

DEQ Integration – Subgroup Report
October 2, 2009

I. Issue Statement

The subgroup was charged with describing how Environmental Justice (EJ) principles can be integrated into DEQ activities. In order to address this issue, the subgroup considered the following major component issues:

- A. In what contexts would the DEQ need or have an opportunity to address EJ considerations?

The response on this issue is addressed in Section II

- B. What has the DEQ done in the past to address EJ considerations in its activities?

There are three noteworthy aspects of the DEQ's past involvement with Environmental Justice:

1. Previous effort to develop an EJ Policy

The DEQ formed an EJ Workgroup in 1998 when Russell J. Harding was Director of the agency. The focus of this workgroup was on addressing recent EPA guidelines on EJ in DEQ programs rather than on developing a state-wide EJ plan. The EJ Workgroup produced a report dated October 12, 1999 and titled "Environmental Justice Recommendations" (Attachment 1). The recommendations in this report were never formalized in a policy or plan. There were a number of controversial decisions by the DEQ and then Governor John Engler which resulted in some workgroup members refusing to participate and disbanding of the EJ Workgroup in 2000. However, this effort sparked interest in improving DEQ public outreach procedures. A draft document dated January 24, 2001 and titled "Model Community Outreach Plan" (Attachment 2) was prepared which helped a number of divisions within the DEQ make improvements in their public outreach procedures.

2. Litigation and Administrative Complaints

DEQ has been the subject of both litigation and administrative complaints alleging environmental injustices.

After the then-DNR issued a permit in 1992 to the Genesee Power Station Unlimited Partnership to operate a wood waste incinerator in Genesee Township, the NAACP and others filed a lawsuit alleging

violations of civil rights and environmental laws. The Circuit Court found that DEQ had violated its constitutional duty to protect the health, safety, and welfare of Michigan's citizens by failing to give surrounding communities impacted by the incinerator a meaningful opportunity to be heard. The Court also directed the DEQ to conduct a risk assessment. The decision was overturned on appeal because the plaintiffs had not pleaded these claims.

Community groups have also filed a number of civil rights complaints with the EPA about DEQ's permitting activities. These complaints allege that DEQ used discriminatory methods in granting permits in minority communities. (For a further discussion of Title VI, see Section I.C.) A complaint was filed in the Genesee Power case above, but a decision was never issued. The rest of the complaints have been dismissed. Of these decisions, two are notable.

In 1998, the EPA determined that a Flint steel mini-mill operated by Select Steel did not adversely impact minority residents because the facility complied with ambient air quality standards. The EPA later advised states that compliance with environmental laws does not shield a state from a Title VI violation. But ambient standards are presumed to be protective of residents' health unless there is evidence to the contrary.

In 2002, the EPA determined that a hazardous waste well in Romulus did not cause disparate impacts because the percentage of minorities in the area immediately surrounding the well was less than the state average. However, the EPA noted that the DEQ did not have a program in place to evaluate Title VI issues and was instead relying on EPA Region 5 guidelines that did not include consideration of disproportionate impacts or cumulative effects. The EPA "strongly" encouraged the DEQ to develop a policy to ensure that the DEQ is in compliance with Title VI.

3. Enhanced Public Outreach Procedures

The DEQ is currently undertaking some advanced public outreach, most notably by the Air Quality Division (AQD). The AQD recognizes that projects that are large, controversial or located in environmental justice communities may benefit from enhanced public outreach procedures. Enhanced public participation efforts help to promote collaborative solutions to difficult environmental problems.

For these projects, a preliminary public meeting is typically conducted before the formal public comment period begins. The purpose of this meeting is to provide information about the project to the public, to

open lines of communication between AQD staff experts and the public, and to offer a question and answer period. Another purpose of these preliminary meetings is to seek input from the public on the design of the formal public comment process. Additional interested party mailings and public meetings are often conducted in response to this input. AQD staff also meet personally with representatives of local community groups and environmental groups and make personal contact with individuals who express interest in the project. Enhanced public participation includes one or more of the following additional procedures:

- Placing applications and supporting information on the AQD Web page;
- Providing documents in appropriate languages for the community;
- Soliciting and receiving comments via e-mail;
- Issuing press releases to remind the public of the meetings and hearings;
- If requested by community members, providing additional mailings to area churches and community groups;
- Holding at least one collaborative public meeting in the community at which environmental groups as well as the applicant and AQD participate as presenters;
- AQD staff conducts follow-up surveys with meeting/hearing participants to gain further insight into community concerns. Much of this work is performed after-hours on staff's own time.

C. Are there any legal requirements related to the consideration of EJ principles?

The DEQ is prohibited from (1) intentionally discriminating against minority residents and (2) undertaking activities that cause an unjustified disparate impact on minority residents. For the legal provisions and citations, "Title VI and Environmental Justice" (Attachment 3).

1. Intentional Discrimination

Under the equal protection clauses of the Michigan and the United States Constitutions, the DEQ is prohibited from intentionally discriminating against minority residents in its activities. To determine whether there has been intentional discrimination, courts generally look to circumstantial evidence: whether there is a disparate impact, the historical background to the decision, the history of the decision-making process, departures from normal substantive factors or procedures, and the legislative or administrative history.

As a recipient of federal financial assistance, DEQ is also prohibited from discriminating on the grounds of race, color, or national origin under Title VI of the Civil Rights Act. In lawsuits, the DEQ is subject to the same standard of intentional discrimination as in the equal protection context. DEQ would lose federal funding if there is a Title VI violation that is not remedied.

2. Disparate Impact Discrimination

While Title VI prohibits intentional discrimination, EPA's Title VI regulations prohibit a broader category of actions—those that have the effect of subjecting individuals to discrimination. EPA has defined discriminatory effects as those that cause an "unjustified adverse disparate impact." Compliance with environmental laws does not by itself demonstrate compliance with Title VI. These regulations can only be enforced through complaints filed with the EPA.

In 1998, the EPA issued Interim Guidance for Investigating Title VI complaints, which set forth the steps by which the agency would consider Title VI complaints. In 2000, after stakeholders criticized the Interim Guidance as unclear, the EPA issued Draft Revised Guidance that explained in more detail each of the steps. The EPA also issued Draft Title VI Guidance on environmental permitting programs for funding recipients. These guidances have not been finalized, but they provide suggestions for developing a state EJ program. These are discussed in Section III.

D. Are there any constraints on the DEQ's consideration of EJ principles?

The primary constraints on the DEQ's ability to consider EJ principles are budgetary. The recommendations of this report will all, to some degree, require resources to implement. The DEQ budget has suffered significant reductions in general fund support in recent years and is expected to see further reductions for at least the immediate future. This will force the DEQ to concentrate on a narrowing band of priority functions and activities. Investment in new activities and ways of conducting operations, such as called for in this report, will be increasingly difficult as a result.

Another potential constraint could relate to the internal DEQ culture. Specifically, DEQ staff generally perceive the laws they administer and environmental standards they apply as per se protective of public health and the environment. It might be difficult, therefore, to recognize the application of those laws and criteria as potentially not being protective because of local circumstances. Depending on how the DEQ responds to this situation, staff may believe that actions necessary to address those

local circumstances are beyond the scope of the department's legal authority.

Finally, to be effective, a policy integrating EJ principles into DEQ activities must have acceptance among a wide range of interests affected by those activities. The need for this general political acceptability must also be recognized.

E. What are the potential impacts of EJ integration on economic development and urban redevelopment?

Integration of EJ principles into DEQ activities could have positive or negative impacts on economic development and urban redevelopment.

Positive impacts could result if integration encourages green development in affected communities through, for example, economic incentives or other measures that result in less pollution. Addressing environmental justice considerations could also improve the quality of life in affected communities, thereby encouraging further appropriate economic activities. Incorporating environmental justice principles can be used as a guide for the business community to pursue the triple bottom line of sustainable economic development.

While environmental justice concerns and economic development are not inherently at odds with one another, negative impacts could result if integration creates a dual standard for built-out, urban communities. Imposing new requirements that increase regulatory requirements and costs and create regulatory uncertainties in EJ communities could serve as an obstacle to certain types of economic development in those built-out urban communities. This could essentially serve as a roadblock to some economic development in minority or urban communities. Driving some development away from urban areas could further encourage urban sprawl and create associated unsustainable demand on public infrastructure. Implementation should guard against potential negative consequences and seek positive alternatives that compensate for negative consequences to achieve a net positive result.

II. Context and Assumptions

The subgroup recognizes that its charge is related to other components of the EJ Plan. Our understanding of how these components are being addressed and how these other efforts relate to the work of this subgroup are as follows:

- A. The Disparate Impacts Subgroup is charged with developing a method for identifying the circumstances that will trigger the need to consider or apply Environmental Justice (EJ) principles in Department of Environmental

Quality (DEQ) activities. The subgroup will also identify underlying principles which will assist other state departments in developing their own disparate impacts and EJ policies and plans.

We assume that the activities this subgroup recommends for the DEQ to conduct in furtherance of EJ considerations will be applied in accordance with the methodology developed by the Disparate Impact subgroup.

- B. The Public Involvement subgroup will provide insights into how the DEQ can enhance public involvement practices as a component of EJ principle integration.

We assume that, to the extent the DEQ Integration subgroup recommends enhanced public involvement practices as a means of addressing EJ considerations, they will be derived from the work of the Public Involvement subgroup.

- C. The Petition Process subgroup will provide a method for citizens to seek redress for adverse or disproportionate social, economic, or environmental impact upon a community.

We assume that while a DEQ action may trigger a petition, or DEQ activities could be identified as a means of addressing adverse or disproportionate impacts, these determinations will be made on a case-specific basis and do not need to be addressed generally through the issue addressed by the DEQ Integration subcommittee.

- D. The Interdepartmental Integration subgroup will provide a mechanism and means for state agencies to integrate and coordinate their activities in support of EJ principles.

We assume that how the DEQ will participate in and contribute to that effort will be considered through the Interdepartmental Integration subgroup's efforts. A relationship to the work of the Interdepartmental Integration subgroup's effort is identified as an alternative under "permitting" on page 10.

Based on the above understanding of the interrelated work of the various subgroups, the DEQ Integration subgroup will focus attention on how to incorporate EJ considerations into administrative activities such as permitting decisions, compliance and enforcement activities, and grant/other incentive programs.

In developing our report, the subgroup made the following assumptions:

1. There are geographic areas in Michigan that have suffered differential environmental impacts that continue to affect the health of the citizens in these communities.
2. Michigan will continue to suffer economically for the foreseeable future. This will have the effect of limiting resources available to the DEQ to fund existing programs, address EJ considerations, and create pressure for economic development.
3. DEQ staff have a limited, although somewhat growing, understanding of EJ principles and the skills and experience necessary to effectively addressing EJ considerations.

III. Relevant Models and Experience

Both the federal government and states have developed programs integrating EJ into the activities of environmental agencies. These are described below.

A. Federal Model

The EPA has addressed EJ issues by incorporating EJ principles into its activities under the 1994 Executive Order on Environmental Justice, and by implementing its Title VI regulations that govern state agencies such as DEQ.

1. Executive Order Activities

The Executive Order directs each agency to "make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations." Each agency is also directed to create an environmental justice strategy that, at minimum, promotes enforcement of statutes in areas with minority and low-income populations, ensures greater public participation, improves research and data collection, and identifies differential patterns of consumption of natural resources.

According to a review of EPA activities conducted in 2001 by legal academics, EPA has focused primarily on providing grants and improving public participation.¹ For example, EPA has given numerous EJ grants to community-based groups, including brownfield grants to promote voluntary private cleanups. EPA has also translated documents into languages other than English and

¹ Denis Binder et al., *A Survey of Federal Agency Responses to President Clinton's Executive Order 12898 on Environmental Justice*, 31 *Env'tl L. Rep.* 11,133 (2001).

revised its public involvement policy. In reviewing EPA permits, the Environmental Appeals Board requires the EPA to provide early and ongoing opportunities for public involvement; and to use the agency's discretion to focus particularly on minority and low-income communities in conducting a health and environmental assessment.

2. Title VI Activities

In its draft guidance to states, EPA suggests three ways to incorporate Title VI consideration into state permitting: (1) a comprehensive approach that improves the permitting process overall and incorporates such activities as staff training, adverse impact & demographic analyses, effective public participation and outreach, intergovernmental involvement, and reducing and/or eliminating adverse disparate impacts; (2) an area-specific approach that encourages stakeholders to develop an agreement to eliminate disparate impacts; and (3) a case-by-case approach that uses general criteria to evaluate permits and follows EPA's steps in analyzing complaints.

The EPA analyzes whether there is a Title VI violation using the following steps:

- *Assess Applicability:* Determine that the permit action is a new permit or a renewal; modifications such as a name change are not generally considered.
- *Define Scope:* Determine the community concerns, the stressors at issue, and the sources of stressors that need to be considered in the analysis, including background sources and unregulated sources.
- *Impact Assessment:* Determine whether the activities of the permitted entity alone or in combination with other sources cause an impact.
- *Adverse Impact Decision:* Determine whether the impact is significant by assessing cumulative effects, such as cumulative cancer risk levels and hazard index values. If the permit complies with a health-based ambient standard, there is a presumption that there is no significant adverse impact; however, this presumption may be overcome if there is evidence that residents are exposed to high levels of the pollutant from other sources.
- *Characterize Populations and Conduct Comparisons:* Define the affected population and determine whether a disparity exists between the affected population and a comparison population in terms of demographic characteristics and impacts.

- *Adverse Disparate Impact Decision:* Determine whether the disparity is significant. Disparities of at least a factor of 2 are likely to be significant.

An adverse disparate impact may be justified if the permit is reasonably necessary to meet a goal that is legitimate, important, and integral to the recipient's institutional mission and there are no less discriminatory alternatives. Thus, for example, adverse impacts from a wastewater treatment plant could be justified if there are no practicable and comparatively effective alternatives.

B. State Models

States have taken a variety of approaches to the consideration of EJ issues. The most comprehensive programs are found in California, Connecticut, Massachusetts and New York. For a list of program activities in other states, see "Elements of Other State Environmental Justice Programs" (Attachment 4).

IV. Recommendation

A. Goals

EO 2007-23 requires that EJ principles are incorporated into DEQ decision-making and practices in order to:

1. Identify and address discriminatory public health or environmental effects of state laws, regulations, policies and activities.
2. Preventing discriminatory or negative public health or environmental effects of the same actions.
3. Maximize the promotion of EJ while minimizing or eliminating adverse or disproportionate social, economic or environment impact.

B. Methods

The Subgroup recommends that these goals be met through three general methods, to the extent resources are available:

1. Building Capacity in the DEQ for understanding and implementing EJ principles. Developing tools and information, training, and creating some level of expertise all serve to build such capacity.

The DEQ should:

- Train key staff in each division in environmental justice principles and their application by the DEQ in its activities.
 - Develop an EJ handbook for use by all DEQ staff. This handbook should allow DEQ staff to recognize how the operational policy described in Item 2 below relates to their day-to-day activities.
 - Identify an EJ Coordinator within the DEQ who will be responsible for assisting and evaluating the DEQ's EJ related programs and activities. This person should also serve as a point of contact for outside parties with EJ-related concerns with DEQ activities.
2. Operationalizing the exercise of EJ principles so that they become part of the way the DEQ conducts its business. This entails creating expectations and identifying tasks through which DEQ staff start to think and act upon EJ principles. The DEQ should:
- Develop an operational policy that describes the department's approach to EJ and adopts implements these integration recommendations. For example, the process by which EJ activities will be triggered within the DEQ should be specified.
 - Make information on EJ and the DEQ's EJ activities available to interested parties, including the regulated community.
 - Post EJ related information on the DEQ website
 - Create fact sheets on key regulatory programs for EJ communities. These fact sheets should explain, for example, the purposes of the regulatory programs, the nature of appropriate decision-making factors used in the program, and how the public can be involved in the program.
 - Create a regional EJ outreach team for Southeast Michigan to act as liaison for the DEQ with EJ communities and local units of government. Provide similar expertise for other districts through Lansing central staff, with assistance from district staff. Use the EJ Coordinator to assist in these efforts.
 - Coordinate with the Department of Community Health in assessing and studying public health issues associated with cumulative environmental impacts in EJ communities.
3. Exercising EJ principles in practice. This entails specific actions the agency undertakes at a functional level in terms of prevention

(permitting, compliance and enforcement), remediation (cleanup of contamination), and incentives (grants and incentives).

In general, the DEQ should prioritize inspections enforcement, compliance assistance, remediation and other activities to assist in identifying and mitigating disparate impacts. The DEQ should undertake the following with respect to specific activities:

a. Permitting

The DEQ should use enhanced public involvement and voluntary activities on the part of permit applicants to address environmental justice concerns.

- (1) Use enhanced public involvement techniques developed by the Public Involvement Subgroup.
- (2) Ensure that all applicable legal authorities and criteria are appropriately applied to minimize any detrimental public health or environmental effect of the proposed activity on the affected community.

Encourage the project applicant and affected community to cooperatively identify and address other public health and environmental stressors affecting the community. If agreed upon by the applicant, voluntary actions can be embodied in permit conditions. If it can be helpful, the DEQ should facilitate appropriate meetings or other interactions between the project applicant and affected community. The DEQ should further encourage such positive interactions by formally recognizing project applicants that voluntarily undertake actions to address community concerns and developing case studies that describe successful examples of this approach.

The DEQ should also participate in the Pilot Sustainable Alternative Agreement Process described below.

b. Compliance and enforcement

Each division should develop a written statement describing how environmental justice considerations will be used in its compliance and enforcement activities. At a minimum, this should include:

- Prioritizing monitoring, inspections, compliance and enforcement activities in Environmental Justice communities.

- Promptly and completely responding to complaints of illegal environmental activities in environmental justice areas to the extent of the division's abilities.
- A process for targeting compliance inspections upon becoming aware of significant adverse impacts caused by environmental pollutants in environmental justice areas to ensure emitters of those pollutants are meeting their legal obligations to control emissions.

c. Remediation

The DEQ should give additional consideration to undertaking remedial projects in environmental justice areas.

d. Incentive programs

The DEQ should provide additional consideration to awarding grants, loans and other incentive programs that will benefit environmental justice areas.

Additional incentives for brownfield redevelopment should be developed. These new incentives should carry with them a need to address EJ considerations in the affected communities.

The DEQ should provide EJ communities assistance with grant applications.

e. Pilot Sustainable Alternative Agreement Process

The DEQ should work with the Interdepartmental Work Group (described in the Interdepartmental Integration Report) to develop a pilot "Sustainable Alternatives Agreement" (SAA) process. The SAA is a contractual agreement between a person proposing a project, an Interdepartmental Work Group, and/or the community stakeholder group that uses incentives to encourage economic development and address disproportionate impacts in the affected community. The Pilot SAA process is further described in Attachment 5.

A SAA process could borrow successful elements of existing programs in Michigan and other states. It should be initiated only as a pilot program since it comprises a fusion of ideas and applies them in a new context (on behalf of EJ Communities in Michigan). A pilot could help refine aspects of the program (e.g., what incentives are most effective), as well as assess the appropriateness of full-scale implementation. A pilot should be conducted for a minimum of three years and involve at

least five proposals before a decision is made on extending the program and, if so, in what form. At the end of this time period, the Interdepartmental Work Group should seek public comment on the success of the pilot process and issue a report to the Governor and the Legislature that makes recommendations on how to proceed.

V. Alternatives

The Subgroup considered adding to the permitting process a mandatory dialogue between the permit applicant and the community with the permitting decision contingent upon the outcome. This alternative was not selected because the subgroup could not reach consensus on whether there is legal authority to require such a step and whether a dual standard in environmental justice communities and the resulting uncertainty would discourage appropriate economic development in those areas.