

US EPA ARCHIVE DOCUMENT

ENVIRONMENTAL JUSTICE IN THE PERMITTING PROCESS

A Report on Stakeholders' Views

*Prepared for the U.S. Environmental Protection Agency
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EXECUTIVE SUMMARY

Environmental permitting poses a true challenge to the Environmental Protection Agency(EPA). EPA's mission is to ensure, among other things, that all Americans, regardless of race, color, national origin or economic status, are protected from significant risks to human health and the natural environment -- air, water, and land -- where they live, learn and work. EPA must carry out this mission consistent with Executive Order 12898 on environmental justice and federal environmental laws.

Environmental permitting represents the principal arena where companies and communities confront each other over the details of which businesses may operate, where, and under what conditions in or near residential neighborhoods. In short, it is where the rubber hits the road in terms of implementing a host of regulatory standards designed, with varying degrees of adequacy, to protect health and the environment.

This report presents the results of interviews about the permit process with twenty (20) stakeholders drawn from government (EPA, Tribal, State, or local), industry, academia, and community organizations. These discussions revealed common concerns -- and fundamental disagreements -- over where and how to integrate environmental justice in the permitting process.

All stakeholders agreed that EPA needs to address the issue of incorporating environmental justice considerations in permitting because communities increasingly are insisting upon a broader view of permitting and because neither companies nor permit writers know what is expected of them. While several stakeholders stressed that permitting is only one of several contexts in which government agencies need to respond to environmental justice concerns, all agreed that permitting guidelines are a high priority.

Stakeholders differed as to what the Agency's permitting goal should be. Tribal, State, local government, academic and community stakeholders thought agencies should address pre-existing conditions with potential health and environmental impacts. EPA stakeholders, in general, agreed, though several expressed an interest in doing so only for a limited category of permits. Industry stakeholders acknowledged the need to deal with cumulative risk in some fashion (though not necessarily in permitting), and expressed a willingness to explore approaches. Stakeholders identified

twelve (12) government or private sector approaches to addressing environmental justice.

Stakeholders also agreed that the current permit process typically does not address environmental justice issues, though they differed as to what transpires. Industry stakeholders saw the process as largely centered on technical issues of compliance; government stakeholders saw themselves addressing a broader set of issues; community stakeholders saw the process as driven towards finding a means to grant the applicant a permit.

Stakeholders identified numerous problems with the current permit program, including failure to consider environmental justice or cumulative impacts, lack of clear guidance for permit writers on how to address environmental justice, and lack of adequate public participation.

Non-Agency stakeholders agreed that the current program does not adequately include community input, while EPA stakeholders held a range of opinions on this subject, ranking the Agency's performance anywhere from "poor" to quite successful. Stakeholders held mixed views on the utility of Alternative Dispute Resolution as a tool for facilitating stakeholder cooperation.

Stakeholders recommended: (1) expanded public involvement in permitting; (2) addressing cumulative impacts (in permitting or elsewhere); and (3) clarifying what the permit writer should consider and how the permit writer should react when confronted with a disparate impact. Many suggested the need for legal guidance -- presumably from the Office of General Counsel -- in this area. Stakeholders also acknowledged opportunities for mutual industry/community gain in permitting.

Community, Tribal, State, local government, and academic stakeholders enthusiastically endorsed community monitoring of facility compliance. Industry stakeholders were willing to entertain proposals for community monitoring, but expressed caution about data adequacy and accuracy. EPA officials generally were skeptical of the extent to which community monitoring assists technical compliance, but might be less skeptical of its value for enhancing community-facility relations.

Stakeholders also identified additional areas of inquiry into environmental justice issues.

PURPOSE

EPA, through the Office of Environmental Justice, has asked the National Environmental Justice Advisory Council (NEJAC) to provide advice and recommendations on the following question:

In order to secure protection from environmental degradation for all citizens, what factors should be considered by a federal permitting authority, as well as state or local agencies with delegated permitting responsibilities, in the decision-making process prior to allowing a new pollution-generating facility to operate in a minority and/or low-income community that may already have a number of such facilities?

To address this question, NEJAC has scheduled a three-day public meeting of industry, government (federal, Tribal, State, and local), academic, and community stakeholders to explore whether and how the issue of environmental justice could be integrated into the permitting process. The discussion is a prelude to a comprehensive report addressing stakeholder perspectives on this significant issue as well as recommendations for Agency review.

This report summarizes interviews with a representative sampling of stakeholders scheduled to participate in the upcoming public meeting. By interviewing a diverse group of stakeholders in advance, the Office of Environmental Justice intends to lay the groundwork for a focused and productive policy dialogue, make efficient use of the time and talents of participating stakeholders, and ensure that any advice and recommendations for Agency action reflect careful attention to the concerns of all affected parties. This report, therefore, aims to capture the views and voices of the stakeholders in their own words, identifying both potential areas of agreement as well as fundamental differences in perspective.

METHODOLOGY

Twenty (20) stakeholders were interviewed for this report: eight (8) representing EPA programs, three (3) representing industrial interests, three (3) representing academia, three (3) representing State or local governments, two (2) representing community organizations, and one (1) representing a Native American Tribe. A list of the stakeholders and their organizational affiliations is attached as Appendix A.

Each stakeholder was asked a series of questions (Appendix B). In addition, the stakeholders were invited to deviate from the questions to discuss issues, concerns, or insights triggered by the questions and also to suggest other appropriate areas of inquiry.

This methodology has both inherent strengths and weaknesses. The relatively small sample size made it possible to conduct in-depth interviews, focusing not just on stakeholder opinions, but also on the reasoning behind those opinions. On the other hand, the small number of stakeholders and their relative distribution (EPA vs. non-EPA representatives) precludes any quantitative analysis of the results. This report, therefore, presents the results of these interviews principally in terms of their content, adding only the most obvious quantitative references (e.g., where "all," "many," "most," or "several" stakeholders expressed a particular view).

RESULTS

1. The importance of environmental justice in permitting.

All stakeholders agreed that EPA needs to address the issue of incorporating environmental justice considerations into the permitting process and decisions. They differed only in the strength with which they held these views. Even the mildest response acknowledged that *"we need to work out the role of environmental justice in the permitting process."* Most stakeholders ranked the issue as *"important"* to *"extremely important."*

Several stakeholders stressed that permitting is only one of several contexts in which government agencies need to respond to environmental

justice concerns. As one put it, *“Environmental justice is much more than permitting. Doing a good job on the front end makes permitting go much better.”* This State stakeholder stressed the need to incorporate environmental justice concerns into agency policies, programs, standards, and enforcement procedures as well as permits. An industry stakeholder, citing numerous types of government decisions with environmental justice impacts, echoed the sentiment, *“Permitting has a role, but it's not a one-stop answer to environmental justice.... We don't want the permit program to be viewed as the sole fix to 200 years of social ills.”*

On the other hand, stakeholders seemed to acknowledge the importance of placing a high priority on tackling permit concerns immediately. One stakeholder emphasized the confusion, confrontation, and delay that will occur until EPA resolves how to handle environmental justice in permitting. Another emphasized the opportunity to avoid end-of-process Title VI and community complaints. Another concluded, *“Permitting is forward-looking.”* A third noted permitting is a *“promising place to address the problem.... Permits respond to local conditions as compared to a one-size-fits-all national approach.”* One summarized community perspectives, stating that: *“Permitting is the gateway for emissions and the first in a series of possible events that could lead to noncompliance and contamination. Minimum standards are supposed to ensure safety (or so people assume), but in the end, it is the host community that bears the risk. Standards, policies, programs are important, but communities often don't have the resources to participate at that level. So for them, permitting is the key.”*

While acknowledging the need to address environmental justice, stakeholders candidly shared their uncertainty about how to proceed. As one put it, *“This is not something we have thought about until recently.”* Another observed, *“EPA and States are still on a learning curve about how to handle environmental justice issues.”* Still another, raising similar questions, recognized that addressing the issue could *“potentially represent a sea change in the way we do permitting.”*

This dichotomy between a clear goal and an uncertain implementation mechanism frustrates Agency officials. On the one hand, EPA, State, and local government stakeholders expressed a sincere desire to address

environmental justice. Typical comments included the following: *"We are committed to look at [environmental justice in permitting] and seek opportunities for meaningful progress;" "We want to make sure all communities are involved, including environmental justice communities, ... and our decisions occur in as open a process as possible;" and "We can't do a proper permit without looking at those [environmental justice] concerns."*

On the other hand, despite their intentions, Agency officials admitted they can show little practical real world impact to environmental justice communities. An EPA official confessed, *"There is a real bafflement on the part of states and EPA as to how to take environmental justice into account. We don't have the statutory authority, expertise, or tools. We pass around stories and articles and realize we have to do more, but we're not sure what."* A State stakeholder explained: *"Permit writers lack an objective standard or protocol to accept or reject a project. There is no federal definition of disparate impact, so we feel open to suit."* This stakeholder urged EPA to provide the leadership: *"We are looking to EPA for the tools on how to do this."* An EPA official, in turn, said *"Good question ... this is the guidance we want to get from NEJAC."*

2. NEJAC as a forum for addressing this issue.

One key question interviews sought to determine was: Is NEJAC the appropriate forum for initiating a dialogue on this issue? While a few stakeholders demurred on this question (due to lack of direct working experience with NEJAC), all of the stakeholders familiar with NEJAC agreed that NEJAC is, or could be, an appropriate forum for this exercise. Within this overall umbrella of approval, however, stakeholder perception of NEJAC varied, as outlined below.

NEJAC won very high marks from many stakeholders representing community organizations, state and local government, and academia. One stakeholder explained: *"NEJAC is one of the few bureaucratic institutions where community organizations feel they can come and speak openly."* A community representative echoed the sentiment, *"No one else is even trying" to address these issues.* Another stated, *"NEJAC has been very important in lifting up questions about environmental and economic justice."*

Academic stakeholders also praised the Council, *"NEJAC can be a very useful forum. It provides the Agency with a place to have interested stakeholders ventilate their concerns. The Agency has used it historically as a good source of information."* Another added, *"They are as good as any forum -- as good as we have.... They do a good job within the limits they have."*

By contrast, NEJAC earned more measured acceptance and respect from industry stakeholders. (E.g., *"I don't see why they wouldn't be a good forum [to address this issue]. The alternatives are not obviously superior."*)

Within EPA itself, reaction to NEJAC was considerably more mixed. Some Agency officials rated the Council quite highly. One described NEJAC as *"the most knowledgeable about environmental justice issues and concerns."* Several answered simply, *"I can't think of any group who would be better at bringing the right folks together. If not NEJAC, then who?"* Others had had little contact with NEJAC or expressed confusion about how to utilize NEJAC output in program decision-making. E.g., *"NEJAC is a good forum to bounce ideas off, get input from, and share ideas and learning with, but ... one downside of NEJAC is that its various committees are not taking an integrated look at overlapping committee issues. So it is hard to figure out their hierarchy of objectives given limited resources -- in other words, how to make it all fit together at the end of the day. But NEJAC can give valuable feedback on this."* Several flatly stated that NEJAC did not sufficiently reflect pressure from industry, Congress, and the states to make meaningful recommendations for Agency action. (E.g., *"The question is broader than NEJAC"*).

Roughly half of the stakeholders cautioned that, even if NEJAC addresses this issue, there is a need to look beyond NEJAC to a broader group of stakeholders. For some, this represents an effort to achieve a missing balance. (A government stakeholder observed, *"There is a perception that NEJAC is very EJ-friendly."* Indeed, several industry stakeholders suggested more business and local government consultation. By contrast, a community representative strongly argued that more industry and State representation in NEJAC would unbalance the Council, making it resemble other Federal advisory committees which offer communities token

representation diluted by the sheer number of other participants.) For others, though, going beyond NEJAC is simply a way to win broad acceptance of any NEJAC recommendations. Several stakeholders stated that it is important to look more broadly even within EPA itself; e.g., *"All departments and programs within the Agency should be discussing [this issue]."*

Finally, one stakeholder commented that the choice of forum was unimportant. *"It can be any forum as long as EPA listens."*

3. The overall goal of environmental permitting.

Stakeholders differed in their view of the appropriate overall Agency goal in permitting. When asked whether the permit agency should address pre-existing conditions with potential health or environmental impacts in permitting, community stakeholders reply simply and emphatically *"Yes!"* They cited communities where *"shelter in place"* alarms are a regular feature of community life. (*"Shelter in place"* refers to governmental strategies which seek to minimize human exposure to high air pollutant episodes by recommending residents go inside whenever an alarm whistle is sounded.) To community stakeholders, this signified that *"the system is broken.... There is no study which proves that 'shelter in place' works, that [ordinary residential] structures adequately protect people...."* They stressed the need for meaningful planning and siting so that the number of people adversely affected in a worst-case pollution scenario is minimized or eliminated.

The Tribal, State, local government, and academic stakeholders agreed that permit agencies should address pre-existing conditions. One emphasized these factors *"may be more important than sporadic permit issues."* Another added that such considerations *"should not be an afterthought, but should be raised early in the process and used as a guideline for determining whether any [siting] action should be taken at all."* A third concluded, *"A responsible agency looking out for the community's interests should relatively level the playing field."*

Collectively, these stakeholders offered a variety of recommendations for addressing pre-existing conditions. They suggested that, where facilities are sited in or near residential areas, permitting agencies:

- (1) Assess community vulnerability. Typical comments included:
"We need to have a good sense of the existing baseline;" "There ought to be an inventory of pre-existing adverse conditions which shows that [some communities] experience a substantially inferior environment;" "Where you have a vulnerable population (for example, where the incidence of asthma is high), a responsible agency official should be circumspect about permitting another air emitter."
- (2) Identify and weigh cumulative risks, including those associated with a worst-case spill or incident. (Admittedly, quantifying the degree of risk would require better research on both the effects of pollutants and synergism among pollutants.)
- (3) Consider future as well as existing projects. One stakeholder called for *"a future allocation mechanism"* to ensure that the first applicant doesn't absorb all of a neighborhood's potential for growth (e.g., traffic capacity).
- (4) Require applicants for new or modified permits to ask: What modifications are necessary to address environmental justice impacts or cumulative risks?
- (5) Gather and assess economic and demographic data in permitting to ensure that adverse uses don't get disproportionately located among minorities and poor people.
- (6) Establish a budget for addressing pre-existing conditions. One stakeholder warned: *"Any attempt to deal with pre-existing conditions has to be accompanied by a budget."*

Industry stakeholders approached this environmental justice goal more cautiously. They acknowledged *"agencies have to deal with cumulative risk in some fashion,"* but stressed the need for *"legal authority," "clear criteria for injustice," "enough information on emissions and health effects to make clear calls," "[and avoiding having] the system bog down."* They questioned whether *"agencies have the resources to have permit writers become fully conversant with these issues"* and emphasized that different perceptions on the issues may exist even within the local community, further complicating review.

Nonetheless, industrial stakeholders shared with other stakeholders a willingness to explore approaches to environmental justice in permitting. While not endorsing any particular solution, industry stakeholders raised the following possibilities:

- (1) Permit agencies can examine, document, and help raise awareness of pre-existing conditions.
- (2) There could be further public scrutiny of zoning and land use planning for environmental justice impacts.
- (3) Agencies could publicize more information on what factors contribute to successful brownfields projects.
- (4) Rather than subject all permits -- even minor permits -- to full-blown cumulative impact analysis, agencies could screen permits to determine which merit fuller scrutiny because of the size of the source, toxicity of the emissions, or degree of public interest in the outcome.
- (5) Corporate policies on siting and acquisition could be changed so that environmental personnel are integrated into decision-making earlier in the process, before companies are so heavily invested in a particular site. (Under current practice, siting is primarily market-driven. Only after a lengthy analysis of non-environmental factors, such as access to supplies and transportation corridors, growth potential, etc., does a company look at the community, its environment and quality of life.)
- (6) Where high risks exist due to prior land use planning errors, successful relocation efforts and voluntary buy-outs could be examined. In the Netherlands, for example, when cumulative risk analysis indicated that community exposure crossed a specified threshold, the government devised a 5-10 year community relocation plan. Voluntary buy-outs to expand buffer zones around industrial facilities have also occurred in the United States.

In general, EPA stakeholders agreed with the goal of addressing cumulative environmental impacts in permitting (assuming legal authority to do so). Some, however, expressed interest in limiting such analysis to major permits, "cancer alleys," or "hot spots," while others appeared to embrace it for a broader universe of permits. Several recommended greater attention to

the environmental impacts of zoning and planning decisions, and other stakeholders concurred.

1. The focus of current permitting.

The stakeholders shared differing views as to what now transpires in the permit process. Industry stakeholders saw the current process as largely centered on technical issues of compliance with federal and state discharge regulations. Government stakeholders saw themselves addressing a somewhat broader set of issues -- still largely centered on compliance with technology requirements, but also encompassing public participation, protection of health and the environment, interagency coordination, enforcement, and state oversight. In marked contrast, Tribal and community stakeholders saw the process as exceedingly narrow, ignoring treaty rights and community views -- indeed, driven toward a distinctly (from their view) biased result. One cited situations where facility construction is underway while the permit application is purportedly still being considered: *"Companies wouldn't invest this money if they didn't feel they could get their permit."* Another put it: *"The process proceeds with an eye toward nothing but technical compliance with numbers and, if there is not compliance, then how can we help the facility get its permit?"* At least one EPA stakeholder appeared to agree: *"If the objective [of the community] is to stop the permit altogether, ... it is hard for EPA to share that goal. Our goal is to make sure these sources have permits, unless they don't comply [with applicable regulations]."*

All stakeholders, however, agreed that, absent a stronger or more comprehensive state statute, the current process does not address the type of environmental justice concerns being raised by Tribal and community organizations. One EPA official summarized, *"There is not a wit given to environmental justice issues [in permitting]."*

Even where states look at cumulative impacts (for example, under a state NEPA-type statute), the analysis tends to be cursory in comparison to the issues raised by environmental justice groups. As one stakeholder put it, *"We are better at looking at project-specific impacts than we are at looking*

at the cumulative impacts of related projects. Even when we try to do so, we fall short.... We tend to jump directly to mitigation. With environmental justice especially, we need to go back to how to avoid impacts, then how to minimize them, and then mitigation. There is a hierarchy there.... We also need to ask what are the real objectives of the project? What alternatives are we required to consider under the law? We seldom look at how these are written. But if they are not broad, then we don't look at issues of alternatives."

2. The limitations of the current permit program,

The most frequently cited problems with the current permit program were: (1) the failure to consider environmental justice or cumulative impacts; (2) the absence of clear authority (either from explicit statutory language or official Agency legal interpretation) to address environmental justice in permitting; and (3) the lack of adequate public participation.

Other problems stakeholders mentioned included fundamental weaknesses in the level of protection provided by the underlying regulatory standards and failure to obtain pre-decisional input from Native American Tribes. One stakeholder also questioned whether existing sources, less subject to intense scrutiny in permit proceedings, weren't often more of a problem than the more thoroughly reviewed new sources.

3. Stakeholder involvement in the permit program.

While all stakeholders agreed on the importance of community involvement in permitting, EPA stakeholders tended to differ from others over the adequacy of current public participation.

Non-Agency stakeholders agreed that the current program does not adequately include community input. Industry stakeholders ranked the process *"not a good job"* to *"terrible."* They criticized: (1) the inadequate publicity (*"It's not in the local papers, what the community reads."*); (2) failure to address language barriers; (3) lack of efficiency in public meetings (*"They're time wasters; they lack focus."*); (4) heavy and unnecessary reliance on technical language; (5) poor outreach (*"The same old*

[stakeholder representatives] are always consulted"); and (6) poor timing: "The timing is all wrong. Thirty days at the end of the process makes no sense when the company and agency have been negotiating together for years. The agencies should move it up. " One noted that Agency staff suffer from the same syndrome as corporate personnel: "It is a tough thing for plant managers to swallow when the little lady next door has the right answer." This stakeholder also observed, "Technical people are often unqualified to run public meetings. They often try to devise technical solutions to what are essentially relationship problems."

When asked whether agencies now do a good job, a community stakeholder responded *"resoundingly no!"* This community representative faulted agencies for *"absolute reluctance and resistance ... to meet,"* and for not *"listening and incorporating stakeholder concerns. For example, they say 'we have an approach to deal with this problem without any input.... Take it or leave it'."* Another, noting that *"EPA has come a long way,"* stated, *"I want to be respectful of what has been done, but things could be moving a lot faster."* This stakeholder observed a tendency in some Regions to do *"just enough to get by."*

Tribes, too, felt uninvolved at meaningful stages of the process. Academic, State and local government stakeholders also identified public participation as an area in need of strengthening.

EPA stakeholders presented a different picture. While some confessed the Agency does a poor job of stimulating public involvement, most rank the Agency's performance as *"okay," "getting better,"* or varied depending upon the State or location. Several cited the *"many opportunities"* for public involvement, the *"clear open door,"* and the *"stakeholder-driven"* nature of the Agency. Several stakeholders, however, noted with concern a growing tension between demands upon EPA from Congress and other stakeholders to streamline the permit process, on the one hand, and conflicting pressure to slow down to include more public participation.

Regardless of how they viewed the current process, stakeholders identified similar criteria for determining whether the public participation process is working:

- Public knowledge of pending permit decisions would be more widespread. (*"It would be a long time since you heard the complaint that I didn't know [about this proceeding] and they wouldn't listen to me."*)
- *"The community would be showing up at meetings."*
- The public would be *"informed enough to participate effectively."*
- Proceedings would be characterized by *"meaningful dialogue"* on community issues. Communities would suggest operating conditions and other adjustments in facility operations.
- *"Permits [would] more regularly respond to individual community needs."*
- *"Ongoing, continuing communications"* would occur between stakeholders, perhaps even after permit issuance.
- There would be greater indicators of community satisfaction with the process (E.g., *"People would feel heard and heard early in the process."* One stakeholder suggested EPA survey for such indicators, *"You could ask stakeholders after-the-fact, 'Did you have the information you needed?'"* EPA could then examine responses to outline a successful model.)
- There would be greater satisfaction among EPA's own Regional Environmental Justice Coordinators.
- Permit writers also would feel satisfied. They would *"be able to look at all affected populations and feel comfortable that they understood and had input."*
- *"See what happens to the pollution loading. Is it coming down? Is there real world progress or just messing around with public participation?"*

A community stakeholder had specific recommendations for achieving better participation: a commitment to public participation at the Regional Administrator level in all regions, in-depth training of Agency personnel at all levels, and additional resources for communities to do their own training and to acquire technical assistance (legal, scientific, medical, etc.). This stakeholder commented, *"You can't talk about equality when you have one side with resources and the other with none. The Agency has to be prepared to assist in balancing the equality."*

1. Facilitating stakeholder cooperation.

While stakeholders acknowledged that the current permit process can be adversarial -- at times needlessly so, they generally rejected casting the solution as a search for a more cooperative permitting model. A community stakeholder stated flatly, *"It's not a matter of finding a more cooperative mechanism... The struggle comes in because the community feels that it is not being treated properly."* A government stakeholder explained: *"The amount of conflict should not be a criterion. Conflict could be a sign of a healthy process."* An industry representative amplified: *"The issue is not cooperation. People need a platform to be heard. They need to have their questions and concerns addressed. If that happens, people can accept a technical answer better. They will still disagree, but not violently."* As one industry stakeholder explained, the issue of cooperation is really one of finding better ways to facilitate communication: *"We need better communication. That will lead to cooperation."*

In general, most EPA stakeholders tended to view facilitated Alternative Dispute Resolution (ADR) as potentially helpful in certain high controversy permit proceedings -- if done effectively, and therefore worthy of further exploration. However, other stakeholders warned against too eager or sweeping an embrace of ADR.

For example, industry stakeholders viewed the utility of ADR as dependent, to a great extent, on the problem-solving, communication, and persuasion skills of the facilitator: *"It could help. It depends on who's doing it. Ideally, you want the lines of communication to include some sense of what the community wants."* Another echoed: *"Some people are terrible at it. Problem-solving requires certain skills; you have to have them."* An academic stakeholder agreed: *"This is an area that is ripe for ADR ... [but also] a challenging area for ADR. If the ADR people tend to look and act condescending to the environmental justice representatives, trust evaporates immediately."*

Academic stakeholders warned that ADR can *"be troubling as a response [in view of] power disparities [between the facility and the community];"* they suggested *"ADR has no real integrity until you equalize*

the playing field," but admitted it is difficult to craft appropriate "safeguards." A Tribal representative also cautioned that, while ADR "used properly is an effective tool," used improperly it can be "a tool to coerce based on a 'panel of experts' opinions'."

A community stakeholder described ADR as "nothing more than process ... trying to get to yes when they never considered why the community would say no.... The issue is not properly framed.... It's not a matter of finding a more cooperative mechanism.... Antagonism exists now because the agency and the facility are unwilling to consider significant changes and the 'no project' option." Another cautioned, "ADR may hinder.... It depends on the situation and the process the parties went through - whether they will trust [ADR]."

Indeed, lack of trust appeared as a serious obstacle to further use of ADR. An industry representative summarized: "Corporations are nervous about giving away too much. Attorneys don't like unless they're doing it. Communities either fear giving away too much or else they're not comfortable. If the ADR person is paid by the company or the government, communities assume he or she will hold their [paying] views in higher regard."

But trust is not the only obstacle. ADR also requires resources and time. An industry spokesman explained: "Going public takes more time which is often inconsistent with business needs. To speed up [public involvement], you have to start early and have an infrastructure to support it." A government stakeholder also warned: "ADR is a lengthy process and it doesn't necessarily resolve the dispute."

Several stakeholders cautioned that success with ADR requires more definition of the underlying ground rules of the transaction. One explained: "ADR begs the question. It's like asking an arbitrator to resolve a claim without providing the information that may lead to an agreement. It may be a good safety valve, ... [but] the real concern is that the rules of the road are unclear." Another agreed: "The parties start from different premises without settled law. Everyone is afraid to negotiate anything away, especially at the beginning." A third echoed the need for EPA

leadership: *"EPA needs to decide the parameters of the box.... EPA can set people up to fail if they don't set forth ... the ground rules and time constraints. If they just say, 'Let's all get together and solve the problem' without any consequences, people come together but there is no reason to come to agreement."* One stakeholder concluded that agencies need to know what they are doing when they embrace ADR or other facilitation techniques so as not to frustrate environmental justice communities anew: *"When you promise a new solution, you can breed further unhappiness if you don't solve the problem."*

2. Expanding the horizons of current permitting.

Three (3) recommendations for improving the current permit process emerged continually in these interviews. The first relates to expanded public involvement. As one stakeholder put it, *"People feel not welcomed or taken seriously. Everyone agrees we ought to fix that."* The second relates to consideration of cumulative impacts. The third involves clarifying the permit writer's obligations. All three (3) are discussed below.

a. Expanded public involvement.

Stakeholders frequently recommended improvements in: (1) timing of public involvement; (2) agency and company responsiveness to communities; and (3) conduct of public meetings.

Typical comments from industry stakeholders on the timing of public comment included the following:

- *"Often the largest challenge is creating a credible public dialogue. The earlier this occurs, the better the public is served. The later it happens, the more the public feels left out, that the deal is done."*
- *"The current system requires public input, but only late in the process. This tends to create an adversarial environment rather than an open public dialogue because of the lateness. It leaves the public feeling that its vote didn't count, that they weren't heard -- and it's true to some extent."*

- *"There is ample room for creative expansion of notice (TV, bulletin boards, etc.) This is not rocket science. It's deciding it's worth it."*

Community stakeholders agreed. One stated: *"Permittees talk to the agency on a daily basis for years before the first public hearing. It's only human nature; [the agency staff] don't want to hear what's wrong with a permit they have spent two years writing. They should have a hearing on the day of the application and give everyone whatever information they have."*

Industry stakeholders also recommended that companies listen more effectively to communities. One stated: *"Companies should make a commitment to respond in writing with a report to each question and a copy to anyone who wants one. They can supply an interim report if they don't have answers to all the questions right then."* This echoed community sentiments that agencies and companies give mere *"lip service"* to their comments.

Finally, industry and community stakeholders recommended that EPA improve the quality of public meetings. An industry representative stated, *"EPA is terrible at running public meetings. Their very nature tends to create an adversary environment. There is technology in mediating and facilitating a public forum, but the agency hasn't embraced it."* A community representative agreed: *"Usually, it's one A.M. before[permit] opponents have a chance to testify."*

b. Identification of cumulative impacts.

All stakeholders agreed that environmental agencies -- whether through permitting, regulation, or cooperation with land use agencies -- need to address cumulative impacts in some fashion. Permit writers, in particular, decry the lack of tools and guidance on how to accomplish this task.

c. Clarifying the permit writer's obligations.

Stakeholders agreed that there is also a need to define more clearly what the permit writer should do when confronted with disparate treatment.

Government stakeholders frequently cited their lack of authority to reject projects on environmental justice grounds. Community stakeholders, by contrast, claimed that Agency staff have not been asked to respond creatively to Office of General Counsel guidance identifying existing statutory authority. An industry stakeholder summarized, *"On the substance, there is real intellectual bankruptcy. What are the rules of the road? What does the Executive Order forbid? What is the basis of a Title VI complaint? What is the right thing to do? Companies fear that projects will be abandoned or delayed without reason and that others will go forward where they shouldn't..... There is no coherent understanding of what we're trying to do."* Taken together, these comments suggest the need for additional legal guidance -- presumably from the Office of General Counsel -- in this area.

9. Opportunities for mutual stakeholder gain.

Industry stakeholders were optimistic about the possibility of identifying opportunities for mutual stakeholder gain. One stated: *"There are lots of win-win opportunities. You can get people talking, get companies to be better corporate neighbors, enhance community involvement."* Examples of opportunities these stakeholders envision included: *"certainty that a company can get a permit and operate within it,"* avoiding *"after-the-fact Title VI complaints which drive companies crazy [by] upfront discussions to surface and resolve problems,"* *"making companies pay more attention to communities,"* and identifying *"opportunities for emission offsets [that reflect] the community's understanding of the emission sources [most strongly] impacting their lives."* Industry also saw unexplored benefits for communities: *"The continued operation of a well-run facility brings employment and secondary benefits from jobs. Facilities attract support services and other facilities."* In addition, *"facilities can do things for communities that the city may not do ... such as addressing suppliers' driving habits."*

Industry stakeholders cautioned, however, that consensus is possible only up to a point. As one stated: *"You can't control what people want. It goes back to expectations. Neighborhood control over who can operate there is not realistic, but better outreach, process, safety, housekeeping is all doable."* Another clarified that impasse-type situations comprise only a small percentage of permit applications : *"The [current] process is not*

broken, though it might not be adequate. But it is broken on the highly controversial issues. Where a company does a sneak attack with the application, that's when people get frustrated. Ninety-nine of one hundred permits happen without contest. A whole lot of permits involve only minor modifications of a facility. The controversy centers around siting ... or where a facility has already ticked off the community. But these are the exceptions rather than the rule."

Community stakeholders also sensed some opportunities for mutual gain. One stated: *"We want industries that want to be good neighbors.... From a proactive side, it is worth it to spend time on what we want it to be like - envisioning our communities."* Another added: *"The process could be revamped to take multiple, cumulative, synergistic impacts into account. We could also create buffer zones. The agency has the authority to be more protective than it is now.... We could change ways of thinking in industry and the agencies. Industry could see profits go up with cleaner facilities. Agencies could say 'do we have discretionary authority to address this problem,' [rather than] 'show me a direct mandate'."*

These stakeholders' optimism, too, was edged with realism. *"It's not that toxic facilities will go elsewhere, but we can find a way to produce products without sacrifice to health and the environment. The ultimate goal is sustainable development, not dead-end, extractable, exploitative development."* A Tribal stakeholder cautioned, *"When you balance the economy versus the ecology, this has to be done in small steps, carefully thought through, with the involvement of the entire community. You need input early, upfront, and as a guideline for the eventual decision."*

10. Community monitoring of compliance.

Stakeholders differed markedly in their initial responses to questions about community monitoring of facility compliance, though the differences may have had more to do with whether their response was focused on ensuring technical compliance or enhancing program credibility.

Community, Tribal, state, local government, and academic stakeholders, for the most part, enthusiastically endorsed community monitoring of facility compliance. They cited a variety of obvious, as well as innovative, ways to accomplish this objective, including:

- a. bucket brigades in which citizens learn how to collect and send samples to EPA-approved labs (used as the basis for at least one successful enforcement action in Region IX),
- b. requiring companies with continuous emission monitoring to have digital printouts on stacks reporting their emission limits,
- c. Community Advisory Committees,
- d. monitoring and enforcement by other governmental entities (e.g., Tribes and local governments),
- e. use of qualified consultants,
- f. community-facility good neighbor agreements, and
- g. daily posting of compliance data on the web.

A community representative pointed out that *"the Agency can't be everywhere"* and that citizen monitoring *"from the front porch"* can be maintained over longer time intervals than temporary Agency monitors. This stakeholder also observed that many community groups distrusted Agency enforcement personnel as *"dismissive"* of their concerns and suspected that *"it's a rare instance where monitoring doesn't show a violation."*

Industry stakeholders were willing to entertain proposals for community monitoring, but expressed caution about issues such as inadequate data quality, errors in data transmission, collection of data which is unwanted and unused, and the risk of citizen suits. Nonetheless, industry stakeholders accepted the fact that compliance data will be made public.

Industry stakeholders also recognized that the issue of community monitoring of compliance is intertwined with the notion of trust. As one stakeholder put it, *"Communities don't want to run the company. They want to be listened to and have their questions answered. If you establish a trust relationship, the community will rely on you to do the job. If you don't, you can't possibly supply enough data."* This may explain why industry stakeholders were not adverse to exploring ways to enhance community trust in compliance data -- for example, sending a community representative into a facility to read monitoring dials or requiring companies to respond to community questions about compliance.

EPA stakeholders as a group expressed the greatest skepticism to community compliance monitoring. One stated *"Community policing is best left to the regulatory agency."* Others *"doubt[ed] its effectiveness,"*

questioned the expense and practicality, cited the difficulties in training citizens, saw themselves as already addressing the need (by requiring companies to submit annual reports to the community), or saw additional requirements as unnecessary because citizens are already using monitoring data to file enforcement suits or urge EPA to step up enforcement.

It is not clear, however, that EPA stakeholders would differ so substantially from other stakeholders if the goal were enhanced facility-governmental-community relations as opposed to mere technical compliance with regulatory standards. Most EPA stakeholders were not familiar with situations in which community monitoring had either assisted the agency or increased public acceptance of the regulatory program. If community monitoring proposals were tailored to accomplish these ends, they might have garnered more support from EPA. As one EPA official put it, *"if it would reduce suspicion,"* then community monitoring would be helpful.

11. Additional issues.

Most stakeholders expressed satisfaction with the scope of the interview questions. Several suggested additional areas of inquiry, including but not limited to the following:

- a. How to promote agency awareness of, and response to, the Office of General Counsel's identification of EJ opportunities under existing statutes and how to get permit writers to begin utilizing these opportunities.
- b. How to address environmental justice in *"all of the program decisions that stack the deck by the time you get to permitting ... (i.e., program design, policy formation)."*
- c. How to start looking at not just the permit process, but the *"implementation level of permitting ... what's happening day to day... go further into the nuts and bolts. This could raise a plethora of issues."*
- d. How to address cross-agency coordination, engaging other federal agencies (e.g., HUD), state agencies and local health departments in addressing environmental justice (including funding states).
- e. How to develop a national policy to ensure State consistency in addressing disparate impacts, in order to avoid industrial forum shopping for lax regulatory jurisdictions.

- f. How to distinguish between competing objectives, defining not only a vision of success, but also priorities and intermediate steps for achieving the vision.
- g. How to determine which sources pose the biggest risks for environmental justice communities (i.e. permits for new sources or small, existing, mobile, or other sources) in order to target agency resources and maximize risk reduction.
- h. How better to incorporate input from Tribes, which occupy a unique status as sovereign stakeholders and which differ from each other in terms of religion, culture, and ways of living.
- i. How to address the need for jobs -- and good ones -- in environmental justice communities. E.g., *"The number one factor in life expectancy/longevity is poverty. Poverty doesn't get factored in well."*

CONCLUSION

The stakeholders surveyed here shared many common concerns -- and fundamental disagreements -- over where and how to address environmental justice concerns regarding permitting. Nonetheless, the degree of accord suggests that there are promising opportunities for consensus on recommendations which enhance the capacity of the current permit process to respond to stakeholders' needs regarding environmental justice.

Accord was greatest on issues related to better public outreach, expanded community participation in decision-making, greater assurances of industry compliance, and greater attention to cumulative risks. Stakeholders differed more sharply over a community's right to prevent siting of a facility which otherwise complies with applicable regulatory standards. However, stakeholders acknowledged that these situations represent a small percentage of permit applications and can frequently be avoided by changed industry and government behavior (such as early involvement of environmental personnel in internal corporate decision-making and community representatives in government decision-making.) For the bulk of permit decisions, the stakeholders surveyed here have laid the foundation for an ample set of recommendations for EPA review.

APPENDIX A

List of Interviewed Stakeholders

EPA Stakeholders:

Tim Fields
Assistant Administrator
Office of Solid Waste and Emergency Response (OSWER)

Rob Brenner
Acting Deputy Assistant Administrator
Office of Air and Radiation (OAR)

Vernon Myers
Environmental Scientist
Office of Solid Waste and Emergency Response (OSWER)

Freya Margand
Environmental Protection Specialist
Office of Solid Waste and Emergency Response (OSWER)

Anna Wood
Regulatory Impact Analyst
Office of Air and Radiation (OAR)

Bob Kellam
Associate Director
Information Transfer and Program Integration Division
Office of Air and Radiation (OAR)

Rosanna Hoffman
Attorney Advisor
Office of Water

Tom Voltaggio
Region III Deputy Regional Administrator

Tribal/State/Local Government Stakeholders:

Stuart Harris
Cultural Resources Coordinator
for the Special Science and Resources Program
Confederated Tribes of the Umatilla Indian Reservation

Robert Varney
Commissioner
New Hampshire Department of Environment

Andrea Kreiner
Manager, Business and Permitting Services Office
Delaware Department of Natural Resources & Environmental Control

Lillian Kawasaki
General Manager
City of Los Angeles Department of Environmental Affairs

Russell Harding (could not be interviewed due to scheduling conflicts)
Director
Michigan Department of Environmental Quality

Industry Stakeholders:

Pat Hill
Senior Manager
Georgia Pacific

Michael Steinberg
Attorney at Law (Partner)
Morgan, Lewis & Bockius

Jerry Martin
Vice President & Global Director of EJ&S Regulatory Affairs
Dow Chemical Company

Community Stakeholders:

Richard Moore
Director
Southwest Network for Environmental and Economic Justice

Nathalie Walker
Managing Attorney
Earthjustice Legal Defense Fund

Deeohn Ferris (could not be interviewed due to scheduling conflicts)
Owner
Global Environmental Resources, Inc.

Academic Stakeholders:

Richard Lazarus
Professor
Georgetown University Law Center

Yale Rabin
Professor
Massachusetts Institute of Technology

Eileen Gauna
Professor
Southwestern Law School

APPENDIX B

Interview Questions

1. How important is the issue of incorporating environmental justice considerations in environmental permitting?
2. Is NEJAC the appropriate forum for initiating a dialogue on this policy question?
3. What are the most important factors, or categories of factors, that the permitting authority now considers when making a permitting decision?
4. What are the problems (both substantive and procedural) with the permitting process in terms of addressing environmental justice issues?
5. What types of factors, if any, should the permitting authority consider to help ensure environmental justice in permitting?
6. Should the permit authority address pre-existing potential health or environmental conditions in the affected community with respect to permit actions? If so, how (e.g., through cumulative impacts analysis, siting criteria, assessment of vulnerable or sensitive populations, or some other mechanism)?
7.
 - (a) Is stakeholder involvement in the permitting process important to the development of good decision-making or important for other reasons (other than to satisfy legal requirements)?
 - (b) Is the permitting process now doing a good job of involving the public at large, and environmental justice populations in particular, in permit decision-making?
 - (c) What are the three things that EPA and/or the permitting authority does best to involve stakeholders in the permitting process and the three things they do least well?
 - (d) Are there improvements you could suggest?
 - (e) How would you assess whether the process is working well at involving stakeholders in a meaningful manner?
8.
 - (a) Does the current permitting process encourage cooperative or adversarial relationships among stakeholders? Would a process that encourages cooperation be advantageous?
 - (b) Would dispute resolution techniques help or hinder the permitting process?
 - (c) What are the obstacles to use of dispute resolution?

9. (a) What are your most important needs from the permitting process?
(b) Are there opportunities in the permit process for mutual community/industry gain?
(c) What could be done to encourage such opportunities?
10. (a) Would permit terms and conditions providing for community monitoring of compliance be of use?
(b) Are there instances where community monitoring has improved compliance or the relationship between the permitted facility and other stakeholders?
11. How should the Agency address quality of life issues and risk communication in the permit process?
12. Are there other questions NEJAC should be asking about this topic?
Other suggestions you would like to make?