

CP- 29 Environmental Justice and Permitting

New York State Department of Environmental Conservation

DEC Policy

Issuing Authority: Commissioner Erin M. Crotty

Date Issued: 3/19/03

Latest Date Revised: 3/19/03

I. Summary:

This policy provides guidance for incorporating environmental justice concerns into the New York State Department of Environmental Conservation (DEC) environmental permit review process and the DEC application of the State Environmental Quality Review Act. The policy also incorporates environmental justice concerns into some aspects of the DEC's enforcement program, grants program and public participation provisions. The policy is written to assist DEC staff, the regulated community and the public in understanding the requirements and review process.

This policy amends the DEC environmental permit process by identifying potential environmental justice areas; providing information on environmental justice to applicants with proposed projects in those communities; enhancing public participation requirements for proposed projects in those communities; establishing requirements for projects in potential environmental justice areas with the potential for at least one significant adverse environmental impact; and providing alternative dispute resolution opportunities to allow communities and project sponsors to resolve issues of concern to the community.

This policy will promote the fair involvement of all people in the DEC environmental permit process. It will do this by training and educating DEC staff on environmental justice; providing public access to DEC permit information; incorporating environmental justice concerns into DEC's permit review process; and pursuing technical assistance grants to enable community groups in potential environmental justice areas to more effectively participate in the environmental permit review process.

This policy contains groundbreaking elements which will lead the nation in environmental justice. As such, the DEC expects that the policy will be revised regularly to account for new information in the area of environmental justice and other issues encountered during the implementation of this policy.

II. Purpose and Background:

In 1998, various and diverse parties interested in environmental justice, including a number of environmental justice advocates and minority and low-income community representatives from across New York State, met with the DEC Commissioner to express concern over environmental justice issues. Concerns raised by interested parties included, but were not limited to: the lack of meaningful public participation by minority or low-income communities in the permit process; the unavailability or inaccessibility of certain information to the public early in the permit process; and the failure of the permit process to address disproportionate adverse environmental impacts on minority and low-income communities.

On October 4, 1999, in response to the concerns raised by parties interested in environmental justice, DEC announced a new program to address environmental justice concerns and ensure community participation in the state's environmental permitting process. DEC named an Environmental Justice Coordinator to oversee the Office of Environmental Justice and develop DEC's Environmental Justice Program, and created two staff positions in the Division of Environmental Permits. DEC also established the New York State Environmental Justice Advisory Group (Advisory Group) comprising representatives from state, local and federal government, community groups, environmental groups, and the regulated community. The Advisory Group, chaired by the Environmental Justice Coordinator, was asked to develop recommendations for an environmental justice permit policy and recommend elements for an effective environmental justice program.

On January 2, 2002, the Advisory Group submitted a report to DEC Commissioner Erin M. Crotty containing its recommendations for creating an effective environmental justice program. The report: *Recommendations for the New York State Department of Environmental Conservation Environmental Justice Program* focuses on the environmental permit process and is intended to ensure DEC's programs are open and responsive to environmental justice concerns. Additional recommendations for an environmental justice program are also included in the report.

The DEC held public meetings state-wide to solicit public comment on the Advisory Group report and accepted public comment for a period in excess of 50 days, through February 22, 2002. This policy is based on the Advisory Group report, public comment on the report and DEC staff recommendations.

On August 7, 2002, a draft of this policy was released for public review and comment. The comment period exceeded 90 days, ending on October 11, 2002. Numerous detailed comments were received by the DEC and are reflected in this policy and in the implementation of this policy.

III. Policy:

It is the general policy of DEC to promote environmental justice and incorporate measures for achieving environmental justice into its programs, policies, regulations, legislative proposals and activities. This policy is specifically intended to ensure that DEC's environmental permit process promotes environmental justice. This policy supports the DEC's continued funding and implementation of environmental programs that promote environmental justice, such as urban forestry, environmental education, the "I Fish NY" program and watershed enhancement projects. This policy also encourages DEC efforts to implement other programs, policies, regulations, legislative proposals and activities related to environmental justice.

This policy shall become effective 30 days after the full text of this policy, or a summary thereof, along with information on how the full text may be obtained, has been published in the Environmental Notice Bulletin, as defined in Environmental Conservation Law 70-0105. Any application for a permit received after the effective date of this policy will be subject to the provisions of this policy.

This policy shall be reviewed at least 18 months from the effective date and revised, as necessary, to consider the policy's applicability to various DEC Programs, incorporate evolving information on environmental justice and reflect the best available environmental protection information and resources. The 18-month period shall enable DEC to further develop implementation procedures, better identify resources needed to implement the policy, and determine appropriate legislative, regulatory and policy changes that can be implemented. Thereafter, DEC shall periodically evaluate the need for further revision, as implementation experience is gained.

This policy will not be construed to create any right or benefit, substantive or procedural, enforceable by law or by equity by a party against the DEC or any right to judicial review. This policy may be subject to change at the discretion of DEC.

A. Definitions. For purposes of this policy, the following definitions shall apply.

1. *Census block group* means a unit for the U.S. Census used for reporting. Census block groups generally contain between 250 and 500 housing units.
2. *Environmental justice* means the fair treatment and meaningful involvement of all people regardless of race, color, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies. Fair treatment means that no group of people, including a racial, ethnic, or socioeconomic group, should bear a disproportionate share of the negative environmental consequences resulting from industrial, municipal, and commercial operations or the execution of federal, state, local, and tribal programs and policies.
3. *Low-income community* means a census block group, or contiguous area with multiple census block groups, having a low-income population equal to or greater than 23.59%* of the total population.
4. *Low-income population* means a population having an annual income that is less than the poverty threshold. For purposes of this policy, poverty thresholds are established by the U.S. Census Bureau.
5. *Major project* means any action requiring a permit identified in section 621.2 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR Part 621.2), which is not specifically defined as minor.
6. *Minority community* means a census block group, or contiguous area with multiple census block groups, having a minority population equal to or greater than 51.1%* in an urban area and 33.8%* in a rural area of the total population.
7. *Minority population* means a population that is identified or recognized by the U.S. Census Bureau as Hispanic, African-American or Black, Asian and Pacific Islander or American Indian.

* The percent threshold relies on 2000 U.S. Census data. The percent threshold may be adjusted as U.S. Census data is revised.

8. *Potential environmental justice area* means a minority or low-income community that may bear a disproportionate share of the negative environmental consequences resulting from industrial, municipal, and commercial operations or the execution of federal, state, local, and tribal programs and policies.

9. *Rural area* means territory, population, and housing units that are not classified as an urban area. See definition for ‘urban area’ below. For purposes of this policy, rural classifications are established by the U.S. Census Bureau.

10. *Urban area* means all territory, population, and housing units located in urbanized areas and in places of 2,500 or more inhabitants outside of an urbanized area. An urbanized area is a continuously built-up area with a population of 50,000 or more. For purposes of this policy, urban classifications are established by the U.S. Census Bureau.

B. Policy Directives. With respect to this policy, DEC shall:

1. Upon the effective date of this policy, provide enhanced accessibility to public permit information held by the DEC, including access to DEC permit information on the DEC Website and a toll free environmental justice hotline to enable the public to access the Office of Environmental Justice during business hours;
2. Upon the effective date of this policy, use geographic information system screening tools and U.S. Census data to identify potential environmental justice areas within New York State;
3. Upon the effective date of this policy, use enhanced public participation and public notification mechanisms, including those which are most effective in potential environmental justice areas.
4. Upon the effective date of this policy, DEC shall make guidance available to assist permit applicants in complying with the Public Participation Plan requirements of this policy. The guidance shall contain tools and information, including those that will better enable the applicant to engage community residents in potential environmental justice areas in the environmental permit review process;
5. Upon the effective date of this policy, facilitate alternative dispute resolution between permit applicants and the public to resolve conflicts in the permit review process;
6. Upon the effective date of this policy, educate permit applicants with respect to environmental justice, the environmental review process, the requirements of this policy and the methodology for identifying a potential environmental justice area by distributing information on environmental justice to permit applicants;

7. Upon the effective date of this policy, provide to interested members of the public such information on environmental justice that is provided to permit applicants. Within six months from the effective date of this policy, the DEC shall identify and begin conducting workshops to educate the public with respect to environmental justice, the environmental review process, the requirements of this policy and the methodology for identifying a potential environmental justice area;

8. Upon the effective date of this policy, establish two work groups to assist DEC to develop and incorporate critical environmental justice information into the DEC environmental review process. Each work group shall report its results to the DEC Commissioner no later than six months after the effective date of this policy. The results will be considered by the DEC Commissioner when revising this policy;

i. One work group shall develop recommendations for conducting a disproportionate adverse environmental impact analysis as a component of the environmental impact statement. Although the Advisory Group report recommended a basic methodology for conducting such an analysis, further definition and specific criteria are needed;

ii. A second work group to be established in conjunction with the New York State Department of Health, shall identify reliable sources of existing human health data and recommend means to incorporate such data into the environmental review process;

9. Within three months from the effective date of this policy, educate DEC staff with respect to environmental justice, the environmental review process and the requirements of this policy. The DEC Office of Environmental Justice shall develop a curriculum and begin implementation of formal training on environmental justice to affected staff in the Divisions of Air Resources, Solid & Hazardous Materials, Water, Environmental Permits, Public Affairs and Education, and other divisions. DEC staff charged with policy implementation have already received training;

10. Within three months from the effective date of this policy, begin conducting supplemental compliance and enforcement inspections of regulated facilities to ensure that facilities are operating in compliance with the Environmental Conservation Law. Supplemental enforcement and compliance inspections will apply to facilities located in potential environmental justice areas where there is reason to believe that such facilities are not operating in compliance with the Environmental Conservation Law;

11. Within three months from the effective date of this policy, translate information on the DEC environmental permit process for comprehension by non-English speakers. The DEC Office of Environmental Justice shall translate the following documents into Spanish: What is SEQR?; A Citizen's Guide to SEQR; The SEQR Cookbook; How to Apply for a DEC Permit; the Guide to Permit Hearings; and the Guide to Mediation Services. The DEC shall also evaluate the need for translation to other languages;

12. Within three months from the effective date of this policy, draft legislation to establish funding and criteria for a technical assistance grant program to assist the public in the permit review process. Funding for the technical assistance grant program shall be derived from the Environmental Protection Fund and may be supplemented by other funding opportunities;

13. Within six months from the effective date of this policy, draft regulations to enhance the effectiveness and strengthen the elements of this policy and address potential adverse environmental impacts that may bear disproportionately on potential environmental justice areas, including regulations to establish mandatory public participation requirements; regulations to require the electronic submission of environmental impact statements; regulations to establish additional criteria for determining significance pursuant to 6 NYCRR 617.7. The DEC will also review the list of Type I actions at 6 NYCRR 617.4, evaluate the need for amendments to include actions that may bear disproportionately on potential environmental justice areas and draft regulations based upon the evaluation;

14. Within six months from the effective date of this policy, propose draft revisions to the full environmental assessment form to, among other things, include information that can be used to identify adverse environmental impacts which bear disproportionately on potential environmental justice areas, and

15. Ensure compliance with the procedural elements of this policy.

IV. Responsibility:

The Office of General Counsel shall provide oversight to ensure compliance with this policy. Each DEC division and office affected by this policy, including those responsible for the permit programs listed in section V.A.1 of this policy, is expected to provide support to fulfill the elements of this policy.

V. Procedure:

The following procedure shall be incorporated into the DEC permit review process when the DEC serves as Lead Agency under the State Environmental Quality Review Act (SEQR). Where the DEC is not the Lead Agency under SEQR, the DEC shall implement the following procedure to the extent permitted by law, including Applicability, the Preliminary Screen, Guidance to Permit Applicants, Enhanced Public Participation, Environmental Impact Assessment, Coordinated Review and Alternative Dispute Resolution. All other requirements related to SEQR shall be strongly encouraged.

A. Applicability.

1. Except as provided for below, the policy shall apply to applications for major projects and major modifications for the permits authorized by the following sections of the Environmental Conservation Law:

- i. titles 7 and 8 of article 17, state pollutant discharge elimination system (SPDES) (implemented by 6 NYCRR Part 750 et seq.);
- ii. article 19, air pollution control (implemented by 6 NYCRR Part 201 et seq.);

iii. title 7 of article 27, solid waste management (implemented by 6 NYCRR Part 360): including minor modifications involving any tonnage increases beyond the approved design capacity and minor modifications involving an increase in the amount of putrescible solid waste beyond the amount that has already been approved in the existing permit;

iv. title 9 of article 27, industrial hazardous waste management (implemented by 6 NYCRR Part 373); and

v. title 11 of article 27, siting of industrial hazardous waste facilities (implemented by 6 NYCRR Part 361).

2. This policy shall not apply to permit applications for minor modifications, except as provided above, nor to renewals, registrations or general permits.

3. Permits authorized by delegation for sources subject to the federal requirements of prevention of significant deterioration (PSD) are subject to a review process under federal regulations and will undergo an environmental justice analysis consistent with EPA policy and guidance. Sources subject to the federal requirements of PSD will also be subject to other state permits applicable under this policy which will trigger the requirements of this policy in addition to the environmental justice analysis required by EPA policy and guidance.

B. Methodology for Conducting Preliminary Screen. Upon receipt of an application for a permit covered by this policy, the DEC Division of Environmental Permits shall conduct a preliminary screen to identify whether the proposed action is in or near a potential environmental justice area(s) and determine whether potential adverse environmental impacts related to the proposed action are likely to affect a potential environmental justice area(s).

1. Identify Potential Adverse Environmental Impacts and Area to be Affected. DEC staff in the Division of Environmental Permits and the affected environmental quality divisions shall identify potential adverse environmental impacts associated with the proposed action. Environmental quality program staff shall also identify the area to be affected by the potential adverse environmental impacts.

2. Determine Whether Potential Adverse Environmental Impacts are Likely to Affect a Potential Environmental Justice Area. An integrated geographic information system and demographic application (GIS Application), shall be used to determine whether potential adverse environmental impacts from the proposed action are likely to affect a potential environmental justice area. Using the information from section V.B.1 above, Environmental Permits staff will determine if any census block groups, meeting the GIS application thresholds for a potential environmental justice area, are within the affected area. The census block groups meeting the GIS application thresholds for a potential environmental justice area should fall substantially within the affected area. If no census block group(s) meeting the GIS application thresholds for a potential environmental justice area is identified, the proposed action is not likely to affect a potential environmental justice area and the permit review process may continue independent of the elements of this policy. If a census block group(s) meeting the GIS application thresholds for a potential environmental justice area is identified, the proposed action is likely to affect a potential environmental justice area and the remainder of these policy requirements shall be incorporated into the review process.

C. Guidance to Permit Applicants. Where a potential environmental justice area is identified by the preliminary screen, the DEC Division of Environmental Permits shall provide the applicant with relevant information on environmental justice. This may include a copy of this policy, the methodology for identifying a potential environmental justice area, guidance developed to implement the policy (e.g., guidance for developing and implementing a public participation plan), information on the alternative dispute resolution process and other documents as applicable.

D. Enhanced Public Participation Plan. Public participation in the DEC environmental permit review process means a program of activities that provides opportunities for citizens to be informed about and involved in the review of a proposed action. To ensure meaningful and effective public participation, this policy requires applicants for permits covered by this policy to actively seek public participation throughout the permit review process. Applicants are encouraged to consider implementing the public participation plan components prior to application submission.

1. Where a potential environmental justice area is identified by the preliminary screen, the applicant shall submit a written public participation plan as part of its complete application. At a minimum, the plan must demonstrate that the applicant will:
 - i. Identify stakeholders to the proposed action, including residents adjacent to the proposed action site, local elected officials, community-based organizations and community residents located in a potential environmental justice area;
 - ii. Distribute and post written information on the proposed action and permit review process. Information shall be presented in an easy-to-read, understandable format, using plain language and, when appropriate, public notice materials shall be translated into languages other than English for comprehension by non-English speaking stakeholders;
 - iii. Hold public information meetings to keep the public informed about the proposed action and permit review status. Meetings should be held throughout the permit review process at locations and times convenient to the stakeholders to the project;
 - iv. Establish easily accessible document repositories in or near the potential environmental justice area to make available pertinent project information, including but not limited to: application material, studies, reports, meeting presentation materials and media releases. The applicant may also establish a repository on the internet.
2. As part of the public participation plan submission, the applicant shall include a report which summarizes: all progress to-date in implementing the plan; all substantive concerns raised to-date; all resolved and outstanding issues; the components of the plan yet to be implemented and an expected time line for completion of the plan.
3. Upon completion of the public participation plan, the applicant shall submit written certification that it has complied with the plan. As part of the certification, the applicant shall submit a revised report detailing activity which occurred subsequent to the initial submission of the report. The certification shall be signed by the applicant, or the applicant's agent, and submitted to DEC prior to a final decision on the application.

E. Full Environmental Assessment Form. Where a potential environmental justice area is identified by the preliminary screen, a full environmental assessment form shall be completed for those actions classified as Unlisted in 6 NYCRR Part 617 and meeting the applicability requirements of this policy. (A full environmental assessment form is currently required for all Type I actions.)

F. Environmental Impact Assessment. Under existing regulations, as part of its impact review, DEC must consider other sources of pollution or similar facility types in the project area in order to establish the baseline conditions against which project impacts will be assessed. DEC shall continue to consider sources of pollution or similar facility types in the respective airshed, watershed, or wasteshed for the project under consideration.

G. Coordinated Review. Where a potential environmental justice area is identified by the preliminary screen, the action is classified in 6 NYCRR Part 617 as either Type I or Unlisted and the project involves more than one agency, the DEC shall coordinate the review of the action with the other involved state and local agencies.

H. Determining Significance. Where the DEC is the lead agency, the Division of Environmental Permits staff based on comments from the affected environmental quality divisions, shall determine the significance of a Type I or Unlisted action, pursuant to criteria established in 6 NYCRR 617.7. If the DEC determines that there will be no adverse environmental impacts or that the identified adverse environmental impacts will not be significant, no further environmental justice analysis is required. If the DEC determines that the action may include the potential for at least one significant adverse environmental impact, 6 NYCRR 617.7 requires the preparation of an environmental impact statement (EIS) and the remainder of the policy requirements shall be incorporated into the review process.

I. Scoping. Where the DEC is the lead agency, a potential environmental justice area is identified by the preliminary screen and an EIS is required, scoping, pursuant to 6 NYCRR 617.8, shall be conducted. Scoping shall include an opportunity for meaningful and effective public participation consistent with the procedures set forth in this policy.

J. Environmental Impact Statement Content. Where the DEC is the lead agency, a potential environmental justice area is identified by the preliminary screen and an EIS is required, the draft EIS shall identify the potential environmental justice area to be affected, describe the existing environmental burden on the potential environmental justice area and evaluate the additional burden of any significant adverse environmental impact on the potential environmental justice area. The detail and depth of analysis for this evaluation will be identified by the DEC during the scoping process.

K. Environmental Impact Statement Procedure. When a draft EIS includes an evaluation of additional burdens on a potential environmental justice area, the DEC shall conduct a public hearing regarding the proposed action and shall receive comments on the draft EIS for no fewer than 60 calendar days from the first filing and circulation of the notice of complete application, or no fewer than ten calendar days following the completion of the public hearing, whichever is later.

L. Alternative Dispute Resolution. At any time prior to a final decision on the permit, the permit applicant and the public may voluntarily avail themselves of the alternative dispute resolution process to resolve conflict in the permit review process. Prior to issuance of the notice of public hearing, pursuant to 6 NYCRR 621.7, the parties shall be encouraged to seek alternative dispute resolution services from an independent provider. After issuance of the notice of public hearing, the parties shall be encouraged to seek alternative dispute resolution services from the DEC Office of Hearings and Mediation Services (OHMS). Where issues raised in ADR are resolved with enforceable permit conditions, the DEC shall incorporate those enforceable permit conditions into the permit. Where issues raised in ADR are resolved with conditions beyond the enforceable authority of the DEC, the conditions may be incorporated into a private agreement between the non-DEC parties and enforceable by those parties.

M. Decision and Findings Requirement. Consistent with existing regulations, any adverse environmental impact related to an action must be avoided or minimized to the greatest extent practicable.

Related References: New York State Environmental Conservation Law §1-0101; New York State Environmental Conservation Law §3-0301; New York State Environmental Conservation Law, article 8; New York State Environmental Conservation Law, article 70; New York State Administrative Procedure Act, article 3; Sections 616, 617, 621 and 624 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York; USEPA Region 2 Interim Environmental Justice Policy; U.S. Census Bureau.