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NYLPI

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March 15, 2005

Monica Kreshik, Esq.
Environmental Justice Coordinator
New York State Department of Environmental Conservation
625 Broadway
Albany, NY 12233-1500

*Re: Comments on the reports of the Disparate Adverse Environmental Impact and Health
Outcomes Data Work Groups*

Dear Ms. ^{Monica} Kreshik:

On behalf of New York Lawyers for the Public Interest (NYLPI), I would like to take the opportunity of the public comment period for the environmental justice work group reports to resubmit those comments that we raised during the review process of the Environmental Justice Advisory Group.

NYLPI is a nonprofit civil rights law firm formed in 1976 to address the unmet legal needs of New Yorkers. In 1991, NYLPI formed its Environmental Justice & Community Development Project to represent communities of color and low-income neighborhoods in environmental justice matters in New York. Our comments draw from NYLPI's extensive experience advocating on behalf of environmental justice communities and from discussion that we have had with our clients from these communities.

Thank you for the opportunity to submit these comments. Please contact me at 212 244-4664 should you have any questions or wish to discuss these matters further.

Sincerely,



Gavin Kearney

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Gavin Kearney, New York Lawyers for the Public Interest
Comments on DAEI Work Group report

DEC Policy CP-29, "Environmental Justice and Permitting" expresses the DEC's commitment to the fair treatment of all New Yorkers. It states, "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." The DAEI Work Group was charged with developing a method to ensure fair treatment by ensuring that future permitting decisions do not maintain or exacerbate the disproportionate share of environmental harms that communities of color and low-income communities in New York already bear. Unfortunately, the report of the Work Group fails this charge.

The most significant problem with the report is that most of the methods it presents (A through D) would not ensure that future permitting decisions reduce current disproportions and would not ensure that future decisions do not create new disproportions or exacerbate existing ones. Such methods cannot be considered environmentally just. The fundamental flaw of these methods is that they do not consider existing burdens when evaluating proposed actions. A method that views each application discretely cannot—in theory or in practice—redress existing inequities or prevent future inequities. An effective, environmentally just approach must presume that permits should not be granted for projects that adversely impact already overburdened areas. If a project must go in an already burdened community, such an approach must avoid, minimize, and mitigate harms to the greatest extent possible.

The report also does not provide guidance on how environmentally just permitting decisions can be made in light of unavoidable limitations in data, research methods and resources available in the permitting process. It states a preference for the use of readily available data and in so doing ignores the fact that most environmental harms, and most factors that render some communities more vulnerable to these harms than others, are not depicted in readily available data. In the context of any research or evaluation, uncertainty surrounding relevant factors is an impermissible basis for ignoring these factors. Here, this uncertainty goes to the very heart of the impact analysis. Permitting decisions, like all planning decisions, should be made with the best knowledge/information that is available and/or can be developed. An effective, environmentally just permitting method must develop and use specific methods for overcoming uncertainty and for assessing existing burdens and vulnerabilities. As a practical reality, this requires the use of qualitative data and requires meaningful community involvement as the impact analysis is designed and as impacts are identified and measured. Where uncertainty cannot be overcome, an environmentally just review process must resolve that uncertainty in a manner that is reasonable and protective of already burdened communities.

Although DEC Policy CP-29 charges the Working Group with developing "specific criteria" for conducting DAEI Analysis, most of the methods presented in this report are also overly vague about critical concepts and analytical steps. For example, the report does not provide explicit criteria for how permit applicants are to select reference communities for comparison purposes. This creates a significant risk that applicants will have the latitude to skew their assessments in ways that undermine environmental justice and it ignores the SEQRA requirement that all reasonable alternatives be considered. Similarly, it is imperative that DEC dictates a single method for this impact analysis. Allowing applicants to pick and choose from a variety of methods creates a significant risk that environmental justice goals will be undermined.

As the DEC moves forward in its efforts to address disproportionate adverse impacts in the permitting process, it must evaluate potential methods by two threshold criteria: whether the method addresses existing disparities in the distribution of environmental burdens; and whether the method prevents future permitting decisions from exacerbating these disparities and/or creating new ones. These criteria are the essence of any commitment to environmental justice. The only method in the current report that effectively meets these criteria is the Burdened Area Analysis.

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MEMORANDUM

To: Monica Abren, Environmental Justice Officer, NYS DEC
From: Gavin Kearney, New York Lawyers for the Public Interest
Re: Incorporation of health outcome data into the environmental review process
Date: 7/6/04

Following are comments originally made in response to the report of the Health Outcomes Data Workgroup. As requested, and because the substance of these comments is beyond the parameters of this report, I am submitting them separately as a recommendation for the future work of the Environmental Justice Advisory Group and for the revision of the DEC's Environmental Justice policy.

As the comments I submitted on the HOD report emphasized, the charge, and consequently the report, are too narrow and of limited utility in the environmental review process. As such, further work should be conducted under a broader mandate to determine how to effectively integrate human health concerns into the environmental review process, as required by SEQRA.

This is the primary weakness of the report, although it does not necessarily reflect a failing on the part of work group members. While focusing on developing reliable sources of human health data, the report fails to develop methods and protocols for incorporating human health into the environmental review process. To be practicable, such methods and protocols must account for the inevitable limitations of data, research methods, and resources in general, and within the permit review process in particular. Because it does not account for these realities, the HOD report creates unrealistic criteria for incorporating human health information into the review process. Should the report's recommendations and methods be adopted as they are, environmental reviews that purport to incorporate human health will overlook the great majority of human health concerns created by proposed actions and thus significantly understate adverse impacts.

Some degree of uncertainty is inevitable in the environmental review process. For example, according to one report there is no information available on the toxic effects of approximately four-fifths of the over 70,000 chemicals that are in commercial use.¹ Uncertainty around adverse health impacts and the vulnerability of various populations, however, is not an acceptable justification for ignoring these concerns. Permitting decisions, like all planning decisions, should be made with the best knowledge/information that is available and/or can be developed. The EPA report *Framework for Cumulative Risk Assessment* acknowledges the unavailability of uncertainty and stresses the need to account for it in risk assessment:

[I]t should be acknowledged by all practitioners of cumulative risk assessment that in the current state of science there will be limitation in methods and data available. ...Data limitations may be somewhat mitigated by qualitative information; the collection of qualitative data may be valuable in cumulative risk assessment. Still, *limitations in*

¹ Robert Kuehn, *The Environmental Justice Implications of Quantitative Risk Assessment*, 1996 U. Ill. L. Rev. 103, 144.

methods or data should not be seen as a convenient reason for completely ignoring or not posing questions for which stakeholders may be seeking answers.²

Analytical limitations are also presented by the nature of the review process. Standards for evaluating research and data must be adapted to time and resource constraints. This reality is reflected in the Science Advisory Board's (SAB) review of disproportionate impact methodologies for potential use by the EPA in conducting Title VI reviews. In its report, SAB states that the time frame for responding to Title VI complaints "places significant restraints on the practical ability to use the most scientifically rigorous methods."³ Similar restraints are present in the environmental review process and it is important that methods for assessing human health (and for assessing adverse impacts) are developed that account for this inevitability.

We strongly recommend that the DEC undertake a broader process with the goal of developing methods and protocols for incorporating human health concerns in to the environmental review process in light of these unavoidable limitations. An appropriately broadened charge could be:

Develop methods and tools for incorporating human health concerns into the environmental review process including:

- 1) Determine what reliable data is realistically available for inclusion in the review process.
- 2) Evaluate the extent to which important health concerns/outcomes are not accounted for by the data identified in (1).
- 3) Develop methods for integrating human health into environmental reviews in light of (1) and (2). Such methods should:
 - a) Account for health outcomes that are not adequately represented in existing databases.
Where ideal data is not available, the best available data should be used with appropriate recognition of the limitations of that data and the assumptions made in applying the data to the specific review.
 - b) Ensure that, where limitations cannot be overcome and uncertainty remains, the reasonable interpretation/resolution that provides the greatest protection to environmental justice communities is used in the review.
 - c) Be practicable in light of the realities and constraints of the permit review process (specifically in light of time and resource constraints), and in light of limitations in research methods.
 - d) Include specific guidance for appropriate application of methods to ensure a high standard of quality and effectiveness in all environmental reviews.

² U.S. EPA, Framework for Cumulative Risk Assessment at 31-2 (May 2003)(emphasis added).

³ Science Advisory Board, *An SAB Report Review of Disproportionate Impact Methodologies* at 1 (December, 1998).

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4) Develop recommendations for developing more effective health outcome data in the future.

A process such as this is critical to truly account for health outcomes in the environmental review process. We would welcome the opportunity to discuss this further and hope that, under the leadership and guidance of the DEC, the Environmental Justice Advisory Group can take on this charge.