

April 29, 2011

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**Re: Comments on the “Considering Environmental Justice in Permitting,”
Section of Draft Plan EJ 2014, Docket #EPA-HQ-OECA-2011-0293**

Dear Ms. Siciliano and Ms. Roos:

The EPA has published on its website a Draft Plan EJ 2014 and requested comments. The Lawyers’ Committee for Civil Rights Under Law has had an Environmental Justice Project for many years and much of the work of the Project has involved environmental permitting processes. In response to the website notice and your email of April 8, I wish to submit comments regarding the portion of the Draft Plan EJ 2014 entitled “Considering Environmental Justice in Permitting.”

Over the past 18 years, the Lawyers’ Committee has worked with environmental justice advocates and represented people of color and low-income communities to eliminate disproportionate pollution burdens. On June 9, 2010, the Lawyers’ Committee for Civil Rights Under Law published a report entitled “Now is the Time: Environmental Injustice in the U.S. and Recommendations for Eliminating Disparities.” The full report may be found at: www.lawyerscommittee.org/admin/site/documents/files/Final-Environmental-Justice-Report-6-9-10.pdf. The purpose of this document was to recommend specific ways that the Obama Administration could further environmental justice. “Now is the Time” grew out of a 2009 convening of leading environmental justice advocates,

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lawyers, researchers and scholars to discuss the state of environmental justice in the United States and to identify federal efforts that could be undertaken to provide equal protection for those people and places that had borne a disproportionate burden of pollution and its adverse affects. This convening was followed by months of writing, discussing and editing the report. Numerous individuals contributed to the substance of “Now is the Time,” which is a compilation of decades of research and reporting. It is unique in its effort to bring together the diversity of specialties, expertise and views on environmental and civil rights protection and enforcement.

On the EPA website concerning the Draft Plan EJ 2014, there are a set of questions posed to help formulate comments. Our comments address two of the questions regarding environmental permitting. One section of the “Now is the Time” report is entitled “National Environmental Policy Act (NEPA) and Environmental Permitting.” As set forth below, this section contains information that should be considered in addressing the questions posed and in formulating a plan for including environmental justice in the permitting process.

I. Are there scientific or legal issues that could be clarified in order to strengthen implementation of this area of Plan EJ 2014, and what steps should EPA take to address such issues?

The “Now is the Time” report recommends specific legal actions which would strengthen this area of Plan EJ 2014.

First, in the section of the report addressing environmental permitting, it is recommended that EPA should revisit a memorandum prepared in 2000 entitled “EPA Statutory and Regulatory Authorities Under Which Environmental Justice May Be Addressed in Permitting.” This memorandum analyzes a significant number of statutory and regulatory authorities under the Resource Conservation and Recovery Act, the Clean Water Act, the Safe Drinking Water Act, the Marine Protection, Research, and Sanctuaries Act, and the Clean Air Act that the Office of General Counsel believed are available to address environmental justice issues during permitting. (Report, p. 6).

Second, the report recommends that the White House Council on Environmental Quality should be directed to amend NEPA regulations at 40 CFR 1508.8 to expressly identify environmental justice as an issue in NEPA compliance documents. (Report, p.5)

Third, the report recommends a second action by the White House Council on Environmental Quality – to amend NEPA regulations 40 CFR 1505.2 and 1505.3, or issue policy guidance directing Federal agencies to establish an enforceable mitigation monitoring plan for any mitigation measure in a NEPA compliance document that reduces environmental justice impacts below the significance level. (Report, p.5)

II. How can EPA better engage communities, our regulatory partners, and all stakeholders when implementing this area of Plan EJ 2014? What ways can our strategies better focus on and address the concerns of minority, low-income, indigenous and other overburdened populations?

Appendix A of “Considering Environmental Justice in Permitting” in the Draft Plan EJ 2014 lists a set of tools and resources that can be used to “better enable disproportionately burdened communities to have full and meaningful access to the permitting process and for permits to address environmental justice issues to the greatest extent practicable.”

Our recent experience with environmental permitting concerns the proposed expansion of the Port of Gulfport, MS, for which significant funding – \$570 million – is coming from Community Development Block Grant (CDBG) funds appropriated in 2005 and 2006 for recovery from Hurricanes Katrina and Rita. Starting in November 2007, the Mississippi State Port Authority (MSPA) filed several applications for environmental permits with the U.S. Army Corps of Engineers. In response, the Lawyers’ Committee has filed, on behalf of local Mississippi clients, comments with the Army Corps of Engineers on these applications for environmental permits related to this project on several occasions.

From this experience, we have learned some important lessons related to environmental permitting. Foremost amongst our concerns is that little attention is being given to environmental justice issues in the environmental review process. For example, on March 11, 2011, the Army Corps published a notice of its intent to prepare an Environmental Impact Statement (EIS) to assess the potential environmental impacts associated with the construction and operation of the Port of Gulfport Expansion Project (see 76 Fed. Reg. 13363 (March 11, 2011)) and held a public scoping meeting on March 31, 2011. In the section concerning the “preliminary identification of environmental issues,” the Army Corps’ notice lists environmental issues for analysis. Of great concern to our client, the Steps Coalition, which is a coalition of low income and minority grassroots organizations in the Gulfport-Biloxi area, was the failure of the Army Corps to identify environmental justice as one of the issues to be examined. A copy of our comment letter dated April 14, 2011 is attached and raises this issue at pp. 3-5.¹

This experience indicates the need for new tools and/or protocols in the permitting process. More specifically, it illustrates why another recommendation from the “Now is the Time Report” is especially important, and should be included in the tools that will

¹ The same failure of the Army Corps to address environmental justice issues occurred in 2007 when the MSPA first sought such a permit. This failure was especially egregious with respect to the 2007 application because that application included the construction of an inland facility to store and ship cargo that was directly adjacent to the North Gulfport community. A copy of the comment letter of January 25, 2008 identifying this shortcoming at pp.6-7 is also attached.

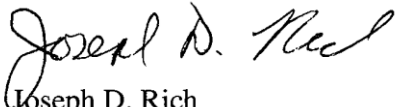
“better enable disproportionately burdened communities to have full and meaningful access to the permitting process and for permits to address environmental justice issues to the greatest extent practicable.” That recommendation states:

Prior to undertaking any environmental permitting or other federal action that may adversely affect human health or the environment, the lead federal agency should be required to conduct an environmental justice analysis to determine whether significant disproportionate adverse effects would be caused by the action and, to the maximum extent feasible, avoid, minimize or mitigate the adverse environmental justice impact. (Report, p. 4)

Such a requirement would ensure that environmental justice issues are addressed by permitting agencies. Most importantly, it would provide affected low income and minority communities with much-needed information about environmental justice issues during the permitting process and make it easier for them to engage in said process.

Thank you for the opportunity to submit these comments. Should you wish to discuss them, I may be reached at jrich@lawyerscommittee.org or 202-662-8331.

Sincerely,



Joseph D. Rich
Director
Fair Housing and Fair Lending Project
Lawyers' Committee for Civil Rights Under Law