added to TSCA in October 1992. This Subchapter deals with hazards from lead-based paint. The TSCA Subchapter IV lead-based paint hazard rules are important to advancing environmental justice when the risk reduction to be achieved affects public or inner-city housing. To the extent that lead-based paint hazards disproportionately affect minority, low-income, and indigenous populations, EPA can argue that there is authority under TSCA section 2(c) (discussed above) to factor environmental justice considerations into the implementation of TSCA Subchapter IV authorities.

EPA has, in fact, considered environmental justice factors in a title IV rulemaking. In 2008, EPA promulgated a rule governing renovation activities in pre-1978 housing and child-occupied facilities (mostly pre-schools and day-care centers) pursuant to TSCA section 402(c)(3).[183] Subsequently, in July of 2010, EPA amended the 2008 rule by eliminating the "opt-out" provision that excused contractors from the lead-safe work practice requirements if the homeowner provided the contractor with a signed statement having to do with the presence of children or pregnant women.[184] In extending the rule requirements to all pre-1978 housing and child-occupied facilities regardless of current occupancy, EPA explicitly cited environmental justice considerations as one of the reasons for making the change.

EPA may have additional opportunities to factor in environmental justice considerations. For example, in October 2009, EPA committed to initiate an appropriate proceeding to review whether the current lead hazard standards EPA promulgated in 2001 under TSCA section 403 are sufficiently protective. In so doing, EPA may have the opportunity to account for heightened risk factors such as diet and exposure of vulnerable populations. Under TSCA section 405(d) EPA is to engage in public education and outreach activities to increase public awareness of a variety of health issues related to lead exposure and poison prevention. Specifically, TSCA section 405(d)(2) provides that public education and outreach activities shall be designed to

[183] *See* 73 Fed. Reg. 21692 (April 22, 2008) (codified at 40 C.F.R. Part 745, Subparts E and Q).

[184] *See* 75 Fed. Reg. 24802 (May 6, 2010) (codified at 40 C.F.R. Part 745, Subpart E).

provide educational and information to: health professionals; the general public, with emphasis on parents of young children; homeowners, landlords, and tenants; consumers of home improvement products; the residential real estate industry; and the home renovation industry. There may be opportunities to target such education and outreach to high-risk populations.

## VI. TSCA SUBCHAPTER V: HEALTHY HIGH-PERFORMANCE SCHOOLS

Section 2695a of TSCA requires EPA, in consultation with the U.S. Departments of Education and Health and Human Services, to issue voluntary school site selection guidelines that account for, among other things, the special vulnerability of children to hazardous substances or pollution exposures. These guidelines are available on the EPA website and are accompanied by "related links and resources" that provide a variety information on environmental justice.[185]

Section 2695c of TSCA requires EPA, in consultation with the U.S. Departments of Education and Health and Human Services, to issue voluntary guidelines for use by states in developing and implementing environmental health programs for schools. Among other things, the guidelines are to take into account the special vulnerability of children in low-income and minority communities to exposures from contaminants, hazardous substances, and pollution emissions, and the impact of school facility environments on student and staff disabilities and special needs.

Section 2695 of TSCA authorizes EPA, in consultation with the U.S. Department of Education, to provide grants to assist states in, among other things, implementing state school health programs and identifying ongoing school building environmental problems. To the extent health and environmental problems associated with schools disproportionately affect minority, low-income, and indigenous populations, EPA could use this authority to address environmental concerns. Section 2695 has a sunset provision, expiring Dec. 19, 2012.

[185] *See* "School Siting Guidelines" available at: http://www.epa.gov/schools/siting/.

# CHAPTER FIVE: TRIBAL PROGRAMS

## EPA'S INDIAN POLICY AND TRIBAL CONSULTATION

Protecting Indian tribes and the places where they live is an important aspect of implementing EPA's commitment to environmental justice. Tribal communities often face vulnerabilities due to lack of a health care infrastructure and heightened exposure to certain toxins. In general, EPA's discretionary authority to promote environmental justice, as discussed in other chapters of this document, is available to address human health and environmental conditions in tribal communities, consistent with Executive Order 12898 on environmental justice, which applies to tribal populations, Native American programs, and federally recognized Indian tribes.[186] EPA advances environmental justice in Indian country by, among other things, assisting tribes in developing their own programs to protect the health of tribal members and their environment and by directly implementing federal programs in Indian country. Tribes are sovereign governments that retain important powers over their members and territory. This chapter focuses on ways to enhance the exercise of tribal sovereignty to protect human health and the environment in Indian country under EPA's statutes. For a discussion of EPA's direct implementation of its statutes in Indian country, see Chapters One to Four.

EPA has a long-standing commitment to work directly with federally recognized tribes as partners on a government-to-government basis to protect tribal health and environments, as illustrated by EPA's Indian Policy and related Headquarters and Regional policy statements and guidance documents. In 1984, EPA became the first federal agency to adopt an Indian Policy.[187] In that Policy, which has been reaffirmed by each EPA Administrator since its adoption, EPA recognized the importance of ensuring close involvement of federally recognized tribal governments in making decisions and managing environmental programs affecting their areas and members. Among other things, the Agency committed to look directly to tribal governments to play an important role in setting standards, making environmental policy decisions, and managing programs in their areas. For a number of programs, one aspect of EPA's implementation of this approach is to treat eligible tribes in a similar manner as states for purposes of receiving grants and administering approved environmental regulatory programs and other functions under EPA statutes. This approach enables tribes to perform essentially the same role in their areas that states play outside of Indian country in regulating the environment under EPA statutes.[188] In other cases, EPA can advance environmental justice in Indian country by directly implementing EPA programs there.

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[186] As used in Executive Order 12898, the terms "minority population" and "low-income population" include American Indians and Alaska Natives. *See* Appendix A to the Council on Environmental Quality's publication "Environmental Justice: Guidance Under the National Environmental Policy Act" at pages 25-26 (Dec. 10, 1997) (providing guidance on key terms in Executive Order 12898). Moreover, Section 6-606 of the EO provides that its provisions apply equally to Native American programs and that steps be taken to address federally recognized Indian tribes.

[187] *EPA Policy for the Administration of Environmental Programs on Indian Reservations* (Nov. 8, 1984). The Policy was issued by then-Administrator William D. Ruckelshaus and is available at http://www.epa.gov/tribal/pdf/indian-policy-84.pdf.

[188] The term "Indian country" as defined at 18 U.S.C. § 1151 means:

Consistent with EPA's 1984 Indian Policy and other federal policies, EPA is committed to consulting with tribal governments on matters that affect their communities and environments. Effective tribal consultation continues to be a stated goal of the federal government. In November 2009, President Obama issued a memorandum reiterating a commitment to regular and meaningful consultation and collaboration with tribal governments on federal decisions that affect them.[189] The memorandum also directed federal agencies to develop a detailed plan of actions to implement the policies and directives of Executive Order 13175,[190] which relates to coordination and consultation with tribal governments on federal actions with tribal implications. On May 4, 2011, the Agency released its new *EPA Policy on Consultation and Coordination with Indian Tribes*,[191] to further implement Executive Order 13175 and EPA's 1984 Indian Policy. The new policy sets a broad standard for when EPA should consider consulting on a government-to-government basis with federally recognized tribal governments. Notably, the scope of the new policy is broader than that found in Executive Order 13175. The new policy establishes clear standards for EPA's consultation process, as well as a management oversight and reporting structure to ensure accountability and transparency. When considering legal tools that may affect tribal interests, including those described in this document to enhance tribal governmental involvement in the protection of human health and the environment in Indian country, EPA will first consult with tribal governments before any decisions are made to use the tools, consistent with the *EPA Policy on Consultation and Coordination with Indian Tribes*.

In addition, through its Indian Policy and other Agency-wide efforts, EPA continues to recognize the importance of tribal involvement in Agency decision-making. Several EPA Regions and programs also have developed specific procedures and plans describing EPA's expectations for tribal consultation and providing guidance designed to promote effective and efficient outreach to, and consultation with, tribal governments in appropriate situations. Such

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> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

Although Indian country is a relevant geographic area for certain purposes and generally describes the area where EPA and authorized tribes, as opposed to states, would administer environmental programs under EPA's statutes, this document is intended to identify a variety of legal tools available to EPA to address environmental justice issues in any overburdened tribal communities, regardless of location, including Alaska Native communities located outside of Indian country.

[189] Presidential Memorandum on Tribal Consultation (Nov. 5, 2009). This memorandum is available at 74 Fed. Reg. 57881 (Nov. 9, 2009) and http://www.epa.gov/tribal/pdf/tribal-consultation-memorandum-09.pdf.

[190] EO 13175, entitled "Consultation and Coordination With Indian Tribal Governments," 65 Fed. Reg. 67249 (Nov. 9, 2000). Importantly, EPA's responsibilities under Executive Order 13175 are separate from the responsibilities under Executive Order 12898. The Agency's consideration of tribal interests and consultation with tribes under Executive Order 13175 stems from the federal government's special relationship with federally recognized tribes. Consistent with the scope of Executive Order 12898, the legal tools identified in this document are intended to address environmental justice issues involving a broader range of tribal communities, including communities of state-recognized and non-recognized tribes, and tribal communities living outside of Indian country, including in Alaska.

[191] The policy is available at http://www.epa.gov/tribal/pdf/cons-and-coord-with-indian-tribes-policy.pdf.

consultation is highly significant in helping to ensure appropriate tribal input in relevant EPA decision-making, and ultimately in the protection of human health and the environment in tribal communities.

# TREATMENT IN A MANNER SIMILAR TO A STATE

## I. EPA'S TAS PROCESS

As noted in Chapters One and Two, the Clean Air Act (CAA), Clean Water Act (CWA), and Safe Drinking Water Act (SDWA) all expressly provide for Indian tribes to play a role in protecting human health and the environment. These statutes allow, but do not require, tribes to seek to administer EPA environmental programs. Specifically, the statutes authorize EPA to approve tribal applications for eligibility to receive grants and carry out environmental programs. Such treatment enables tribes to protect human health and the environment in tribal areas in generally the same way that states do for areas outside of Indian country. In addition, EPA has interpreted the Toxic Substances Control Act (TSCA) and the Emergency Planning and Community Right-to-Know Act (EPCRA) – both of which are silent as to tribes – to authorize tribal roles within their areas. See Chapter Four. EPA also interprets the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) to authorize approval of certain tribal programs for the certification and training of applicators of restricted use pesticides. See Chapter Four. Moreover, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) provides that tribes shall be afforded substantially the same treatment as states for various specified provisions of the statute, including the provisions regarding notification of releases and consultation on remedial actions affecting a tribe or tribes. See Chapter Three.

As a general matter, EPA's statutes and regulations that authorize EPA to treat an Indian tribe as a state (TAS)[192] do so for eligible Indian tribes (*i.e.*, those that are federally recognized, have a governing body carrying out substantial duties and powers over a specific area, and are capable of carrying out the functions in a manner consistent with EPA's statutes and regulations). In addition, the statutes or regulations generally call for a jurisdictional showing for the relevant geographic area over which the tribe seeks to administer an environmental regulatory program.

[192] TAS terminology originates from existing language in the tribal provisions of certain EPA statutes and implementing regulations establishing the authority for EPA to approve tribal applications for eligibility to receive funding and administer environmental programs under federal laws. In 1994, EPA adopted and implemented a policy to discontinue the use of the term "treatment as a state" to the extent possible because the term is disfavored by federally recognized tribes and does not accurately reflect their unique legal status or relationship with the federal government, which is significantly different than that of states. 59 Fed. Reg. 64339 (Dec. 14, 1994) (commonly known as the TAS Simplification Rule). EPA believes that Congress did not intend to alter the unique federal/tribal relationship when it authorized treatment of tribes "as states;" rather, the purpose was to reflect an intent that tribes should assume a role in implementing EPA statues on tribal land comparable to the role states play on state land. *Id*. EPA continues to supports discontinuation of the term "treatment as a state." When its use is needed for clarity and consistency due to the term's statutory origin, EPA prefers to use the more accurate term "treatment in a manner similar to a state," which is also abbreviated "TAS." EPA continues to evaluate this terminology and to seek ways to better reflect the unique status of federally recognized tribes and the federal/tribal relationship by avoiding unnecessary comparisons to states.

There are, however, significant differences among the various TAS authorities. For instance, in some cases, the statutes differ in how they address the geographic extent of potential tribal programs. The CWA authorizes EPA to approve eligible tribal programs over reservation areas. Other statutes allow approval of programs over broader areas, including non-reservation areas of Indian country. EPA also interprets the statutes differently regarding demonstrations of tribal authority to carry out environmental regulatory functions. For example, EPA interprets the CAA TAS provision to constitute a delegation of authority by Congress to eligible tribes to manage air resources throughout their reservations. By contrast, EPA currently interprets the CWA and SDWA TAS provisions to require a demonstration of inherent tribal authority to regulate the relevant activities.

In addition, the statutes include some differences in the scope of available programs that tribes may apply to administer. For instance, the CWA identifies various statutory provisions for which EPA may treat eligible tribes similarly to states. They include: grants under CWA section 106, water quality standards under section 303, clean lakes under section 314, nonpoint source management under section 319, water quality certifications under section 401, the National Pollutant Discharge Elimination System (NPDES) program under section 402, and regulating the discharge of dredged or fill material into waters of the United States under section 404.[193] Similarly, the SDWA authorizes TAS for eligible tribes to exercise "primary enforcement responsibility for public water systems and for underground injection control," and to receive financial assistance to carry out those functions.[194] By contrast, the CAA authorizes TAS more generally and directs EPA to promulgate regulations specifying "those provisions of [the CAA] for which it is appropriate to treat Indian tribes as States."[195] EPA has promulgated such regulations at 40 C.F.R. Part 49; these regulations generally authorize eligible tribes to "be treated in the same manner as States with respect to all provisions of the Clean Air Act" with the exception of a few enumerated provisions largely relating to program submission or other requirements that EPA determined were not appropriate to impose on tribes.[196] See Chapter One.

EPA has promulgated regulations under its various statutes governing the process by which tribes may apply for TAS status as well as the procedures EPA will follow in taking action on tribal applications.[197] These regulations provide substantial detail to interested tribes regarding the information they should submit in their applications and generally call for EPA to process the applications in a timely manner. Generally, as discussed below, EPA may have the

[193] CWA section 518(e).

[194] SDWA section 1451(a)(2)-(3).

[195] CAA section 301(d)(2).

[196] 40 C.F.R. §§ 49.3 and 49.4.

[197] *See, e.g.*, 40 C.F.R. §§ 49.1-49.9 (CAA programs); 40 C.F.R. § 131.8 (CWA water quality standards program); 40 C.F.R. §§ 123.31-123.34 (CWA NPDES permitting program); 40 C.F.R. §§ 233.60-233.62 (CWA wetlands permitting program); 40 C.F.R. §§ 501.22-501.25 (CWA sewage sludge management program); 40 C.F.R. §§ 130.6(d), 35.583, and 35.633 (CWA grants); 40 C.F.R. §§ 142.72, 142.76, and 142.78 (SDWA public drinking water system supervision program); 40 C.F.R. §§ 145.52, 145.56, and 145.58 (SDWA underground injection control program); 40 C.F.R. §§ 35.676 and 35.686 (SDWA grants); 40 C.F.R. § 300.515(b) (CERCLA response actions); 40 C.F.R. § 745.324 (TSCA lead-based paint program); and 40 C.F.R. §§ 35.693, 35.703, and 35.713 (TSCA grants).

capacity to streamline the TAS process for environmental regulatory programs, and efforts to this end are currently under way.

## II. STEPS TO ENHANCE TAS

The statutory TAS provisions allow EPA some flexibility in determining how best to implement its authority to authorize tribes to administer federal programs. Thus, since EPA adopted its first TAS regulations, it has taken various steps to try to improve the process, both by simplifying the way it is administered under various programs and by revising its TAS regulations.

### *A. What EPA has Already Done*

EPA has taken several steps to make the TAS process more robust, efficient, and effective. First, EPA has worked continuously to improve the TAS process since issuing its first TAS regulations in 1988. For instance, EPA's experience processing TAS applications led the Agency to issue a regulation revising and simplifying all of its then-existing TAS regulations in 1994. Under the simplified TAS process, EPA streamlined various procedures to eliminate duplicative requirements both in the preparation of tribal applications and also in the processing of those applications by EPA. EPA again refined the TAS process in 1998 and 2008 after convening workgroups to examine the Agency's continuing experience with tribal TAS applications and to identify potential additional efficiencies and areas where additional guidance would be useful. The latter process, which included significant consultation with tribal officials, culminated with the issuance of a formal TAS Strategy[198] designed to promote more efficient and transparent review of tribal TAS applications. The TAS Strategy provides important guidance regarding the information tribes should submit in their applications, describes practical and efficient procedures and timelines EPA intends to use to process the applications, and includes measures to help ensure accountability and appropriate sharing of information with applicant tribes.

In addition, EPA has generally attempted to interpret its statutory authority broadly to allow for tribal involvement in a wide variety of programs. For instance, as noted above, the CAA provided EPA with discretion to determine which provisions of the statute were appropriate for TAS. In implementing the CAA TAS regulations, EPA determined that all provisions of the statute were appropriate for TAS, with certain limited enumerated exceptions largely relating to provisions that would have inappropriately imposed requirements on, rather than affording opportunities to, tribal governments. Similarly, EPA has interpreted TSCA and EPCRA – which include no explicit reference to tribal roles – to authorize TAS for tribes to implement various roles under those statutes in their areas, including managing lead-based paint residential abatement programs under TSCA.[199]

Moreover, in addition to section 126 of CERCLA, which specifies certain provisions of the statute for which tribes shall be afforded TAS, EPA's National Oil and Hazardous

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[198] Memorandum from Marcus Peacock, EPA Deputy Administrator, entitled "Strategy for Reviewing Tribal Eligibility Applications to Administer EPA Regulatory Programs" (Jan. 23, 2008). This memorandum, which refers to the TAS guidance memorandum issued on March 19, 1998, is available at http://www.epa.gov/tribal/pdf/strategy-for-reviewing-applications-for-tas-01-23-08.pdf.

[199] *See, e.g.*, 40 C.F.R. § 745.324.

Substances Pollution Contingency Plan (NCP) regulations under CERCLA define "State" to include Indian tribes "except where specifically noted" to the contrary[200] and establish eligibility criteria for tribes that want to carry out response actions under CERCLA section 104.[201] Further, as discussed in Chapter Four, the only explicit reference to tribes in FIFRA is in section 23 of the statute, which authorizes EPA to enter into agreements with tribes under the statute and to assist tribes with training and certification of applicators of certain pesticides. EPA has interpreted its authorities under FIFRA to allow tribes to submit their own plans to train and certify applicators of restricted use pesticides. Chapter Four also describes how EPA has implemented its authorities under FIFRA to take several steps to ensure that the statute's benefits are available to communities in Indian country. These include steps by EPA to directly implement programs in areas of Indian country to address emergencies and special local needs.

EPA has taken steps to enable tribes to seek TAS and implement approved programs without the need to demonstrate certain criminal enforcement authorities. The only statute that expressly provides that tribes do not need to exercise criminal authority to obtain TAS is SDWA section 1451(b)(2). The other statutes are silent on this issue, and EPA has used its discretion to issue regulations that enable the Agency to approve tribes for TAS notwithstanding limitations on tribal criminal enforcement authority.[202] In these cases, EPA's regulations generally call for the federal government to retain primary criminal enforcement authority and for the tribes to enter into agreements with EPA to provide investigative leads and otherwise assist in the development of criminal enforcement actions.

Further, in an effort to streamline TAS applications in situations where jurisdictional or land status issues may exist for only part of a particular tribe's application, EPA's regulations generally allow the Agency to approve an applicant tribe's TAS status for those areas where the jurisdictional scope of the tribe's application is undisputed.[203] Although the resulting TAS approval may be limited in geographic extent and may not address all areas covered by the tribe's application, this approach enables the tribe to assume a role for the approved area without the delays and uncertainties that may accompany resolution of jurisdictional or land status disputes. In any such situation, EPA would consult with the applicant tribe regarding the scope of the application and any EPA approval.

EPA's ability to approve tribal roles for certain programs faces statutory barriers. Notably, EPA was unsuccessful in defending a regulation authorizing TAS for tribes under the Resource Conservation and Recovery Act (RCRA). Although RCRA does not contain an explicit TAS provision, EPA attempted to exercise its discretion to provide a role for tribes similar to that of states for certain RCRA programs. Following a challenge to EPA's rule, the D.C. Circuit, relying on certain definitional language addressing tribes in RCRA, held that EPA

[200] 40 C.F.R. § 300.5.

[201] 40 C.F.R. § 300.515(b).

[202] *See, e.g.*, 40 C.F.R. §§ 49.7(a)(6) and 49.8 (CAA regulations); 40 C.F.R. §§ 123.34, 233.41(f), and 501.25 (CWA regulations for, respectively, NPDES, section 404, and sewage sludge programs).

[203] *See, e.g.*, 40 C.F.R. § 49.9(e).

lacked authority to treat tribes as states under the current language of that statute.[204] The Court did recognize, however, EPA's authority to regulate under RCRA within Indian country.[205]

### *B. Further Steps to Enhance TAS*

EPA believes that direct tribal involvement through the TAS process is an effective means of ensuring that the needs of tribal communities, and the uses those communities make of their environmental resources, are addressed during implementation of programs under EPA's statutes. Enhancing tribes' ability to obtain eligibility to administer these programs promotes environmental protection in Indian country, with significant emphasis on tribal sovereign decision-making and control of Indian country health and environments by the communities living there. EPA is, therefore, interested in additional steps the Agency may take to streamline the TAS process and thereby promote enhanced tribal involvement. EPA can, for instance, continue to review its TAS procedures on a national level as the Agency gains additional experience processing TAS applications in the context of the goals and expectations of the TAS Strategy described above.

In addition, EPA is considering whether it can reinterpret existing CWA TAS requirements in ways that would eliminate the need for tribes to show inherent authority over non-member activities for purposes of TAS for CWA regulatory programs. That would significantly streamline the TAS application and review processes, and could create an incentive for more tribes to seek TAS for EPA regulatory programs to protect tribal health and environments. Under EPA's current approach, some tribes may defer seeking TAS for CWA programs because of this inherent authority element. To demonstrate inherent authority, tribes sometimes need to present detailed factual showings relating to impacts of the regulated activities on the applicant tribe, including non-member activities on reservation land. Tribes have expressed concern over making these demonstrations, which are functioning for some tribes as a deterrent to seeking TAS status. As EPA recognized in the preamble to its final TAS regulations for the water quality standards (WQS) program, the CWA might be amenable to a different interpretation.[206] For example, EPA interprets the TAS provision in the CAA as a Congressional delegation to eligible tribes of authority over their entire reservations (including activities on non-member-owned fee lands) for CAA purposes. Under that delegation approach, tribes do not need to demonstrate inherent authority in order to obtain TAS status over their entire reservations. One federal district court judge stated, in dicta, that EPA could properly have construed the CWA TAS provision as a delegation of authority,[207] and a majority panel of a federal appeals court cited that statement favorably.[208] Moreover, as EPA acknowledged in the

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[204] *See Backcountry Against Dumps v. EPA*, 100 F.3d 147 (D.C. Cir. 1996), which also is referenced in Chapter Three.

[205] *Id.* at 153.

[206] 56 Fed. Reg. 64876, 64877-80 (Dec. 12, 1991) (discussing whether CWA section 518(e) could be construed to delegate to tribes authority to regulate water quality throughout reservations without further judicial or Congressional guidance).

[207] *Montana v. EPA*, 941 F. Supp. 945, 951 (D. Mont. 1996), *aff'd*, 137 F.3d 1135 (9th Cir.), *cert. denied*, 525 U.S. 921 (1998).

[208] *Arizona Public Service v. EPA*, 211 F.3d 1280, 1292 (D.C. Cir. 2000), *cert. denied sub nom. Michigan v. EPA*, 532 U.S. 970 (2001).

preamble to the final WQS regulations,[209] in a plurality opinion of the Supreme Court, Justice White cited CWA section 518(e) as an example of a Congressional delegation of authority.[210] EPA's interpretation of the CAA, which was upheld in a legal challenge,[211] has significantly streamlined many TAS applications under that statute. EPA is considering whether a similar interpretation is available under the comparable language of the CWA.

EPA is also considering whether for certain CWA programs, such as the WQS program, EPA could approve a tribal program without requiring the tribe to demonstrate that it has civil authority to regulate the environment. For instance, in submitting WQS for EPA review and approval, states must certify that the WQS were duly adopted pursuant to state law.[212] States are not, however, required to make a separate demonstration of regulatory authority over state waters or the activities of persons in their areas. EPA is considering whether it may be possible to reinterpret its existing WQS TAS regulations to reduce burdens on tribes by making the showing for tribal involvement more comparable to that of states. Such an approach, along with other similar efforts to streamline TAS procedures and requirements, may provide important opportunities to enhance tribes' ability to manage their environments through the TAS process.

Similarly, there may be opportunities for EPA to reconsider its prior interpretation of the SDWA TAS provision as it relates to a tribe's jurisdictional showing. Of course, any such approaches under the SDWA or CWA would need to be carefully analyzed in light of the existing statutory language and in the context of EPA's prior interpretations and programmatic needs.

EPA could also clarify its interpretation of some existing regulations to further the role of tribes. For example, CERCLA section 126(a) specifies that "[t]he governing body of an Indian tribe shall be afforded substantially the same treatment as a State" with respect to certain provisions of the statute, including consultation on remedial actions under CERCLA section 104(c)(2). As noted above, in Subpart F of the NCP regulations, EPA established criteria for TAS under CERCLA section 104, including the need for the tribe to have jurisdiction over a site at which a Fund-financed response is contemplated.[213] In view of the language in section 126(a) and the scope of section 300.515(a) of the NCP regulations, EPA could clarify whether this jurisdictional criterion is relevant for purposes of tribal consultation on remedial actions that affect them, as opposed to situations in which the tribe has the lead for conducting the response action. Similarly, EPA could clarify whether the jurisdictional criterion is relevant for purposes of entering into an EPA/State Superfund Memorandum of Agreement under 40 C.F.R. § 300.505 when the tribe is not the lead for the response action.

[209] 56 Fed. Reg. at 64880.

[210] *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408, 428 (1989).

[211] *Arizona Public Service v. EPA*, 211 F.3d 1280 (D.C. Cir. 2000), *cert. denied sub nom. Michigan v. EPA*, 532 U.S. 970 (2001).

[212] 40 C.F.R. § 131.6(e).

[213] 40 C.F.R. § 300.515(b).

## ALTERNATIVES TO TAS

As EPA has gained experience with its tribal programs, it has increasingly recognized that not all tribes are interested in assuming, or are able to assume, TAS. Indeed, EPA recognizes that there are other ways tribes can participate in the protection of their communities and environments. For example, EPA can provide financial assistance to tribes to develop their capacity for environmental management without the need to seek TAS for any particular program. The Tribal General Assistance Grant Program, which is discussed further in Chapter Seven, is one example. But EPA also recognizes that tribes can use program development grants under specific media statutes, like the CWA, to help them manage their environments without seeking TAS status for any regulatory program. Consistent with that approach, EPA developed a guidance document – "Final Guidance on Awards of Grants to Indian Tribes under Section 106 of the Clean Water Act" – that discusses measures tribes can take, using CWA development grant funds, to participate in managing reservation environments separate from the TAS process for regulatory programs.[214] The Guidance discusses both regulatory measures under tribal (rather than federal) law, and measures not involving the exercise of any regulatory authority that nevertheless enhance environmental protection.

Moreover, as an alternative to TAS under the CWA, tribes may seek to manage and protect reservation waters, including water bodies they share in common with states, by working cooperatively with states under CWA section 518(d). That provision authorizes tribes and states to enter into cooperative agreements, subject to EPA review and approval, to jointly plan and administer CWA programs. Its legislative history indicates that it was intended to create an alternative to TAS to protect reservation environments under the CWA.[215] Use of this authority has been very limited; there may be room for expanding use of this authority.

## DIRECT IMPLEMENTATION

As discussed in other chapters, EPA can undertake direct implementation of human health and environmental programs in Indian country. In some cases, EPA may undertake implementation activities directly using Agency resources. In other situations, the Agency may work in conjunction with tribes under direct implementation cooperative agreements, which are described more fully in Chapter Seven.

Because very few tribes have as yet sought and been approved to administer environmental regulatory programs under EPA's statutes, the majority of environmental regulatory activity under federal laws in Indian country involves direct implementation by EPA. In most cases, therefore, EPA will be the entity with relevant authority to implement the various legal tools described in this document in Indian country. However, as described elsewhere, Indian tribes are sovereign entities exercising important powers over their members and areas, and those areas may include overburdened communities. In making decisions to advance environmental justice in overburdened tribal communities, EPA will remain respectful of tribal

[214] The guidance is available at http://water.epa.gov/grants_funding/cwsrf/upload/2006_10_20_cwfinance_final-tribal-guidance.pdf

[215] *See* 132 Cong. Rec. 32380, 32403 (1986).

governmental roles by, among other things, consulting with the relevant tribal governments on matters that affect them.

EPA currently implements a wide variety of environmental programs in Indian country. Some programs are specifically targeted to Indian country areas; others are national programs or requirements that apply in Indian country and elsewhere. EPA has used its rulemaking authority to implement environmental protection programs in Indian country. For example, EPA promulgated a Federal Implementation Plan for protection of air quality on the Indian Reservations in the States of Idaho, Oregon, and Washington; at the time of EPA's action, none of the tribes in those states had obtained TAS for CAA regulatory programs or established Tribal Implementation Plans. More broadly, EPA has recently issued regulations governing Review of New Sources and Modifications in Indian Country.[216] This rule for the first time establishes a regulatory framework for important elements of the New Source Review Program of the CAA in Indian country: *i.e.*, permitting for minor sources and for major stationary sources and major modifications in areas that are designated as not attaining the National Ambient Air Quality Standards. EPA continues to explore additional opportunities to implement programs in Indian country, including through rulemaking and other activities.

[216] 76 Fed. Reg. 38748 (July 1, 2011) (to be codified at 49 C.F.R. §§ 49.151-49.161 and 49.166-49.173, and Part 51, Appendix S).

# CHAPTER SIX: ENVIRONMENTAL REVIEW PROGRAMS

## INTRODUCTION

The National Environmental Policy Act (NEPA)[217] applies broadly to federal actions that may significantly affect the environment, and readily encompasses concerns raised by environmental justice, including impacts on the natural or physical environment and interrelated health, social, cultural, and economic effects.[218] Similarly, EPA has broad authority under section 309 of the Clean Air Act (CAA) to review and comment on other federal agencies' proposed regulations and actions that may significantly affect the environment.[219] Accordingly, the Presidential memorandum accompanying Executive Order 12898 emphasizes the importance of using the NEPA and CAA section 309 review processes to advance environmental justice. It directs federal agencies to "analyze the environmental effects, including human health, economic and social effects, of [their proposed] actions, including effects on minority communities and low-income communities, when . . . required by [NEPA]."[220] The memorandum calls for agencies to address significant adverse environmental effects on these communities in mitigation measures outlined or analyzed in environmental assessments, environmental impact statements, or records of decision.[221] It also directs EPA in its section 309 reviews to ensure that agencies fully analyze under NEPA the environmental effects, including human health, economic and social effects, of their proposed actions on minority communities and low-income communities.[222] NEPA and CAA section 309 are important tools for ensuring consideration and enhancing understanding of the environmental justice implications of federal actions across the entire Executive Branch.

Reflecting the importance EPA assigns to using NEPA as a tool in its efforts to promote environmental justice, EPA issued an April 19, 2011 memorandum entitled "Addressing Environmental Justice Through Reviews Conducted Pursuant to the National Environmental Policy Act and Section 309 of the Clean Air Act." The memorandum urges each EPA Regional Office, as well as Headquarters, to enhance Agency efforts to take environmental justice into account in their NEPA work. This includes fully utilizing EPA's authorities to advance environmental justice in the course of complying with NEPA under its own programs, as well as in connection with its review of other federal agencies' NEPA documents under CAA section 309.

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[217] 42 U.S.C. §§ 4321-4370h.

[218] The Council on Environmental Quality's regulations implementing NEPA define the term "effects" or "impacts" to include "ecological . . ., aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative." 40 C.F.R. § 1508.8.

[219] See CAA sections 309(a) (applying to matters "relating to duties and responsibilities" granted to the Administrator) and 309(b) (directing the Administrator to refer to the Council on Environmental Quality matters determined to be "unsatisfactory from the standpoint of public health or welfare or environmental quality").

[220] 30 Weekly Comp. Pres. Doc. at 280.

[221] *Id*.

[222] *Id*.

## NEPA

NEPA and its implementing regulations, including those of the Council of Environmental Quality (CEQ),[223] require federal agencies to consider the environmental effects of their proposed actions that are subject to NEPA. When proposing a major federal action significantly affecting the quality of the human environment, section 102(2)(C) of NEPA requires an agency to prepare an Environmental Impact Statement (EIS). An agency can prepare an environmental assessment (EA) to determine whether the effects are potentially significant, or can move directly to preparing a more detailed EIS. If in an EA an agency determines the proposal's effects will not be significant, the agency may complete its NEPA review with a "[f]inding of no significant impact."[224]

In preparing EISs, NEPA and CEQ's implementing regulations direct federal agencies, including EPA, to establish a pre-EIS scoping process;[225] analyze the environmental effects of the proposed action; discuss all reasonable alternatives (including those outside the agency's jurisdiction) and the alternative of no action; identify practicable mitigation[226] not covered in the alternatives discussion; and provide for meaningful public participation. Because of statutory and judicially created exemptions, NEPA generally applies only to a limited number of EPA program activities, such as when EPA issues new source NPDES permits, conducts certain types of research, or constructs facilities. However, EPA may prepare voluntary EISs or EAs for its NEPA-exempt actions under its "Statement of Policy for Voluntary Preparation of National Environmental Policy Act (NEPA) Documents," and the criteria for doing so include "the potential for using an EA or an EIS to facilitate analysis of environmental justice issues . . . and to expand public involvement . . . ."[227] To help ensure that EPA fully considers environmental justice in its NEPA reviews, in 1998 EPA issued its *Guidance for Incorporating Environmental Justice Concerns in EPA's NEPA Compliance Analyses*.[228] This guidance suggests that the EPA NEPA analyst may approach the analysis of environmental justice from three vantage points: whether there exists a potential for disproportionate risk, whether communities have been

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[223] 40 C.F.R. Parts 1500-1508.

[224] 40 C.F.R. § 1508.13.

[225] CEQ and EPA guidance emphasizes the importance of public participation in the scoping process. *See* CEQ's *Environmental Justice: Guidance Under the National Environmental Policy Act* (Dec. 10, 1997) at 10-13 and EPA's *Guidance for Incorporating Environmental Justice Concerns in EPA's NEPA Compliance Analyses* (April 1998) at 4.0 – 4.1. *See also* 40 C.F.R. §§ 1501.7 and 6.203(a)(2).

[226] Pursuant to 40 C.F.R. § 1508.20, the term "[m]itigation" includes:

> (a) Avoiding the impact altogether by not taking a certain action or parts of an action.
> (b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation.
> (c) Rectifying the impact by repairing, rehabilitating, or restoring the affected environment.
> (d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.
> (e) Compensating for the impact by replacing or providing substitute resources or environments.

[227] *See* 63 Fed. Reg. 58045, 58046 (Oct. 29, 1998), which is available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=1998_register&docid=98-29019-filed.pdf.

[228] The guidance is available at: http://www.epa.gov/environmentaljustice/resources/policy/ej_guidance_nepa_epa0498.pdf.

sufficiently involved in the decision-making process, and whether communities currently suffer, or have historically suffered, from environmental and health risks or hazards.[229] EPA also follows the 1997 guidance on this subject issued by CEQ, entitled *Environmental Justice: Guidance Under the National Environmental Policy Act*.[230]

For purposes of environmental justice, when NEPA applies and the Agency prepares an EA or EIS, EPA's NEPA regulations,[231] policy, and guidance call for EPA to: (1) examine the direct and indirect effects of the EPA action on minority, low-income, and indigenous populations, including health impacts and socio-economic impacts that are interrelated to effects on the physical environment; (2) analyze, from an environmental justice perspective, the cumulative impact of the EPA action when added to other past, present, and reasonably foreseeable future activities (federal and non-federal); (3) analyze reasonable alternatives that address environmental justice impacts; (4) consider mitigation measures to address impacts on minority, low-income, and indigenous populations; and (5) provide for public review and comment on the draft EIS or EA, including the discussion of environmental justice issues.

Under NEPA, EPA may consider in an EA or EIS environmental factors that are not expressly set forth in its organic statutes, regulations, or guidance. Courts have held that NEPA, which is a procedural statute, does not expand the scope of an agency's regulatory jurisdiction. Nonetheless, federal agencies can use the NEPA process to inform how they exercise their discretion. For example, where an agency's organic authority allows for two (or more) possible approaches to an issue, a NEPA environmental justice analysis may be used to inform the choice of which approach to take. Similarly, an environmental justice analysis may help an agency identify an approach under its organic authority that it might not otherwise have considered.

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[229] *Id*. at 2.3.

[230] The CEQ guidance at 8-9 includes the following general principles for considering environmental justice under NEPA:

- Consider the composition of the affected area to determine whether minority, low-income, or tribal populations are present, and if so whether there may be disproportionately high and adverse human health or environmental effects on these populations.
- Consider relevant public health and industry data concerning the potential for multiple exposures or cumulative exposure to human health or environmental hazards in the affected population, as well as historical patterns of exposure to environmental hazards.
- Recognize the interrelated cultural, social, occupational, historical, or economic factors that may amplify the natural and physical environmental effects of the proposed action.
- Develop effective public participation strategies.
- Assure meaningful community representation in the process, beginning at the earliest possible time.
- Seek tribal representation in the process.

The CEQ guidance is available at http://ceq.hss.doe.gov/nepa/regs/ej/justice.pdf.

[231] 40 C.F.R. Part 6.

## CLEAN AIR ACT SECTION 309

Under section 309(a) of the CAA, EPA is required to review and comment on the environmental impacts of the actions of other federal agencies, including proposed regulations and projects subject to the EIS requirement in section 102(2)(C) of NEPA. In addition, pursuant to CAA section 309(b), if EPA determines, as a result of its review, that a particular activity is unsatisfactory from the standpoint of public health, welfare, or environmental quality, it must publish the determination and refer the matter to CEQ for resolution.[232] Consistent with the President's memorandum accompanying Executive Order 12898, and because of the clear linkage between environmental justice and the stated criteria for an EPA referral to CEQ, EPA may readily use the CAA section 309 review process to ensure that other federal agencies fully analyze and address, as appropriate, the environmental effects, including human health, social, and economic effects, of their proposed actions on minority, low-income, and indigenous populations.

To help advance environmental justice through this review process, EPA issued its *Guidance for Consideration of Environmental Justice in Clean Air Act Section 309 Reviews* (July 1999).[233] The guidance covers how to consider environmental justice at each stage of the CAA section 309 review process. It addresses pre-environmental-review activities, identifying minority and low-income populations, potential impacts, review of draft EISs, public participation, alternatives, mitigation,[234] ratings, and review of final EISs. Under the CAA section 309 review process, EPA reviews and comments on a wide variety of federal projects with significant environmental impacts. In its comment letters to sister agencies, EPA routinely raises environmental justice issues, including those related to the nature of impacts on minority, low-income, or indigenous communities; the thoroughness of the analysis; and identification of alternatives or mitigation to address the impacts.

In July 2011, EPA issued guidance that is designed to help other federal agencies and states, among other things, to account for environmental justice considerations in the context of mountaintop mining, with a specific discussion on the opportunities afforded by NEPA.[235] The guidance recommends, among other things, that EPA Regional Offices encourage agencies "to make the full range of NEPA notices and documents, including draft EAs, readily available to the public" and "to improve the accessibility of public meetings." This illustrates how EPA can play an important role, consistent with NEPA, to advance environmental justice through

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[232] *See* CEQ's regulations at 40 C.F.R. Part 1504 for the procedures on referrals.

[233] The guidance is available at: http://www.epa.gov/compliance/resources/policies/nepa/enviro_justice_309review.pdf.

[234] *See EPA Guidance for Consideration of Environmental Justice in Clean Air Act Section 309 Reviews* (July 1999) at 2.3.5, which provides that mitigation measures should be developed specifically to address potential disproportionately high and adverse effects to minority and/or low-income communities. Similarly, the action agency, with tribal concurrence, should select mitigation measures that will not diminish tribal resources and that will ensure the protection of such resources from environmental harm.

[235] *See* "Improving EPA Review of Appalachian Surface Coal Mining Operations under the Clean Water Act, National Environmental Policy Act, and the Environmental Justice Executive Order" (July 21, 2011), which is discussed in Chapter Two.

transparency and open government as well as comprehensive consideration of the environmental impacts through an effective environmental justice analysis.

# CHAPTER SEVEN: GRANTS AND PROCUREMENT

## EPA AUTHORITY TO ADDRESS ENVIRONMENTAL JUSTICE THROUGH ASSISTANCE AGREEMENTS AND OTHER FINANCIAL MECHANISMS

### I. GRANTS FOR ENVIRONMENTAL JUSTICE PROJECTS

EPA manages an environmental justice grants program[236] that provides financial assistance to eligible organizations working on or planning to work on projects to address local environmental and/or public health issues in their communities.[237] The program also provides financial assistance to eligible organizations to build collaborative partnerships, to identify the local environmental and/or public health issues, and to envision solutions and empower the community through education, training, and outreach.[238] The Agency's statutes authorize these grants, which provide assistance for demonstrations, research, surveys, and training. Eligible environmental justice activities include:

(1) Demonstrations or analysis of environmental justice conditions and problems (for example, socio-economic impact studies);

(2) Projects to research specific local environmental justice issues; and

(3) Environmental justice training or education for community residents, teachers, or related personnel.

### II. RESEARCH, DEVELOPMENT, AND TRAINING GRANTS UNDER ENVIRONMENTAL STATUTES

The Environmental Justice Grant Program implements statutes that give EPA broad authority to support activities including research, development, training, surveys, investigations, and demonstrations related to pollution of particular environmental media.[239] For example, Clean Water Act section 104(b)(3) authorizes EPA to make grants for activities related to water pollution to state agencies, other public or nonprofit private organizations, and individuals. Similarly, consistent with EPA's competition policy, EPA could make a grant under Solid Waste Disposal Act section 8001(a) to a community association for a survey of health and welfare

[236] The term "grants" as used in this chapter includes cooperative agreements as well as grants. Both are assistance agreements; they differ only in the extent of Agency involvement in the project.

[237] *See* Environmental Justice Collaborative Problem-Solving Cooperative Agreement Program at http://www.epa.gov/environmentaljustice/grants/ej-cps-grants.html.

[238] *See* Environmental Justice Small Grants Program at http://www.epa.gov/environmentaljustice/grants/ej-smgrants.html.

[239] The authorities under which these environmental justice grants will be awarded are: Clean Water Act (CWA) section 104(b)(3), Safe Drinking Water Act (SDWA) section 1442(b)(3), Solid Waste Disposal Act (SWDA) section 8001(a), Clean Air Act (CAA) section 103(b)(3), Toxic Substances Control Act (TSCA) section 10(a), Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) section 20(a), Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) section 311(c), and Marine Protection, Research, and Sanctuaries Act (MPRSA) section 203.

effects of a local landfill. The authority to fund these "research and demonstration" activities is well established. Projects funded under these authorities and other EPA authorities have the potential to make a significant impact in identifying issues of environmental justice concern and establishing a foundation for developing corrective actions. The Agency must comply with the Office of Management and Budget (OMB) regulations implementing the Paperwork Reduction Act when funding any information-gathering activities under such a grant.

## III. SUPERFUND TECHNICAL ASSISTANCE GRANTS

CERCLA section 117(e) authorizes EPA to make Technical Assistance Grants (TAGs) of up to $50,000 to groups of individuals affected by Superfund sites. TAGs help communities obtain technical assistance from independent experts who can interpret site information to promote better understanding of a site and more meaningful public participation in the clean-up decision-making process. TAGs are subject to most Agency-wide general grant regulations, but often with less formal requirements. TAGs are based on an established legal mechanism for providing assistance to communities impacted by Superfund sites. TAGs awarded to eligible minority, low-income, or indigenous populations advance environmental justice by providing those groups with information that would enable them to participate in the environmental decision-making process.

## IV. NATIONAL AND COMMUNITY SERVICE ACT

Under the 1993 amendments to the National and Community Service Act,[240] EPA and other federal agencies may enter into interagency agreements with the Corporation for National and Community Service (the Corporation) for service programs that address established priorities: the environment, public safety, human needs, and education. Agencies may use these funds to implement their own programs or to enter into contracts or cooperative agreements with entities that are carrying out national service programs in the States. EPA can consult with the Corporation about the availability of funding under this authority, and, if available, seek to enter into interagency agreements for projects that advance environmental justice.

## V. NATIONAL ENVIRONMENTAL EDUCATION ACT

Section 6 of the National Environmental Education Act[241] authorizes EPA to award grants for projects to design, demonstrate, or disseminate practices, methods, or techniques related to environmental education and training. EPA is authorized to support projects that address environmental issues which, in the judgment of the Administrator, are of high priority; these could include projects that advance environmental justice. EPA annually solicits applications for section 6 grants from local education agencies, colleges and universities, state education and environmental agencies, nonprofit organizations, and noncommercial educational broadcasting entities. Each recipient must meet a 25 percent cost-sharing requirement. No grant awarded under section 6 may exceed $250,000, and 25 percent of the funds awarded under this provision each year must be for grants of not more than $5,000.

[240] 42 U.S.C. § 12571.

[241] 20 U.S.C. § 5505.

## VI. ASSISTANCE AGREEMENTS WITH TRIBAL GOVERNMENTS

As discussed in Chapter Five, enhancing tribes' ability to manage their lands and to participate and assist in the implementation of environmental programs typically will advance environmental justice and help them address concerns they may have.

### *A. Assistance Available to Tribes*

Some of EPA's organic statutes that authorize EPA to provide assistance to states also authorize the Agency to award assistance to federally recognized tribal governments. EPA awards environmental program grants to tribes under CAA section 105 (air pollution control), CWA sections 106 and 108 (water pollution control), CWA section 104(b)(3) (water quality cooperative agreements; wetlands development grants), CWA sections 319(h) and 518(f) (nonpoint source management grants), FIFRA section 23(a)(1) and (2) (pesticide cooperative enforcement; pesticide program implementation; and pesticide applicator certification and training), PPA section 6605 (pollution prevention grants), SDWA sections 1433(a), (b) and 1451 (public water system supervision; underground water source protection), TSCA section 404(g) (lead-based paint program), TSCA section 306 (indoor radon grants), TSCA section 28 (toxic substances compliance monitoring), Public Law 105-276 (hazardous waste management program grants; underground storage tank program grants), and CERCLA section 128(a) (tribal response program grants). Regulations governing these assistance agreements may be found in 40 C.F.R. Part 35, Subpart B. In addition to these grant programs, tribes are also eligible for Superfund Cooperative Agreements under CERCLA section 104(d) that are awarded and administered in accordance with 40 C.F.R. Part 35, Subpart O (EPA's Superfund response action grant regulations applicable to state, local, and tribal governments).

### *B. Indian Environmental General Assistance Program Act*

The Indian Environmental General Assistance Program Act of 1992 (IEGAPA)[242] authorizes EPA to make grants to Indian tribes to build capacity to administer environmental protection programs on Indian lands. New General Assistance Program (GAP) grants under the IEGAPA must be for at least $75,000 and the term of an award may not exceed four years. GAP grants are awarded non-competitively.

### *C. Direct Implementation Tribal Cooperative Agreements*

EPA's annual appropriations act typically authorizes EPA to enter into Direct Implementation Tribal Cooperative Agreements (DITCAs) with federally recognized Indian tribes or intertribal consortia to assist EPA in implementing federal environmental programs required or authorized by law in the absence of an acceptable tribal program. EPA works closely with tribes to identify DITCA-eligible activities and to determine those direct implementation activities where there is a joint tribal and EPA priority for program implementation. DITCAs are awarded non-competitively.

### *D. Indian Self-Determination Act Preference*

The Indian Self-Determination Act requires tribal grantees to give preference and opportunities in the award of contracts, subcontracts, and subgrants to Indians.[243]

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[242] 42 U.S.C. § 4368b.

[243] *See* 40 C.F.R. § 31.38.

## VII. BROWNFIELDS REVITALIZATION FUNDING

The Brownfields revitalization funding authority under CERCLA section 104(k) authorizes EPA to, among other things, make grants for site characterization, assessment, and cleanup, as well as for the capitalization of revolving loan funds for remediation of Brownfield sites. The statute also authorizes EPA to provide, or support with financial assistance, Brownfields-related research, training, and technical assistance. Eligibility for grants for site characterization, assessment, and capitalization of revolving loan funds is limited to governmental entities or certain types of quasi-governmental organizations that are connected to governments.

In authorizing the Agency to make grants under this authority, CERCLA directs the Administrator to establish a system for ranking grant applications. The statute contains ten ranking criteria, including the extent to which a grant would address or facilitate the identification and reduction of threats to the health or welfare of children, pregnant women, minority or low-income communities, or other sensitive populations; the extent to which a grant would address or facilitate the identification and reduction of threats to human health and the environment, including threats in areas in which there is a greater-than-normal incidence of disease or conditions that may be associated with exposure to hazardous substances, pollutants, or contaminants; and the extent to which a grant would meet the needs of a community that is unable – because of the small population or low income of the community – to draw on other sources of funding for environmental remediation and subsequent redevelopment of the area in which a Brownfield site is located.

## VIII. GRANT CONDITIONS

### *A. Conditions Related to Goals of the Statute*

EPA may place conditions on any grant award if the conditions are directly related to the goals of the statute authorizing the award.[244] In *Shanty Town Associates Ltd. Partnership v. EPA*, the court held that EPA acted within its CWA authority in conditioning a Title II grant to a municipality for construction of a sewage collection system. EPA's environmental impact statement found that the new sewage system would induce development and therefore increase nonpoint source pollution from the area served. The Agency inserted in the grant to the city a condition limiting the use of the new system to existing development. A developer challenged the condition on the ground that it was not related to the purpose of the grant, which was sewage treatment works construction, not land use control or nonpoint source management. The court held that, although CWA Title II does not mention use limitations, EPA had authority to impose them as a condition because they were directly related to the goals of the CWA.

EPA may consider including in appropriate grants special conditions aimed at advancing environmental justice. Grants that might be appropriate for such a condition include, but are not limited to, National Estuary Program grants under CWA section 320(g), state/tribal cooperative agreements under CERCLA section 104, and state continuing environmental program grants.[245] However, any condition should be written in terms of implementing a goal of the act authorizing

[244] *Shanty Town Associates Ltd. Partnership v. EPA*, 843 F.2d 782 (4th Cir. 1988).

[245] Continuing environmental program grants are awarded under CWA sections 106 and 319, SDWA section 1443, SWDA section 3011, CAA section 105, TSCA section 28, and FIFRA section 23.

the grant. Indeed, the more closely aligned the grant condition is to the statutory goals the more legally defensible the condition will be. For example, a condition requiring the grantee to consider cumulative impacts, unique exposure scenarios, or sensitive populations would arguably be directly related to a statute's goal of protecting human health.

One avenue EPA could use to ensure that environmental justice considerations are considered in determining the activities to be funded under state and tribal environmental program grants is to include environmental justice in the national goals, objectives, and priorities of each program as expressed through the National Program Guidance. Including environmental justice in the National Program Guidance for each program would provide EPA with a basis for negotiating activities into recipient work plan commitments. National Program Guidance is an appropriate means to provide a framework for addressing environmental justice considerations in each program and each award because work plans should reflect program priorities outlined in the National Program Guidance.[246] And, by signing the grant documents, the grant recipient will have expressly accepted the conditions imposed by the terms of the grant.

If a condition or program priority can be said to implement the underlying statute rather than Title VI of the Civil Rights Act (see discussion of Title VI below), EPA could seek to enforce the condition through the remedies and disputes process under the general grant regulations,[247] rather than under EPA's recipient anti-discrimination regulations.[248] The procedures under the grant regulations, which are described below, are simpler and allow for more informal, faster action than the procedures under Title VI regulations.

### *B. Environmental Justice in Evaluation Criteria*

Each Request for Proposals (RFP) issued in competitive grant programs contains an explanation of the evaluation criteria the Agency uses to evaluate the merits of each applicant's grant proposal. Where appropriate, EPA could incorporate environmental justice considerations into its stated evaluation criteria. Any evaluation criteria included in an RFP should be consistent with the goals of the act authorizing the grant and must be consistent with any evaluation criteria stated in that act.[249] Environmental justice considerations incorporated into evaluation criteria may be reflected in the terms and conditions of the grant award, as appropriate.

### *C. Conditions for High-Risk Grantees*

The general grant regulations at 40 C.F.R. § 31.12 allow EPA to impose certain conditions or restrictions on a "high-risk" recipient during the pre-award stage of the grants process. A recipient or subgrantee may be considered high risk if EPA determines, for example, that it has a history of unsatisfactory performance, has not conformed to terms and conditions of previous awards, or is otherwise not responsible. Special conditions or restrictions may include withholding authority for advance payments, or withholding authority to proceed to the next phase before receipt of evidence of acceptable performance within a given funding period;

[246] 40 C.F.R. §§ 35.107 and 35.507.

[247] 40 C.F.R. Parts 30 and 31.

[248] 40 C.F.R. Part 7.

[249] *See, e.g., Ill. Environmental Protection Agency v. EPA*, 947 F.2d. 283 (7th Cir. 1991).

additional project monitoring; or requiring the recipient or subgrantee to obtain technical or management assistance. As a short-term measure the Agency could consider identifying recipients as high-risk when there is evidence of current or past practices that are inconsistent with environmental justice principles, *e.g.*, those reflected in the Title VI regulations or Executive Order 12898. The Agency would need to make a determination of whether a high-risk designation is appropriate through information gathered in a pre-award review, an audit of the recipient's past performance, or using other available information. In this case, EPA might impose a special condition on subsequent grants establishing special requirements for such recipients.

### *D. Disadvantaged Business Enterprises*

EPA promotes nondiscrimination in the award of contracts under EPA financial assistance agreements through its regulations at 40 C.F.R. Part 33. Financial assistance recipients are required to make good faith efforts to meet negotiated fair share objectives for disadvantaged-business-enterprise participation in procurement under financial assistance agreements. Disadvantaged business enterprises include, but are not limited to, businesses owned or controlled by African-Americans, Hispanic Americans, Native Americans, Indian Tribes, Asian Pacific Americans, Native Hawaiian organizations, women, and Historically Black Colleges and Universities. Each procurement contract signed by an EPA financial assistance agreement recipient must include a term and condition that incorporates the requirements of Part 33.

## IX. REMEDIES FOR NON-COMPLIANCE WITH GRANT CONDITIONS

### *A. Remedies*

EPA's regulations establishing administrative requirements for grants to states, local governments, and Indian tribes are found at 40 C.F.R. Part 31. Similar regulations governing grants to all other recipients are found at 40 C.F.R. Part 30. Under both regulations, if a recipient materially fails to comply with any term or condition of a grant agreement, EPA may take one or more of the following actions:[250]

(1) issue a stop-work order;

(2) withhold payments;

(3) suspend or terminate the agreement;

(4) annul the agreement, wholly or partly, and recover all awarded funds (Part 30 or Part 31, as appropriate, sets forth grounds for annulment);

(5) withhold further awards for the program; and

(6) seek other remedies legally available.

[250] *See* 40 C.F.R. §§ 30.63 and 31.43, as applicable.

### *B. Disputes*

Grant recipients and applicants that wish to dispute an Agency action, including a decision to take one of the remedial actions listed above, may pursue the administrative dispute resolution process set forth in the regulations at 40 C.F.R. Part 30, Subpart C, and 40 C.F.R. Part 31, Subpart F.[251] Persons other than a grant applicant or recipient may not bring a dispute challenging a grant action under these regulations, although they may informally petition the Agency. The dispute resolution process seeks to resolve matters through a relatively simple and informal EPA management review. A disputant under these regulations may submit documentary evidence and briefs for inclusion in a written record, is entitled to an informal conference with EPA officials, and is entitled to a written decision from the appropriate EPA Dispute Decision Official (DDO). Upon request for review of a DDO decision, a disputant is entitled to a written decision from the appropriate Regional Administrator (RA) or Assistant Administrator (AA). An RA's decision may be reviewed by the appropriate AA, at the discretion of the AA. If the AA decides not to review the RA's decision, the RA's decision is the final agency action.

## NON-DISCRIMINATION IN FEDERAL ASSISTANCE PROGRAMS

### I. INTRODUCTION

EPA implements Title VI of the Civil Rights Act of 1964, section 504 of the Rehabilitation Act of 1973, section 13 of the Federal Water Pollution Control Act Amendments of 1972, Title IX of the Education Amendments of 1972, and the Age Discrimination Act of 1975, which prohibit discrimination based on race, color, national origin, disability, sex, and age. Regulations at 40 C.F.R. Part 7, entitled "Nondiscrimination in Programs or Activities Receiving Federal Assistance from EPA," include general and specific prohibitions against intentional and unintentional (*i.e.*, disparate effects) discrimination by EPA's assistance recipients on the basis of race, color, national origin, sex, or handicap.[252] Every EPA grant recipient, including almost every state environmental agency, is subject to the terms of Part 7.[253]

EPA enforcement of these anti-discrimination provisions can be a tool in the Agency's efforts to address discrimination and advance environmental justice. In particular, the Presidential memorandum accompanying Executive Order 12898 identifies Title VI as an important tool to help achieve the goal of environmental justice. The memorandum directs federal agencies to ensure that recipients of federal financial assistance do not discriminate based on race, color, or national origin under Title VI in their programs or activities that affect human

[251] The dispute resolution procedures in Part 31, Subpart F, apply to states, local governments, and Indian tribes. Those in Part 30, Subpart C, apply to all other applicants and recipients. The procedures in the two regulations are virtually the same.

[252] The procedures outlined in Part 7 have been adopted by the Part 5 regulations with respect to complaints of sex discrimination in education programs or activities. *See* 40 C.F.R. § 5.605.

[253] In implementing the *Plan EJ 2014* goal of supporting community-based programs, EPA intends to develop language for environmental justice principles, including Title VI guidance (as appropriate with all Agency grants), for inclusion in the FY2011 National Environmental Performance Partnership System and National Program Manager guidance.

health or the environment. Further, Title VI's prohibition against discrimination applies to all the programs and activities of a recipient of federal assistance, including EPA assistance. Because "program or activity" is defined to include all the operations of recipients of EPA assistance, including state or local departments or agencies, the applicability of the Part 7 regulations is very broad.

EPA's Office of Civil Rights (OCR) is responsible for implementing Part 7.[254] EPA is now focused on investigating and resolving the large number of pending Title VI complaints, some of which have been pending in EPA for a number of years. As those complaint investigations are completed, EPA will expand its foundation of decisions and policies upon which consistent, aggressive Agency enforcement activities, as described below, can be based.

## II. PRE-AWARD COMPLIANCE

Before EPA awards assistance (grants or cooperative agreements, in most cases), it is required to determine whether the applicant is in compliance with Part 7.[255] To obtain the information necessary to make that determination, EPA requires applicants to submit notice of any pending lawsuits alleging discrimination, any civil rights compliance reviews regarding the applicant conducted during the two-year period before the application, the name and title of its compliance coordinator, and a copy of the applicant's grievance procedures, if any.[256] In addition, applicants may be required to submit any other information that EPA determines is necessary to make the pre-award compliance determination.[257]

EPA could revise the application form to request additional information that could help identify potential civil rights concerns related to the grant applicant. For example, applicants could be required to provide information regarding the applicant's resources, policies, and practices for addressing discrimination. The process for revising the form would include OMB approval and would entail relatively minor cost and resources. A more significant expansion of the pre-award compliance review process, however, would warrant close coordination (including Standard Operating Procedures) within EPA in order to avoid major disruptions and delays in the grant application review and approval process.

In addition, applicants for EPA assistance must submit an assurance with their applications that, with respect to their programs or activities that receive EPA assistance, they will comply with the non-discrimination provisions in Part 7.

## III. POST-AWARD COMPLIANCE

The Agency may periodically conduct reviews of any assistance recipient's programs or activities to ensure compliance with Title VI. These compliance reviews may include information and data requests. They may also include on-site reviews when EPA has reason to believe that discrimination may be occurring in those programs or activities.[258] EPA could

[254] *See* 40 C.F.R. §§ 1.25(b)(5) and 7.20(a).

[255] 40 C.F.R. § 7.110(a).

[256] *See* EPA Form 4700-4.

[257] 40 C.F.R. § 7.110(a).

[258] 40 C.F.R. § 7.115.

expand its compliance review program in a number of ways. Part 7 requires recipients to collect, maintain, and, upon request, provide EPA with a description of any pending lawsuits against the recipient alleging discrimination; racial/ethnic, national origin, sex, and handicap data; a log of discrimination complaints; and reports of any compliance reviews conducted by other agencies.[259]

EPA could increase the frequency and/or regularity with which it requests compliance review information from recipients. That information could be reviewed to determine if a more comprehensive compliance review is necessary. In addition, EPA could establish criteria for selecting targets for compliance reviews that further the Agency's environmental justice goals. EPA could also expand the scope of its compliance reviews beyond the procedural requirements in the regulations to include any recipient activity that the Agency believes may raise Title VI concerns. Currently, the compliance reviews are generally limited to ascertaining whether the recipient is in compliance with the procedural requirements contained in Part 7 (*i.e.*, whether the recipient has a grievance procedure and compliance coordinator). Part 7 requires most recipients to adopt grievance procedures to assure prompt and fair resolution of complaints of discrimination. EPA could more heavily scrutinize recipients' grievance procedures and, where inadequate, assist them in developing such procedures. This would help provide complainants with another avenue of redress, and recipients would be better able to resolve concerns in-house, thereby potentially reducing the number of Title VI complaints filed with EPA.

Expansion of the current compliance review program has the potential to have greater impact than what is accomplished through complaint investigations (where existing resources are principally spent) because the scope of compliance reviews could be broader than that of complaint investigations. EPA's regulations already provide the authority to implement this change. However, a significantly more robust compliance review program would require substantial additional resources.

## IV. COMPLAINT INVESTIGATIONS

Any person who believes that he or she or a specific class of persons has been discriminated against in violation of Part 7 may file a complaint with any EPA office within 180 days of the alleged discrimination. For claims of unintentional discrimination under EPA's Title VI regulations, the administrative complaint process is the only available forum for relief because Title VI complaints filed in federal courts are limited to claims of intentional discrimination.

EPA could do more outreach to educate the public on using Title VI to address issues of discrimination in their communities. This outreach could potentially have a significant impact in that it could improve the quality of Title VI complaints and bring additional issues of discrimination to EPA's attention. Such a program could be established internally, relying on Standard Operating Procedures to maintain consistency. Initially, such outreach would require significant effort, in that educational materials would need to be developed. Ongoing educational efforts, however, would require less effort to maintain.

[259] 40 C.F.R. § 7.85.

EPA's regulations at 40 C.F.R. § 7.120 require that the complaint meet the minimum jurisdictional criteria to be accepted. First, the complaint must be in writing. Second, it must be filed within 180 days of the alleged discriminatory act. Third, it must allege discrimination based on race, color, or national origin. Finally, it must identify a recipient of EPA assistance alleged to have committed discriminatory acts. EPA must investigate accepted complaints and will either dismiss complaints where no violation is found, attempt to resolve complaints informally, as described below, or make a finding of violation. Investigations are often resource-intensive and time-consuming. EPA could make more use of alternative dispute resolution (ADR) processes to resolve complaints more efficiently and effectively. The Agency may call on its own trained mediators and environmental experts, as well as external ADR professionals, to facilitate this process and perhaps resolve some Title VI issues more quickly and collaboratively.

The increased and systematic use of ADR to resolve Title VI issues could potentially have a significant impact by addressing potential discrimination issues without EPA using the resources required for a full complaint investigation. Because EPA's regulations already reference the informal resolution of complaints, such a program could be established internally, without the need for additional regulations or guidance. OCR has started to expand the use of ADR and has worked with EPA's Conflict Prevention and Resolution Center (located within the Alternative Dispute Resolution Law Office) to have mediators "on call" to assist with informal resolution of Title VI complaints.

## V. ACTIONS AVAILABLE TO OBTAIN COMPLIANCE

If informal resolution efforts fail, EPA will notify the recipient of its preliminary findings and make recommendations for achieving voluntary compliance. Where a preliminary determination of noncompliance does not result in voluntary compliance, EPA must issue a formal determination of noncompliance with a requirement that the recipient come into voluntary compliance within 10 calendar days. If resolution and voluntary compliance are not successful, the Agency may use any means authorized by law to obtain compliance, including referral of the matter for enforcement to the U.S. Department of Justice. If EPA pursues litigation, the objective would likely be to obtain injunctive relief to end or mitigate the discrimination.

EPA may also choose to begin proceedings to annul, terminate, refuse to award, or refuse to continue assistance. The proceedings may, at the request of the applicant or recipient, include a hearing before an administrative law judge (ALJ). The ALJ's determination becomes the Administrator's final decision in the event the applicant or recipient does not file exceptions to the ALJ's determination. In cases of review by the Administrator, all parties may submit written statements. If the Administrator's decision is to deny an application, or annul, suspend or terminate assistance, the decision does not become final until 30 days after she submits a full written report of the circumstances and grounds for the action to the House and Senate committees having legislative jurisdiction over the EPA program involved. The Administrator's decision is not subject to review under the general grant regulations.

# PROCUREMENT TOOLS FOR ADDRESSING ENVIRONMENTAL JUSTICE

## I. INTRODUCTION

There are various statutory and regulatory procurement authorities that EPA could utilize to advance environmental justice. There are several existing government-wide policies designed to provide "maximum practicable opportunities" in the award of contracts and subcontracts to small business concerns owned by "socially and economically disadvantaged" groups as well as businesses located in areas of high unemployment. These existing government policies are included in the Federal Acquisition Regulation (FAR),[260] which regulates agencies' procurement of supplies and services.

EPA could use these existing policies to help provide economic empowerment to communities that have traditionally had environmental justice issues.

EPA could also seek to advance environmental justice in its procurements through the incorporation of environmental justice tasks in procurement statements of work and environmental justice considerations in evaluation criteria.

## II. EXISTING PROCUREMENT MECHANISMS THAT COULD BE USED TO PROMOTE ENVIRONMENTAL JUSTICE

FAR 19.201 expresses the policy that "maximum practicable opportunities" be directed towards small disadvantaged business concerns and small business concerns located in Historically Underutilized Business Zones. See Section II.C below.

### *A. The "8(a)" Program*

Section 8(a) of the Small Business Act authorizes the Small Business Administration (SBA) to enter into contracts with other federal agencies and to perform those contracts by subcontracting to "socially and economically disadvantaged small business concerns."[261] Such entities are small businesses if: (1) they are at least 51 percent owned by one or more socially and economically disadvantaged individuals; and (2) management and daily business operations are controlled by one or more of such individuals.[262]

Participants in the 8(a) program must satisfy both the social and economic disadvantage requirements. For purposes of the 8(a) program, the following definitions apply:

- "Socially disadvantaged individuals" are "those who have been subjected to racial or ethnic prejudice or cultural bias within American society because of their identities as members of groups without regard to their individual qualities."[263]

[260] 48 C.F.R. Parts 1-53.

[261] 15 U.S.C. § 637(a).

[262] 15 U.S.C. § 637(a)(4).

[263] 13 C.F.R. § 124.103(a).

They presumptively include African Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and Subcontinent Asian Americans.[264]

- "Economically disadvantaged individuals" are "socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to [non-socially disadvantaged individuals] in the same or similar line of business . . . and such diminished opportunities have precluded or are likely to preclude such individuals from successfully competing in the open market." In determining whether an individual is "economically disadvantaged," SBA specifically considers: (i) the personal financial condition of the individual claiming disadvantaged status; (ii) the financial condition of the business concern itself; and (iii) the individual's ability to obtain access to credit and capital needed to operate a competitive business enterprise.[265]

Under the 8(a) program, SBA assists disadvantaged small businesses in the making and performance of contracts by helping procuring agencies identify potential 8(a) contracts, matching the needs of 8(a) firms with available contracts, and promoting continuity of awards. SBA also establishes the fair market value price the procuring agency would pay for the contracted goods and services. Under the 8(a) program, awards may be made on either a sole source or competitive basis.

### *B. The Small Disadvantaged Business Participation Program*

FAR 19.12 allows agencies to use the participation of small disadvantaged business (SDB) concerns in performance of a contract as an evaluation or subevaluation factor when determining the awardee of a federal contract.[266] In developing these evaluation factors or subfactors, agencies may consider the following:[267]

- The extent to which SDB entities are specifically identified;
- The extent of commitment to use SDB entities;
- The complexity and variety of work SDB entities are to perform;
- The realism of the proposal;
- Past performance of offerors in complying with subcontracting plan goals for SDB entities; and
- The extent the participation of SDB entities in terms of value of the total acquisition.

Thus, the Small Disadvantaged Business Participation Program could be used to promote environmental justice in new EPA procurements by evaluating the deployment of proposed SDB

[264] 13 C.F.R. § 124.103(b).

[265] 13 C.F.R. § 124.104.

[266] *See* FAR 19.1202-1. Because of the multiple uses of the word "concern" in this document, hereafter, we use the phrase "SDB entity" to mean "small disadvantaged business concern."

[267] *See* FAR 19.1202-3; EPAAR 1519.204(c) and 1552.219-74.

entities by each offeror submitting a proposal and theoretically awarding contracts to those entities making the most use of SDB entities.

The policies for assisting small and disadvantaged businesses in government procurements are similar to the tenets underlying environmental justice. Many of the groups defined as "socially and economically disadvantaged" for procurement purposes are those that have been subject to the types of disproportionate environmental burdens that environmental justice is designed to address. In order to promote environmental justice, EPA could more aggressively award contracts under the small and disadvantaged business programs.

### *C. Policies Favoring Small Business Entities Located in Historically Underutilized Business Zones (HUBZones)*

The Historically Underutilized Business Zone (HUBZone) Act of 1997 created the HUBZone program whereby the federal government provides contracting help for qualified small business entities located in historically underutilized business zones "to increase employment opportunities, investment, and economic development in those areas."[268] Under the HUBZone program, there can be a HUBZone set-aside for acquisitions exceeding $100,000 if the contracting officer has a reasonable expectation that offers will be received from two or more HUBZone small business entities and the award will be made at a fair market price. Under these circumstances, procurements over $3,000 but less than $100,000 can be set aside for HUBZone concerns at the contracting officer's sole discretion.[269] Further, a contracting officer may make a sole-source award to a HUBZone entity without considering small business set-asides only if one HUBZone small business entity can satisfy the applicable requirements and if certain dollar thresholds are exceeded.[270]

These policies favoring HUBZone concerns can promote economic empowerment within "urban or rural areas with high proportions of unemployed or low-income individuals."[271]

### *D. Indian Incentive Program*

In addition to the above, FAR 26.100 implements 25 U.S.C. § 1544, which provides an incentive to prime contractors that use Indian organizations and Indian-owned economic enterprises as subcontractors. In short, the Indian Incentive Program allows an incentive payment equal to five percent (5%) of the amount paid to a subcontractor in performing the contract, if the contract so authorizes and the subcontractor is an Indian organization or Indian-owned economic enterprise.[272]

[268] *See* 15 U.S.C. § 631 and FAR Subpart 19.13.

[269] *See* FAR 19.1305.

[270] *See* FAR 19.1306.

[271] *See* 15 U.S.C. § 631(d).

[272] *See* FAR 26.102.

## III. OTHER POTENTIAL PROCUREMENT TOOLS TO ADVANCE ENVIRONMENTAL JUSTICE

### *A. Environmental Justice as Part of Statements of Work and Evaluation Criteria*

The Agency could immediately specify environmental justice tasks in its procurement statements of work so long as those tasks state the Agency's minimum needs and further the Agency's mission.[273] Environmental justice considerations could be incorporated into evaluation criteria as long as the criteria represent the key areas of importance and emphasis to be considered in the source selection decision.[274] For example, under the appropriate circumstances, the quality of an offeror's past performance on environmental justice work could be considered by the Agency as a factor in the award selection process.

### *B. Require Successful Bidders to Incorporate Environmental Justice (By Sub-Contractor or Employment) in Performing the Contract Work*

EPA could potentially require its contractors to promote environmental justice in performing EPA contracts through subcontracting to or direct employment of individuals/groups targeted based on environmental justice considerations. Such a requirement would have to be promulgated as an EPA Acquisition Regulation and go through notice and comment rulemaking in accordance with the Office of Federal Procurement Policy Act[275] before it could be utilized by the Agency.

[273] *See* 41 U.S.C. § 253.

[274] FAR 15.304(b).

[275] 41 U.S.C. § 418b.

# CHAPTER EIGHT: FREEDOM OF INFORMATION ACT

## INTRODUCTION

Access to public information about human health and the environment is a key element of advancing environmental justice under Executive Order 12898 and its accompanying Presidential memorandum. Section 5-5(c) of Executive Order 12898 provides for federal agencies to "work to ensure that public documents, notices, and hearings relating to human health or the environment are concise, understandable, and readily accessible to the public." In addition, the Presidential memorandum specifically directs agencies to "ensure that the public, including minority communities and low-income communities, has adequate access to public information relating to human health or environmental planning, regulations, and enforcement when required under the Freedom of Information Act . . . ."[276]

This chapter discusses well-established legal authorities under the Freedom of Information Act (FOIA).[277] The process identified below has the potential for a high level of impact in advancing environmental justice. In summary, special modifications to advance environmental justice could be incorporated into EPA's upcoming anticipated FOIA rulemaking, followed by introducing new policies and practices implementing FOIA that would achieve maximum results with minimal changes. Thus, a combination of regulatory change, complementary new internal policy and procedures, increased outreach and training for overburdened communities and interested groups, and improved attention to accessibility of information for overburdened communities, can all be used to augment EPA's commitment to environmental justice.

## FOIA

### I. BACKGROUND REGARDING FOIA PROCESSES

FOIA provides the public with access to information regarding the activities of federal executive agencies. It also contains important exemptions that protect certain classes or types of information. A FOIA request is generally a request to a federal agency for access to records concerning another person (as opposed to the requester), an organization within the agency, or a particular topic of interest. In 2009, the Obama Administration issued two memoranda to the heads of agencies, committing to a new level of openness in government and stressing the importance of FOIA in that pursuit.

Over the past decade, the Agency has moved in the direction of more FOIA accountability and reduction of its FOIA backlog. More recently, proactive disclosure of information as a means of eliminating the need for the public to file a FOIA request provides broader access to environmental information. Proactive disclosure of information facilitates several strategy objectives to promote environmental justice. These include, at a minimum,

[276] 30 Weekly Comp. Pres. Doc. at 280.

[277] 5 U.S.C. § 552.

increased public participation in numerous aspects of EPA's work, improved knowledge base on environmental justice issues, increased information and data collection relating to the health and environment of overburdened communities, and related goals.

## II. FOIA PROCESSES—REGULATORY CHANGES AND NEW POLICY/PROCEDURES

EPA's FOIA regulations[278] were last updated in 2002. In 2007, for the first time in over a decade, Congress amended FOIA by passing the OPEN Government Act of 2007. The new law addresses how FOIA is administered and codifies provisions of Executive Order 13392, entitled "Improving Agency Disclosure of Information."[279] EPA's FOIA regulations have not yet been revised to implement the 2007 Act, but EPA expects to do so, informed by guidance from the U.S. Department of Justice.

In the course of revising its FOIA regulations, EPA could consider using the opportunity to advance environmental justice by enhancing access to information by minority, low-income, and indigenous populations. EPA's statutory and regulatory authorities provide a broad, discretionary basis for protecting human health and the environment. Enhancing access to information would recognize the heightened public health concerns often present in overburdened communities.

Improving the effectiveness of FOIA for overburdened communities could likely be done in a number of ways.

First, and not insignificantly, the following approaches are dependent on defining and identifying a given FOIA request as one raising an environmental justice issue. Various authorities emphasize the unique nature of overburdened communities, but as FOIA requests now exist, there is no unique identifier that would identify a given request as sensitive to environmental justice issues. Thus, EPA could develop metrics to clearly and easily identify those requests in the Agency's initial review.

Second, EPA could use discretionary disclosure authority under FOIA to help address the information needs of minority, low-income, and indigenous populations. In March 2009, the U.S. Attorney General encouraged the use of discretionary FOIA disclosures by instituting a series of new principles: (1) an agency should not withhold information simply because it may do so legally; (2) if full disclosure is not possible, an agency should consider partial disclosure; (3) an agency should proactively and promptly handle FOIA requests; and (4) an agency should as a matter of course post information online using modern technology – even in advance of any public request. These principles lend themselves easily to advancing environmental justice and may facilitate the type of information access overburdened communities may need from EPA.

As a general rule, EPA's ability to make a discretionary disclosure depends on whether a discretionary exemption applies. EPA cannot make a discretionary disclosure for non-discretionary exemptions, including Exemption 1 (national security), Exemption 3 (disclosure prohibited by another statute), Exemption 4 (confidential business information), and Exemptions

[278] 40 C.F.R. Part 2.

[279] 70 Fed. Reg. 75373 (Dec. 19, 2005).

6 and 7(C) (both related to personal privacy). Where EPA has information that is covered only by an exemption that allows discretionary disclosure, that information may be released in response to a FOIA request.

Third, a searchable repository of records released under FOIA could be made available on a public website. Such a repository could include an environmental justice "tag" for records and projects that may be of interest to minority, low-income, or indigenous populations. A searchable, public database would aid proactive disclosure of environmental justice data, research, issues, education, and Agency actions. As EPA moves towards proactively identifying and posting FOIA information, it could consider integrating these "tags" into this process. And database design should emphasize accessibility in format, comprehension, ease of use, and cost effectiveness in use.

Fourth, the information needs of overburdened communities may be considered in the way the information is provided or presented. For example, where electronic access may be limited, and the number of responsive records makes it practical to do so, the information can be provided in hard copy. Additionally, where information is of a highly technical nature, explanatory or background information may be included with the response. These opportunities are highlighted further under Section IV below.

## III. FOIA ENVIRONMENTAL JUSTICE TRAINING

Training could be provided to EPA offices in order to enhance responsiveness to environmental justice considerations through the FOIA process, consistent with the reforms discussed above. Training could, among other things, alert staff to look for opportunities to make proactive, public disclosures at an earlier stage, even prior to an actual FOIA request. Informed staff may be able to identify environmental data, information, research, and activities of importance to overburdened communities, and these could be provided on EPA's website. Such proactive, pre-request public disclosures could include, for example, EPA-required information from pollution sources, unless prohibited by law.

Similarly, outreach and training efforts could be increased in interested communities. Training could enhance community awareness of FOIA as a tool to advance environmental justice.

## IV. FOIA PROCESSES: INFORMATION COMPREHENSIBILITY AND ACCESSIBILITY

Information of value to overburdened communities could be created, formatted, and provided to these communities in a way that advances the goals of comprehensibility and accessibility. Although FOIA does not require the creation of new records, the Agency could choose to put information that is highly technical, scientific, medical, or complex in nature into plain language synopses in order to serve a wide range of educational backgrounds. Second, the Agency may choose to translate documents in circumstances involving limited English proficiency. Financial challenges of low-income populations could be taken into account as well – with an eye toward reducing the costs associated with making FOIA requests by perhaps shifting to pre-request electronic disclosures on EPA's website. Limited income may also be associated with reduced access to the Internet, and this may prevent some communities from

seeking public information. Cooperation, training, and outreach to interested groups and public information entities such as libraries may also help address these concerns.

## CONCLUSION

The FOIA process provides a vehicle that could advance environmental justice. Much of what could be accomplished in this area is accessible under current law. Where regulatory change is indicated, it could be accomplished in the course of upcoming, anticipated changes to EPA's FOIA regulations.

# GLOSSARY OF SELECTED ABBREVIATIONS AND ACRONYMS

**A**

| | |
|---|---|
| AA | Assistant Administrator |
| ADR | Alternative Dispute Resolution |
| AFO | Animal Feeding Operation |
| AHERA | Asbestos Hazard Emergency Response Act |
| ALJ | Administrative Law Judge |
| ARARs | Applicable or Relevant and Appropriate Requirements |
| ATSDR | Agency for Toxic Substances and Disease Registry |

**B**

| | |
|---|---|
| BACT | Best Available Control Technology |
| BEACH Act | Beaches Environmental Assessment and Coastal Health Act |

**C**

| | |
|---|---|
| CAA | Clean Air Act |
| CAFO | Concentrated Animal Feeding Operation |
| CEQ | Council on Environmental Quality |
| CERCLA | Comprehensive Environmental Response, Compensation, and Liability Act |
| CFR | Code of Federal Regulations |
| CMOM | Capacity, Maintenance, Operation and Management |
| CSO | Combined Sewer Overflows |
| CWA | Clean Water Act |

**D**

| | |
|---|---|
| DDO | Dispute Decision Official |
| DITCA | Direct Implementation Tribal Cooperative Agreements |

**E**

| | |
|---|---|
| EA | Environmental Assessment |
| EAB | Environmental Appeals Board |
| EIS | Environmental Impact Statement |
| EO | Executive Order |
| EPA | U.S. Environmental Protection Agency |
| EPCRA | Emergency Planning and Community Right-to-Know Act |
| ETS | Environmental Tobacco Smoke |
| EPCRA | Emergency Planning and Community Right-to-Know Act |

**F**

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|---|---|
| FAR | Federal Acquisition Regulation |
| FFDCA | Federal Food, Drug, and Cosmetic Act |

| | |
|---|---|
| FIFRA | Federal Insecticide, Fungicide, and Rodenticide Act |
| FOIA | Freedom of Information Act |
| FQPA | Food Quality Protection Act |

**G**

| | |
|---|---|
| GACT | Generally Available Control Technology |
| GAP | General Assistance Program |

**H**

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|---|---|
| HAP | Hazardous Air Pollutants |
| HRS | Hazard Ranking System |
| HUBZone | Historically Underutilized Business Zone |

**I**

| | |
|---|---|
| IPM | Integrated Pest Management |

**L**

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|---|---|
| LAER | Lowest Achievable Emission Rate |
| LUST | Leaking Underground Storage Tank |

**M**

| | |
|---|---|
| MACT | Maximum Achievable Control Technology |
| MPRSA | Marine Protection, Research, and Sanctuaries Act |
| MS4 | Municipal Separate Storm Sewer System |

**N**

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|---|---|
| NAAQS | National Ambient Air Quality Standards |
| NAICS | North American Industry Classification System |
| NCP | National [Oil and Hazardous Substances Pollution] Contingency Plan |
| NPDES | National Pollutant Discharge Elimination System |
| NPL | National Priorities List |
| NSR | New Source Review |

**O**

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|---|---|
| OCR | Office of Civil Rights |
| OMB | Office of Management and Budget |

**P**

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|---|---|
| PCB | Polychlorinated Biphenyl |
| POTW | Publicly Owned Treatment Works |
| PPA | Pollution Prevention Act of 1990 |

| | |
|---|---|
| PSD | Prevention of Significant Deterioration |
| PWS | Public Water Supply |

**R**

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|---|---|
| RA | Regional Administrator |
| RCRA | Resource Conservation and Recovery Act |
| RMPs | Risk Management Plans |

**S**

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|---|---|
| SBA | Small Business Administration |
| SDB | Small Disadvantaged Business |
| SDWA | Safe Drinking Water Act |
| SIC | Standards Industrial Classification |
| SSOs | Sanitary Sewer Overflows |

**T**

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|---|---|
| TAGs | Technical Assistance Grants |
| TAR | Tribal Authority Rule |
| TAS | Treatment as a State |
| TIPs | Tribal Implementation Plans |
| TMDLs | Total Maximum Daily Loads |
| TRI | Toxics Release Inventory |
| TSCA | Toxic Substances Control Act |

**U**

| | |
|---|---|
| UIC | Underground Injection Control |
| UST | Underground Storage Tank |

**W**

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|---|---|
| WPS | Worker Protection Standards |
| WQS | Water Quality Standards |