



April 29, 2011

The Honorable Lisa P. Jackson  
Administrator  
U.S. Environmental Protection Agency

Submitted through the EPA  
website and by electronic mail  
([lee.charles@epa.gov](mailto:lee.charles@epa.gov))

Re: Plan EJ 2014

Dear Administrator Jackson:

I write for the New Mexico Environmental Law Center to comment on the nine draft implementation plans for draft Plan EJ 2014 released in March of 2011. We applaud your effort to promote environmental justice through the work of the U.S. Environmental Protection Agency and we appreciate the opportunity to comment on the draft Plans.

We believe that the draft Plans are appropriate as a start for the Environmental Protection Agency's effort to include environmental justice considerations in its work and in the work of other agencies of the federal government. We view as particularly important the draft Plans' emphasis on participation by residents of low-income communities and communities of color (collectively environmental justice communities).

Unfortunately, it also is our view that the draft Plans are deficient in several important respects, two of which are the most important. The first is the draft Plans' failure to take into account several impediments to participation by residents of environmental justice communities. The second of these is the draft Plans' failure to address directly the most important issues facing residents of those communities – the siting of new polluting facilities and continued operation of existing polluting facilities that impact the health and environment if these community residents.

These comments are cross-cutting comments, and we therefore are submitting them through the EPA website docket number EPA-HQ-OECA-2011-0299. Because of our concern about the reliability of website submission, we also are submitting these comments in the form of a letter sent to Charles Lee at [lee.charles@epa.gov](mailto:lee.charles@epa.gov).

Finally, it is inappropriate for the EPA to solicit comments on the draft Plans exclusively through a web site. As we have pointed out below, approximately 35% of the people in New

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Mexico do not have Internet access, and it is likely that many of those people reside in environmental justice communities. It also is likely that lack of Internet access is common in environmental justice communities throughout the country. The EPA therefore should provide alternative means of commenting on the draft Plans.

## **I. The New Mexico Environmental Law Center**

The New Mexico Environmental Law Center (Law Center) is a non-profit public interest law firm. The Law Center provides free and low-cost legal services for protection of communities and the environment. For the past 20 years a significant majority of the Law Center's work has involved environmental justice issues. During that time, almost all of the Law Center's legal services have been provided to communities in New Mexico whose residents are predominantly low-income and communities here whose residents are predominantly people of color. These communities are either being impacted by or are threatened by existing or proposed facilities such as airports, chemical plants, landfills, and roads, and by existing or proposed operations such as extraction of ground water, mining, and oil and gas production.

The following comments are based upon the Law Center's experience working for these communities and for environmental justice in statewide contexts such as lobbying at the New Mexico Legislature, advocating for the inclusion of environmental justice provisions in statewide regulations, and working for the adoption of the New Mexico environmental justice executive order that was signed in 2005.

## **II. Environmental justice includes meaningful involvement and fair treatment of all people.**

The U.S. Environmental Protection Agency (EPA) defines environmental justice as:

the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.

According to the EPA's own definition, environmental justice therefore includes both meaningful involvement of all people and fair treatment of all people in the development, implementation, and enforcement of environmental laws, regulations, and policies.

**III. The draft Plans' priorities are appropriate.**

**A. The draft Plans recognize the importance of supporting residents of environmental justice communities.**

The draft Plans list as one of their priorities “supporting community-based action programs”. (Although this is listed as the fourth priority, we assume that the order of listing does not indicate the relative importance of the priorities.) This is appropriate because ensuring environmental justice for the residents of communities of color and low-income communities must be based on an understanding of the concerns of the residents of those communities, and because one of the most fundamental principles of the environmental justice movement is that residents of environmental justice communities speak for themselves.

It also is appropriate for the draft Plans to include as one of their strategies providing funding and technical assistance to build capacity of environmental justice communities through alignment of community-based programs. Often multiple programs designed to address environmental and health issues exist in environmental justice communities without coordination among those programs that would enable them to provide the most benefit to community residents. In addition, the draft Plans properly call for the EPA to foster community-based programs. The work of environmental justice must be from the ground up in order to be successful, and the EPA should do whatever is possible to provide resources so that residents of environmental justice communities can advocate for themselves.

However, as is explained below, the draft Plans do not address this priority adequately. The draft Plans do not include sufficient measures to deal with serious impediments to the ability of residents of environmental justice communities to be involved effectively in rulemaking, permitting, and other proceedings. The draft Plans' approach to this priority therefore should be revised in order to provide meaningful access to those proceedings by residents of those communities.

**B. The other priorities of the draft Plans are important.**

As we indicated in our October 2010 comment on the five priority areas of the draft Plans, the other priorities of the draft Plans also are appropriate.

**1. Permitting decisions have significant impacts on environmental justice.**

In New Mexico, the permitting of polluting facilities is a critical factor in the subjugation of communities of color and low-income communities to environmental degradation. Permits for such facilities are frequently issued by state or local regulators implementing EPA programs, and they are issued without regard to the impacts of the facilities involved on the communities where the facilities are or are proposed to be located. This happens in part because of the failure of regulators to take into account the impacts of polluting facilities on communities as well as the cumulative and synergistic effects that multiple facilities have.

The Plans should make clear that consideration of, and action on, environmental justice concerns must be mandatory in the permitting context. Too often regulators view environmental justice concerns as issues that may, but do not have to be, taken into account rather than as concerns that should be given at least as much weight as other factors. In New Mexico, very few regulators believe that environmental justice concerns should dictate results. The view of these regulators is that the only action required to provide environmental justice is giving community residents an opportunity to voice their concerns. Such regulators do not understand that in order to provide environmental justice they must take into account and act upon the concerns of residents of low-income communities and communities of color. Even among regulators here who take seriously the concept of consultation with community members, very few understand that environmental justice also means not making decisions that cause disproportionate impacts on low-income communities and communities of color.

**2. Rulemaking is an appropriate priority because of the impacts of regulations on communities.**

One of the arguments frequently used by regulators to justify their failure to take into account and act on environmental justice concerns is that they are not authorized to do so by the regulations that they implement. For that reason, the Plans' focus on rulemaking processes is important, but the Plans should go further and require that regulations implementing EPA programs include mandatory environmental justice provisions.

Taking environmental justice concerns into account in rulemaking proceedings often is viewed by decision makers as being limited to providing residents of low-income communities

and communities of color with opportunities to express their views. This is not sufficient to protect the residents of those communities. The regulations that result from those proceedings must contain mandatory provisions that prevent permitting and other decisions that result in disproportionate environmental impacts on such communities.

**3. The Plans should include enforcement as a priority.**

In New Mexico, enforcement of environmental protection mandates in communities of color and low-income communities is less rigorous than it is in Anglo communities and affluent communities. An example of lax enforcement in environmental justice communities is the ongoing effort to regulate the Helena Chemical Company plant in the community of Mesquite, a predominantly Hispanic and moderate income community in southern New Mexico. That plant operated for almost a decade without an air quality permit from the State Environment Department, even though it was apparent to regulators that a permit was required for the plant.

The lesson from the Helena Chemical Company situation is that provisions mandating efforts to protect communities will be ineffective if they are not enforced. Agencies that administer EPA programs should not be allowed to overlook protecting communities of color and low-income communities by failing to enforce the mandates of applicable statutes and regulations. The Plans therefore should provide for mandatory environmental justice provisions and penalties for state and other agencies that do not enforce those provisions.

**4. Administration-wide action on environmental justice should be promoted as a priority of the Plans.**

It is appropriate for the Plans to promote administration-wide action on environmental justice because action by one agency or in one program will not address the needs of low-income communities and communities of color. The Plans should call for active efforts on the part of the EPA and other agencies to promote understanding of and action on environmental justice concerns throughout the entire administration. Only with that approach can the Plans address all of the ways in which environmental justice communities are subjected to the disproportionate impacts of environmental contamination.

**IV. The draft Plans are deficient in several important respects.**

Unfortunately, the draft Plans have several important flaws. First, they fail to take into account significant impediments that stand in the way of environmental justice communities' residents participating meaningfully in the development, implementation, and enforcement of environmental laws, regulations, and policies. Second, the draft Plans are difficult to decipher and to evaluate for two reasons. The draft Plans rely on documents that are outside the draft Plans, including documents that have already been completed, and they include numerous internal references and acronyms. This makes the draft Plans hard to follow and interpret for anyone who is not intimately familiar with the EPA.

Finally, and most importantly, the draft Plans fail to address directly the two most critical issues for residents of environmental justice communities. The first is the impacts of existing facilities that cause pollution on the health and environment of community residents. The second is the effects on the residents' health and environment that will result if permits are issued for proposed future facilities that will contaminate the environment.

**A. The draft Plans do not take into account barriers to participation that exist for environmental justice communities.**

**1. The draft Plans inappropriately rely upon the Internet as a means of distributing information.**

There are quite a few points at which the draft Plans indicate that the Internet will be used for distribution of information and other purposes. For example, Strategy 2.1 of the draft Plan for Incorporating Environmental Justice into Rulemaking (Draft Rulemaking Plan) indicates that the EPA will: "Assess internal and external comments provided on the Interim Guide through Agency websites." Draft Rulemaking Plan, page 3. In Strategy 2.3, the draft Rulemaking Plan also states that the EPA will solicit internal and external comments through web sites. *Id.*, page 5. Similarly, Strategy 5 of the draft Plan for Advancing Environmental Justice Through Compliance and Enforcement (Draft Compliance and Enforcement Plan) appears to rely heavily on distribution of information through EPA's web sites in its Strategy 5. Although Activities 5.2 and 5.3 both mention other means of distributing information, each relies on making information available through web sites. Draft Compliance and Enforcement Plan, pages 10, 11.

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The draft Plan for Science Tools Development (Draft Science Tools Plan) indicates that the EPA Office of Research and Development and the National Exposure Research Laboratory have developed a web based cumulative risk assessment tool (called the Cumulative Risk Assessment Environmental Justice Wizard) and that its developers proposed to engage with environmental justice and community-based stakeholders concerning this tool. Draft Science Tools Plan, pages 7-8. Finally, the draft Plan for Resources Tools Development (Draft Resources Tools Plan) states in Strategies 3 and 4 that it will rely on the Internet for community training and for development of grant competition tools. Draft Resources Tools Plan, page 4.

This reliance on the Internet and electronic media is misplaced. In New Mexico, for example, the latest census indicates that approximately 35% of the population has no access to the Internet. We do not have statistics on how many of those people are residents of environmental justice communities; however, it is probable that a large number of them are residents of such communities because those communities most often lack basic infrastructure and services. In New Mexico, there are large areas of the state in which residents are without electricity as well as Internet access. It also is likely that lack of Internet access exists in environmental justice communities throughout the country.

For these reasons, the draft Plans' reliance on the Internet as a means of providing information to the residents of environmental justice communities is not appropriate.

**2. The draft Plans fail to recognize the need to provide resources for residents of environmental justice communities.**

In order for residents of environmental justice communities to be able to participate effectively in the proceedings and other activities that are the subject of the draft Plans, those residents must have access to resources. Many members of low-income communities and communities of color have full time jobs, and do not have either the time or the resources to travel to hearings, meetings, negotiations or other functions, even those intended to address issues of health and environment. Despite this, there is no mention anywhere in the draft Plans, even in those provisions that call for obtaining public input, of providing *per diem* or mileage payments to residents of low-income communities and communities of color so that they will be able to afford to participate.

In addition, even when environmental justice community residents can take the time and spend the resources to participate, they can do so effectively only if they have meaningful access to the proceedings. In some cases this means having services such as translation. In many cases, particularly in a state like New Mexico, it means being able to obtain notice of meetings and hearings through media other than the electronic media.

In situations in which the proceedings at issue involve questions of law and science, community residents also must have their own attorneys and technical experts in order to be able to present their views persuasively. This does not mean having access to EPA's attorneys and experts. It is critical for community residents to be able to develop and advocate their positions effectively that they have attorneys and experts who are working for them and not for the EPA. However, nothing in the draft Plans indicates that these resources will be made available to residents of low-income communities and communities of color.

There are examples of these omissions throughout the draft Plans. The draft Rulemaking Plan Strategy 2.3 addresses community engagement and a stakeholder partnership plan, but contains no language concerning the provision of resources to communities or stakeholders. Draft Rulemaking Plan, page 5. Similarly, Strategies 2.1 and 2.3 of the draft Permitting Plan point out the need to enhance the ability of affected communities to participate fully, but do not address the need of those communities to have resources to do so. Draft Permitting Plan, pages 3, 5. The same omission occurs in Strategy 5 of the draft Compliance and Enforcement Plan and in Goal 1.1 and Strategies 2, 3, 4, and 5 of the draft Plan for Supporting Community-Based Action Programs (Draft Supporting Community-Based Programs Plan). Draft Compliance and Enforcement Plan, pages 9-10; Draft Supporting Community-Based Programs Plan, pages 1, 4-7. Finally, in Strategy 1.2 and Activities 1.1, 1.2, 2.1, 2.3, 4.1, and 5.3, the draft Science Tools Plan discusses involving stakeholder communities, but never directly addresses the need to provide financial and other resources to those communities. Draft Science Tools Plan, pages 1, 5-6, 8-9, 10-11, 14-15, 17-18.

**B. Commenting effectively on the draft Plans is hampered by their use of EPA terminology and by their reliance on existing documents.**

The draft Plans refer to EPA organizational structures without explanation and rely on policies that can no longer be affected by public comment. This undermines the effectiveness of comments on the draft Plans. It would not be productive, for example, for a member of the

public to comment that a particular Plan ought to be coordinated by a different division of EPA or to argue that provisions in a document that has been finalized should be changed. The draft Plans should be changed to provide more information about the EPA organizational structure and to allow comments on documents that form the basis for the Plans.

**1. The draft Plans are difficult to understand.**

The language that is used in the draft Plans makes them difficult to understand and to comment on for anyone who is not already familiar with the EPA and with its organization and existing policies. Throughout the draft Plans, there are numerous references to divisions and programs within EPA without explanations of their functions. Examples of this occur in the Organizational Structure sections of the draft Rulemaking Plan, the draft Permitting Plan, the draft Fostering Administration-Wide Action Plan, and the draft Science Tools Plans. Draft Rulemaking Plan, page 3, Draft Permitting Plan, page 2, Draft Fostering Administration-Wide Action Plan, page 1, Draft Science Tools Plan, page 4. This also occurs in Strategy 2.1 of the draft Rulemaking Plan's references to the Office of Chemical Safety and Pollution Prevention, the Office of Enforcement and Compliance Assistance, and the Office of Research and Development. Draft Rulemaking Plan, pages 2-3.

**2. The ability of the public to comment effectively on the draft Plans is undermined by the draft Plans' reliance on other policies that are being finalized or are already final.**

The draft Plans also refer to other documents, including some for which comment periods have closed and some that have already been finalized. For example, the draft Rulemaking Plan relies heavily on the EJ in Rulemaking Guidance, but the time for commenting on that Guidance closed in March, 2011. Draft Rulemaking Plan, pages 3-4. Similarly, the Office of Enforcement and Compliance Assurance apparently has already determined the criteria to be used in selecting the National Enforcement Initiatives, and plans to finalize the National Enforcement Initiatives strategies and measures by tomorrow. Draft Compliance and Enforcement Plan, pages 2-3. The draft Compliance and Enforcement Plan also relies on the already finalized EJ Geographic Assessment Tool, the EJ Strategic Enforcement Tool, and the National Enforcement Strategy for Resource Conservation and Recovery Act Corrective Action. Draft Compliance and Enforcement Plan, pages 5-6. The same references to existing tools and strategies and tools

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occur in the draft Supporting Community-Based Programs Plan, which relies on the National Environmental Performance Partnership System and National Project Manager guidance, and in the draft Science Tools Development Plan, which makes reference to the already launched Community Engagement Initiative. Draft Supporting Community-Based Programs Plan, pages 2-3, Draft Science Tools Development Plan, pages 10-11.

**C. The draft Plans fail to address directly the pollution of communities by facilities that contaminate the environment.**

The most critical issue for residents of environmental justice communities is the impacts on their health and environment caused by facilities that cause environmental degradation. Despite this, the draft Plans never directly address either how the EPA proposes to deal with existing facilities that contaminate the environment or the means that the EPA will use to prevent the degradation of communities' environments by such facilities in the future. Although the draft Plans' provisions on rulemaking and permitting discuss taking into account environmental justice, they never spell out any specific steps that the EPA proposes to take to deal with the existing concentration of polluting facilities in low-income communities and communities of color, or to prevent the future concentration of those facilities in those communities. The draft Plans never even imply that this is a goal to be worked towards or to be achieved.

So long as they do not address this issue, the Plans will be seriously ineffective because they will address only one of the two points of environmental justice. By failing to address the impacts of polluting facilities on the environment and health of residents of environmental justice communities, the Plans will result in the approach taken by some regulators in New Mexico, who believe that providing environmental justice to community residents begins and ends by giving the residents an opportunity to express their concerns and positions. The regulators fail to understand that providing environmental justice also means treating the community residents fairly by not burdening them with facilities that degrade their environment and health.

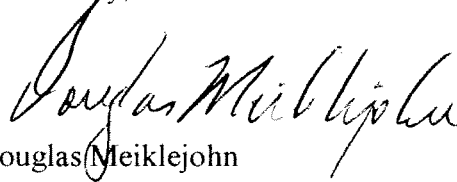
**Conclusion**

On behalf of the Law Center and the environmental justice communities we represent, thank you again for your efforts to promote environmental justice and for the opportunity to comment on Plan EJ 2014. We commend you for developing the draft Plans, and we would

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appreciate it if you would keep us informed about future developments and about further opportunities to comment.

Yours truly,

A handwritten signature in cursive script that reads "Douglas Meiklejohn". The signature is written in black ink and is positioned above the printed name and title.

Douglas Meiklejohn  
Executive Director