



PREPARED STATEMENT OF MICHAEL W. STEINBERG
ON BEHALF OF THE
BUSINESS NETWORK FOR ENVIRONMENTAL JUSTICE

Before the Subcommittee on Superfund and Environmental Health
of the Senate Committee on Environment & Public Works

July 25, 2007

EXECUTIVE SUMMARY

EPA's Environmental Justice "Toolkit." In November of 2004, EPA issued its **Toolkit for Assessing Potential Allegations of Environmental Injustice.** The Toolkit was meant to provide EPA's Environmental Justice Coordinators with a systematic approach for evaluating complaints of alleged environmental injustice.

Unfortunately, EPA's Toolkit has many serious shortcomings that limit its usefulness. These include:

Confrontation instead of collaboration. Rather than encouraging collaborative approaches to problem-solving in affected communities, the Toolkit embodies a confrontational approach similar to EPA's highly controversial guidance, issued in 2000, under Title VI of the Civil Rights Act of 1964.

Uncritical acceptance of complaints. Using an elaborate "hypothetical example," the Toolkit suggests that EPA's EJ Coordinators should view the facts from the perspective of citizens who complain, and should pay little heed to the views of state and local government officials, or to those of business and industry stakeholders. EPA's "hypothetical example," with its "charismatic" citizen leaders and its furtive, secretive facility owner, is nothing short of disgraceful.

Unexplained and subjective indicators of environmental injustice. The Toolkit uses 51 different indicators, many of which have no apparent connection to environmental injustice. Examples include: "climate," "cultural dynamics," "percent of the population that is literate," "percent of the population with access to public transportation and services," and "percent of community that uses regulated (cigarettes, alcohol) and unregulated (drugs) substances."

Equating all disproportionate impacts with environmental injustice. The Toolkit mistakenly equates all disproportionate impacts with environmental injustice. But the law requires equal treatment, not equal results. Moreover, as a practical matter, equal results cannot be achieved in a free society.

Lack of meaningful public comment. The Business Network for Environmental Justice ("BNEJ") filed detailed comments with EPA when the Toolkit was proposed in November of 2003. Yet EPA never responded to those comments. EPA issued the Toolkit in final form without addressing the issues raised by the BNEJ.

STATEMENT

I. Introduction

The Business Network for Environmental Justice (“BNEJ”) is a voluntary organization of businesses, corporations, industry trade associations, industry service providers and business groups interested in environmental justice issues. Formed in 1995, the BNEJ believes all people should be treated fairly under all laws, including environmental laws, without discrimination based on race, color, or national origin. We support open and informed dialogue with citizens about environmental decisions that affect local communities. We also support continued sound scientific research into factors affecting human health and the environment, and the use of scientifically sound risk assessments in evaluating and prioritizing health and environmental risks.

The BNEJ’s statement today focuses on EPA’s Toolkit for Assessing Potential Allegations of Environmental Injustice (the “Toolkit”), issued in November of 2004. We believe the Toolkit fails to provide a useful framework for assessing allegations of environmental injustice. Rather than encouraging collaborative approaches to problem-solving in affected communities, the Toolkit embodies a confrontational approach that bypasses state environmental regulators and affected industrial facilities. In many respects, EPA’s Toolkit outlines an approach similar to that found in EPA’s highly controversial proposed investigation guidance, issued in 2000 under Title VI of the Civil Rights Act of 1964.

Given our serious concerns with the Toolkit, the BNEJ submitted detailed written comments to EPA when the Toolkit was proposed in November of 2003. Unfortunately, EPA never responded to the BNEJ’s comments, but simply issued the Toolkit in final form without addressing any of the issues raised by the BNEJ. Thus, it is especially appropriate for the Subcommittee to examine the Toolkit as part of its consideration of EPA’s environmental justice programs.

II. The Toolkit Sends EPA’s Environmental Justice Coordinators Down the Path of Confrontation, Rather than Collaboration.

EPA’s target audience for the Toolkit is “the Environmental Justice Coordinators at EPA Headquarters and Regional Offices who are directly involved in environmental justice initiatives and are the front-line in addressing allegations of environmental injustice.” Toolkit at 2. The stated objective of the Toolkit is to provide the EJ Coordinators with both

- “a conceptual and substantive framework for understanding the Agency’s environmental justice program”; and

- “a systematic approach with reference tools that can be used . . . to assess and respond to potential allegations of environmental injustice”

Toolkit at 1. The BNEJ agrees that it would be beneficial to provide these tools to the Agency’s EJ Coordinators. Unfortunately, the Toolkit falls well short of the mark. Specifically, the Toolkit embodies a confrontational approach to potential environmental justice problems, rather than the collaborative problem-solving approach that is far more likely to succeed.

A. The EJ Coordinators Should Serve Primarily as Facilitators and Problem Solvers.

In order to address potential environmental justice issues most effectively, EPA’s EJ Coordinators should seek to serve as facilitators and problem solvers, rather than fact-finders. By promoting collaborative discussions among state and local government, business and industry, and communities, the EJ Coordinators are in the best position to help achieve “win-win” solutions.

This means that the EJ Coordinators should focus on identifying potential solutions to the various problems they encounter, rather than on studying those problems. To help the EJ Coordinators do their jobs, they might benefit from some technical assistance in (1) understanding the nature of the various complaints they may receive, and (2) setting priorities among those complaints. But the Toolkit does not provide that assistance. Instead, as shown below, it departs from the collaborative problem-solving model and reflects a more confrontational approach to environmental justice issues.

B. The Toolkit Departs from the Collaborative Problem-Solving Model

The approach taken in the Toolkit is curiously out of touch with some of the best and most current thinking – both within EPA and elsewhere – on the collaborative problem-solving model. Consider the work of the National Environmental Justice Advisory Council (“NEJAC”), the advisory committee chartered and overseen by the Office of Environmental Justice (“OEJ”). In the past several years, the NEJAC has released a series of major advisory reports intended to guide EPA policy on environmental justice issues. These reports embrace a constructive problem-solving approach that contrasts sharply with the adversarial, fragmented approach advocated in the Toolkit.

For example, in its seminal study of the potential to advance environmental justice through pollution prevention, the NEJAC in its consensus chapter advocated a move “toward a multi-stakeholder collaborative model to advance environmental justice through pollution prevention.” The NEJAC specifically advised that:

A community-driven multi-stakeholder model would feature the common goal of a healthy local environment and highlight the need to share responsibility for achieving that goal. A community-driven model would take a broad look at environmental concerns in the community, identify the most effective ways to improve health, and utilize the potential of collaboration and mobilizing local resources to make progress in improving the health status of local residents. A community-driven collaborative model would acknowledge the importance of sharing information and establishing a level playing field for all participants. This kind of collaborative model can help build sustainable community capacity to understand and improve the environment.

National Environmental Justice Advisory Council, *Advancing Environmental Justice through Pollution Prevention* 21 (June 2003) (emphasis supplied).

The approach that underpins the NEJAC pollution prevention report is not an aberration, but is an approach that has been endorsed by EPA's Office of Environmental Justice in numerous other settings. It is the OEJ, after all, that chairs the federal Interagency Working Group that has gained such acclaim for its piloting and institutionalization of the collaborative model. See, e.g., Charles Lee, "Collaborative Models to Achieve Environmental Justice and Healthy Communities," *Human Rights* (ABA), Volume 30, Issue 4 (Fall 2003). See also National Environmental Policy Commission, *Final Report to the Congressional Black Caucus* at 10 (consensus recommendations) (Medical University of South Carolina September 26, 2003).

The effectiveness of the collaborative approach was well articulated in another recent report prepared by EPA's Office of Policy, Economics and Innovation, which summarized:

Multi-stakeholder collaboration can act as a transformative mechanism for enabling communities and associated stakeholders to constructively address complex and long-standing issues concerning environmental and public health hazards, strained or nonexistent relations with government agencies and other institutions, and economic decline.

Office of Policy, Economics, and Innovation, *Towards an Environmental Justice Collaborative Model*, p. 6 (EPA/100-R-03-001 January 2003), www.epa.gov/evaluate.

The National Association of Manufacturers, a founding member of the BNEJ, was an active and enthusiastic participant in the NEJAC pollution prevention report quoted above. The BNEJ membership is, frankly, dismayed to see EPA's Office of Environmental Justice encourage its EJ Coordinators to turn away from the collaborative problem-solving model and to focus instead on a confrontational approach that – as we show below -- pits one "team," consisting of EPA's EJ Coordinators and the

community activists, against another “team” made up of state and local government officials and the business community.

C. The Toolkit Outlines a Process Similar to EPA’s Highly Controversial Title VI Guidance.

Not only is the Toolkit not premised upon a collaborative process, but it actually outlines a process similar to EPA’s highly controversial proposed guidance on Title VI investigations, issued in 2000. The BNEJ commented extensively on that proposed guidance. In particular, we emphasized that the proposed Title VI Guidance

adopts a reactive strategy that promotes uncertainty for all involved. Instead of defining clear standards about which facilities and operations will be allowed in which communities, [it] encourages ad hoc challenges to proposed or existing environmental permits. The results are: (1) affected communities and other environmental justice advocates are always reacting to specific projects, rather than proactively establishing clear standards to protect their communities; (2) the momentum of an existing or even proposed facility can be difficult to stop; (3) state permitting agencies and facility owners/operators face substantial uncertainty about whether a proposed activity will be found to have an impermissible disparate impact . . . and (4) a facility owner/operator can invest substantial amounts in a particular facility (including an established, long-permitted facility) and/or permit application only to have it unpredictably investigated and rejected

August 28, 2000 BNEJ Comments at 4-5, quoting Craig Arnold, *Land Use Regulation and Environmental Justice*, 30 Env’tl L. Rptr. (ELI) 10395, 10397-98 (June 2000) (emphasis supplied).

The Toolkit, in turn, shares many of these same defects. We mention below some of the more glaring flaws in the Toolkit:

1. Complaints May Be Raised By Anyone At Any Time, With or Without Evidence.

A basic concern with the Toolkit is its assumption that anyone may raise a complaint of environmental injustice at any time and in any manner, with or without any supportive evidence. This seems to invite ad hoc challenges to virtually any regulatory or permitting decision, even after the final rule or permit is issued. This in turn means that there will be no predictability and no finality in the regulatory and permitting processes.

Apparently complaints of environmental injustice need not meet any particular threshold of significance in order to warrant a screening-level assessment by EPA. The

complaints need not even be made in writing. Moreover, these complaints can be made even after previous complaints of environmental injustice – based upon the same fact pattern -- have been made, reviewed, and found to lack merit.

What is more, the Toolkit does not even require the complaining parties to exhaust their administrative remedies with state and local government agencies. This is a very serious flaw, because the community, the regulators, and the permittee(s) all benefit when these issues are pursued to the greatest extent possible during the regulatory or permitting processes.

In fact, requiring exhaustion would help in two ways. First, if the complaining party achieves its objectives through the regulatory or permit process, then there is no need to file a complaint of alleged environmental injustice. Second, if the complaining party does not achieve its objectives because the regulatory or permitting agency considers and rejects the arguments being advanced, then the complaining party may well reconsider the merit of filing a complaint with EPA.

Moreover, even if a complaint is eventually filed, exhaustion helps insure that EPA will have readily at hand a well-developed factual record on which to base its decision-making. The regulatory or permitting agency likely will not be required to gather new data, as the issue(s) will already have been aired. Additionally, the community, the agency, and the permittee(s) would all benefit from early awareness of the issues underlying the complaint, rather than being surprised when new issues are raised in a complaint filed with EPA months after the regulatory or permit decision at issue.

2. EPA Defines the “Affected Community” and then Selects a “Reference Community” for Comparison.

A key step in analyzing potential disproportionate adverse impacts is to identify, and determine the characteristics, of the affected community, which then provides a basis for comparison to an appropriate reference community. The results of the analysis will hinge on whether the affected population differs significantly from the comparison population. Unfortunately, the Toolkit fails to clarify how EPA will approach this vital task.

The Toolkit seems to envision using proximity to a pollution source as a proxy for actual exposure to pollution. This suggests that EPA will draw circles of various radii around the source(s) and then assume that the population within the circles is somehow “affected” by air emissions or other impacts. This approach leaves the community, the regulatory agency, and the permittee completely unable to predict the outcome of the analysis, because they cannot predict what the “affected community” will be. They have no way of knowing how large or how small the circles should be or will be. Nor do they have any way of telling how accurately any circles can reflect the realities of exposure,

given that emissions are rarely distributed in circular patterns. There can be neither predictability nor certainty to EPA's investigations when no one knows in advance whether EPA will rely on proximity approaches and, if so, how EPA will determine the size of the circles.

Similar problems arise when EPA selects a reference community for comparison purposes. There is no "control" reference group for comparison with the affected community that precisely matches its demographic composition and that lacks the presence of the facility of concern. No theoretical standard exists with which to determine what demographic reference population is the most "appropriate." A reference community thus must be selected based on arbitrary choices. These choices may include demographic groups located within a greater distance, or within a larger jurisdiction, or within a "comparable" jurisdiction in another location.

The inherently arbitrary selection of a reference community has significant consequences, because the racial and ethnic composition of communities is not uniform. Consequently, it will be a rare event that any particular community will contain the same demographic composition as the jurisdictions that surround it. "Generally, population variables are not 'well-mixed': they are not randomly distributed in groups and clusters"^{1/} Therefore, if proximity alone is used to define the "affected community," we should expect to find on a fairly routine basis statistically significant disparate impacts between smaller "affected community" jurisdictions and larger "reference community" jurisdictions. As explained below in Section IV, these disparate impacts should not be equated with environmental injustice.

In sum, EPA's Toolkit fails to explain how the Environmental Justice Coordinators are to make the all-important comparison between the "affected" community and the "reference" community. Without clarity on that basic point, no one can ever know in advance whether EPA will decide that any particular situation involves "environmental injustice."

3. EPA Sets the Bar Too Low on Data Quality.

EPA's Toolkit indicates a preference for valid and reliable data, but also a willingness to use other data -- data that are not valid and/or not reliable -- in cases where good data are unavailable. This approach disserves the community, the regulatory agency, and the permittee(s) by allowing decisions to be made on the basis of information or analytic methods that may not be sufficient to justify the conclusions drawn from the available data, or that may not present an accurate picture of the actual situation.

1/ Leslie Kish, Survey Sampling 163 (1965).

This problem is most readily apparent in EPA's discussion of the causation aspect of its analysis. The issue here is individual or aggregate causation: Does the facility, either alone or in combination with other sources, actually cause a disparate adverse impact?

To EPA's credit, the Toolkit acknowledges the difficulty of establishing causation in many situations. Toolkit at 69. But EPA does not explain how it will ensure that any proxy for an actual exposure that is evaluated is the cause of a discriminatory disparate impact.

For example, EPA states that it will consider as an "indicator" of environmental injustice "the number of environmentally regulated facilities within a community" and "the length of time" they have been in operation. Toolkit at 31-32. In other words, EPA will look at *potential* exposure scenarios and make various assumptions in order to use this information in support of overall findings about adverse impacts. But the use or storage of pollutants cannot be equated with actual releases or actual exposure. It would be highly inappropriate for EPA to evaluate the specifics of such use and storage in order to predict the likelihood of possible future releases. See *Fertilizer Institute v. United States EPA*, 935 F.2d 1303 (D.C. Cir. 1991) (even CERCLA's very broad definition of "release" does not include storage). This kind of prediction should not be considered to support a complaint of environmental injustice.

The point here is not that EPA must always have current pinpoint emissions monitoring data in order to draw any conclusions about releases and exposures from a facility. Estimates of emissions may be entirely appropriate where actual data are unavailable. However, actual releases and actual exposures, not potential releases, should be the focus of any adverse impact determination.

Finally, despite EPA's stated preference for valid and reliable data, some of the databases and other potential sources discussed in the Toolkit fall short of the mark. TRI reporting data, for example, are widely recognized as having built-in limitations due to the "one size fits all" rules that govern the way facilities must calculate or estimate their own TRI data. The CERCLIS database maintained by the Superfund program is also known to have varying data quality among the EPA Regional offices. It may not be possible to specify in advance which data sources will and will not be considered in all cases. EPA should recognize, however, that data from some of the most common databases may well be unsuitable for use in assessing complaints because they are neither valid nor reliable.

4. EPA May Not Involve the Permittee in the Assessment.

EPA should recognize that the permittee typically has a strong and legitimate interest in any government activity relating to its facility. The issue need not be viewed solely in terms of whether a permit amounts to a legally protected property interest.

Instead, it can be viewed in terms of ensuring that all persons with an interest in the issues are informed and afforded a reasonable opportunity to submit any information they believe may be useful.

The permittee will likely be in possession of the most up-to-date information about actual facility emissions, available pollution-control technologies, the cost of installing them and their technical practicability. Clearly, there is a role for the permittee(s) in assessing any complaint of environmental injustice, and EPA should recognize such a role.

The permittee's perspective may be particularly crucial in cases where a regulatory benchmark, rather than a risk level, is used to assess the facility's emissions. Regulatory limits on emissions are often established through a lengthy process that considers various margins of safety, impacts on sensitive sub-populations and other complexities. In the *Select Steel* case, for example, one critical fact was that the National Ambient Air Quality Standards were established to protect human health with an adequate margin of safety. The permittee will often have a unique appreciation of issues such as these from having participated in the standard-setting process. To leave the permittee uninvolved is to risk the loss of this potentially vital information.

Finally, not notifying the permittee of the complaint is simply not being fair to a stakeholder with a strong and legitimate interest in the issues. Permittees may be investing substantial amounts in facilities that may never be allowed to operate, and they obviously need to know that their permits are potentially at risk.

5. EPA May Pressure the State Agency to Take Action Against the Permittee Even If its Facility Has Little Impact on Overall Pollution Levels.

Despite EPA's frequent acknowledgment that a single permitted facility is rarely the sole cause of an disparate adverse impact, there is no mention in the Toolkit of how the remedy for such an impact should be distributed among the various sources that contribute to it.

For all that appears, the complaining party could simply focus on the facility that received the most recent permit (or permit renewal) and demand of that facility sufficient emissions reductions or offsets to address any impacts of concern, even though the facility in question contributed very little to those impacts in the first place. Indeed, this is exactly how EPA proceeds in the "hypothetical example" it presents in Appendix C to the Toolkit.

The BNEJ believes that EPA must commit itself strongly and explicitly to a rule of proportionality -- a facility that is a minor part of the problem should not be expected to

bear a major share of the solution. This basic rule of proportionality is absent from the Toolkit.

Focusing on the most recent permit, and attempting to hold that one facility accountable for the impacts of many other sources, is blatantly unfair and completely unworkable. What is more, expecting one permittee to remedy or mitigate the cumulative adverse impacts of other businesses, governmental sources, and the general public is also unlawful. Again, the Toolkit simply fails to provide the EJ Coordinators with a coherent framework for addressing this important recurring issue.

6. EPA's Actions May Be Unreviewable.

Finally, the Toolkit fails to provide any right of administrative appeal or judicial review of the actions taken by EPA's EJ Coordinators in response to complaints of environmental injustice. In the "hypothetical example" given in Appendix C, for example, EPA decides that the permittee should pay for an assessment of environmental justice issues and that the state should deny the air quality permit. It is manifestly unfair for the EJ Coordinators to make decisions of this magnitude in a vacuum, shielded from review by anyone else. EPA should expressly acknowledge the desirability of administrative and judicial review for all Agency decisions in the area of environmental justice that significantly affect the rights of any person. The Toolkit itself should also acknowledge the presumption that such review is available.

D. EPA's "Hypothetical Example" Dramatically Illustrates the Toolkit's Confrontational Approach.

The confrontational approach underlying the Toolkit is illustrated most dramatically in EPA's "hypothetical example" of "Census Tract 9999" in Chestnut Heights County, which is Appendix C to the Toolkit. Taken as a whole, Appendix C suggests that EPA's EJ Coordinators should view the facts from the perspective of citizens who complain, and should pay little attention to the views of state and local government officials, or to those of business and industry stakeholders. The BNEJ does not believe that this is how EPA's EJ coordinators actually perform their work. Nor would this be a constructive approach for them to begin using.

Among the many elements of EPA's "hypothetical example" that illustrate the one-sided and confrontational approach are the following:

- No written complaint is ever filed by "Citizens for Environmental Justice (CEJ)," but CEJ "insists" that EPA staff accompany them on a walking tour of their small community, and EPA readily agrees to do so (pp. C-1, C-3);
- EPA observes what it describes as "huge" tractor trailers, a "mammoth" landfill, abandoned buildings that "on their face" indicate possible

contamination, and a facility owner who “immediately” shuts his doors as soon as he sees an unfamiliar face (p. C-1);

- EPA never mentions the zoning or other approved land use plan(s) for the community;
- EPA quickly adopts the CEJ perspective that their minority, low-income neighborhood is widely referred to as “The Pits,” and EPA itself consistently uses that term, apparently as a gesture of solidarity (p. C-1 and throughout);
- EPA describes the President of CEJ as “charismatic,” in contrast to the industrial facility owner who is described as behaving in a highly suspicious manner (pp. C-1, C-2);
- EPA echoes CEJ’s claim that their neighborhood “is targeted by the decisionmakers” because the residents are minority and low-income, yet EPA apparently finds no evidence to support such a claim (p. C-3);
- EPA fails to mention the state permitting agency’s facially neutral permitting practices, or the fact that state law typically requires permitting decisions to be based on technical criteria, not on demographics;
- After the walking tour, EPA’s notes “strongly indicate an environmental justice situation,” apparently because numerous potential sources of pollution are located in a small community whose residents are heavily minority and low-income (p. C-4);
- EPA invites CEJ to send two representatives to help EPA plan its screening-level assessment, but makes no effort to involve either the owner of the proposed facility whose air quality permit application is pending, or any of the other industrial stakeholders in the community (p. C-5);
- EPA decides that the reference community for comparison purposes is the entire county (Chestnut Heights County), based solely on the way in which CEJ has articulated its (verbal) complaint (pp. C-5 to C-6);
- EPA meets repeatedly with CEJ and takes pains to insure that the assessment plan, the conceptual model, etc., are acceptable to CEJ, yet EPA fails to provide information to, or seek input from, any of the industrial stakeholders (p. C-6);

- EPA asks the state permitting agency to re-do its air quality modeling for the proposed facility, this time “assuming more extreme weather conditions for the area than assumed previously,” although there is no indication that the original assumptions were inaccurate in any way or that the new “more extreme” assumptions are more realistic (p. C-11)
- Based on the “more extreme” modeling, EPA concludes that the proposed facility could have adverse health effects on the community “given the possible existing levels of air contamination” (p. C-13);
- Although the state DEQ held a public hearing on CEJ’s concerns less than a month ago, and released extensive documentation on its approach to the air quality permitting issues, EPA faults the DEQ because the CEJ members were unable to read its documentation (pp. C-4, C-11);
- EPA expresses concern that “the state DEQ might not deny the [proposed facility’s air quality] permit” (C-14) (emphasis supplied), even though the facility apparently meets all of the technical standards for obtaining the requested air quality permit;
- EPA then convinces the state DEQ “that a more Refined Assessment is needed” and that “the owners of the proposed facility should contribute resources for the assessment” (p. C-14); and
- EPA also suggests to the state DEQ various “mitigation options that the state can discuss with the facility owners . . . or consider for state actions . . .” (p. C-14).

In sum, EPA responds to CEJ’s verbal complaint by devoting substantial resources to a new investigation, viewing the facts in the light most favorable to CEJ, second-guessing the findings of the state regulatory agency, bypassing the views of the affected industrial facility, and then pressuring the state agency to extract both a financial contribution and also unspecified “mitigation” measures from the facility owner. This is a textbook example of confrontation and intrigue being pursued where collaborative problem-solving would have achieved better results. Yet the Toolkit presents this case study to the EJ Coordinators as an illustration of how they should perform their official duties. For EPA to encourage this kind of conduct by its employees is nothing short of disgraceful.

III. EPA Must Explain and Document the Toolkit’s 51 Different EJ “Indicators”

The Toolkit presents a total of 51 “Environmental Justice Indicators” to be used by the EJ Coordinators in assessing potential complaints. According to the Toolkit, EPA developed these 51 indicators by “adapt[ing]” various indicators used by the

Organization for Economic Co-Operation and Development (OECD). Toolkit at 26. But upon closer examination, it is clear that EPA has not fully explained, or adequately documented, most of the 51 indicators it now seeks to use.

The OECD's most current published work in this area is entitled "OECD Environmental Indicators – Towards Sustainable Development" (2001). This publication includes indicators approved by the Environment Ministers of the OECD member countries for use in performing environmental assessments. In this 2001 publication, OECD presents 34 such indicators, divided into 2 groups – environmental indicators and socio-economic indicators.

EPA's Toolkit, on the other hand, presents a total of 51 indicators, divided into 4 groups – environmental, health, social, and economic. According to the Toolkit, EPA has "modified or supplemented the OECD's indicators." Toolkit at 26.

But it appears that EPA has done much more than that. Of the 51 indicators presented in the Toolkit, very few are OECD indicators. Most of the others – particularly those presented as "health" and "social" indicators – are not even loosely related to any of the OECD's indicators. In other words, EPA created many of these indicators on its own, without offering any explanation or documentation for them.

At a minimum, then, EPA must now independently explain and support the manner in which it developed each of these 51 indicators, as well as its rationale for proposing to use them in evaluating environmental justice complaints. The Toolkit simply does not present this explanation or this support.

Even without this explanation or support, many of the 51 indicators in the Toolkit raise significant questions because on their face, they do not appear to be indicative of either environmental problems or environmental injustice. We address below just a few examples taken from 3 of the 4 sub-groups in the Toolkit.

- **Climate** is listed as an Environmental Indicator, even though every community obviously has a climate and the presence of a climate is not by itself an indicator of any environmental quality issue or environmental justice issue;
- **Infant mortality rate** is listed as a Health Indicator, even though EPA acknowledges that this rate "is sensitive to a variety of community health factors . . . including nutrition, drug and alcohol use, and disease status," Toolkit at 39-40, which may have nothing to do with environmental quality or environmental justice issues;
- **Percent of the population that is literate in English or other languages** is listed as a Social Indicator, when the literacy rate in and of

itself is obviously not an indicator of either environmental quality or environmental injustice;

- **Percent of the population with access to public transportation and services** is listed as a Social Indicator because low-income persons may “require public transportation to access urban . . . amenities,” Toolkit at 47, which on its face is not an indicator of either environmental quality or environmental injustice;
- **Percent of community that uses regulated (cigarettes, alcohol) and unregulated (drugs) substances** is listed as a Social Indicator because these substances can make users “more susceptible to other environmental hazards,” Toolkit at 48, yet their use is a matter of personal choice and respect for the law, not an indicator of environmental quality or environmental injustice; and
- **Cultural dynamics** is listed as a Social Indicator, without any clear definition of what it means or how it can be measured, yet it is not an indicator of environmental quality or environmental injustice.

In sum, EPA has yet to explain (1) how it derived these 51 indicators from the OECD’s drastically different set of 34 environmental indicators, or (2) how EPA’s 51 Indicators can be reliably measured and used in conducting assessments, or (3) most fundamentally, why EPA believes these 51 indicators actually “indicate” the existence of environmental injustice. Until EPA provides the essential explanation and documentation, the Toolkit should not be used by EPA’s EJ Coordinators.

IV. By Equating All Disproportionate Impacts with Environmental Injustice, The Toolkit Promises Far More Than EPA Can Deliver.

The final problem with the Toolkit is also the most fundamental: It promises far more than EPA can deliver. Based on the term “fair treatment,” as found in EPA’s Mission Statement, the Toolkit seemingly equates all disproportionate impacts with environmental injustice. See, e.g., Toolkit at 71-72. This is not sound public policy, because EPA is promising more than it can possibly deliver.

As noted earlier, the BNEJ emphatically believes all people should be treated fairly under all laws, including environmental laws, without discrimination based on race, color, or national origin. This means that environmental standard-setting, permitting, and enforcement should be free of any such discrimination.

But this does not mean that all persons can or should be guaranteed equal environmental results. See, e.g., *Alexander v. Choate*, 469 U.S. 287, 304 (1985) (Congress sought to assure “evenhanded treatment” and equal opportunity to

participate in federally-funded programs, not to guarantee “equal results” from such programs) (Rehabilitation Act); *Jersey Heights Neighborhood Ass’n v. Glendening*, 174 F.3d 180, 194 (4th Cir. 1999) (noting that, in the context of highway construction, “equal benefits” would mandate “a twisting, turning roadway that zigs and zags only to capture equally every ethnic subset of our population,” and rejecting “equal benefits” approach as an “absurdity”) (Fair Housing Act).

As a practical matter, a guarantee of equal results would be impossible to implement or enforce in a free society. Identical facilities cannot be placed everywhere, and even identical facilities cause unequal impacts in different locations for different populations. Consequently, some individuals within the community and some communities as a whole will inevitably face greater exposure than others to any given facility. Differences in exposure are not the same thing as environmental injustice. The key point is that differences do exist, and so the EJ Coordinators must have some way to distinguish between those differences that are significant and those that are not.

This point was clearly articulated by the Environmental Hearing Board of the Commonwealth of Pennsylvania in an early phase of the environmental justice litigation arising in Chester, Pennsylvania:

Life in organized society necessarily involves risks, burdens and benefits. These all increase as society grows larger and more complex. Ideally, they should be shared equally by all members of the society, but that is rarely, if ever, possible. Transportation facilities cannot be everywhere; some persons will be close to one, others will not. *Whether this is looked upon as benefit or burden will depend on the outlook and interests of each person.* Parks and recreational facilities also cannot be in every neighborhood. Those not near to such a facility may feel burdened by the distance while those adjacent to it may feel burdened by the proximity. . . . The point is that all persons in society have a mixture of risks, burdens and benefits in varying proportions to other persons.

Chester Residents Concerned for Quality Living v. Commonwealth of Pennsylvania, Environmental Hearing Board Docket No. 93-234-MR, slip op. at 1518 (Oct. 20, 1993) (emphasis added).

Thus, the Toolkit should not suggest that all disproportionate adverse impacts amount to “environmental injustice” that EPA will strive to eliminate. Such an approach is not supported by EPA’s legal authorities, is not sound public policy, and is ultimately not a realistic objective in a free society.

V. Conclusion

The BNEJ is committed to working with the EPA, states, our host communities and other stakeholders on environmental justice concerns. Our members are committed to the non-discrimination mandates of Title VI of the Civil Rights Act of 1964 and Executive Order 12,898, and they seek to be responsible community members.

We believe that EPA's Toolkit is so severely flawed that it should not be used by the EJ Coordinators until EPA takes action to address these many deficiencies. We hope that this statement concerning EPA's Toolkit will ultimately assist EPA in its efforts to develop better tools for its EJ Coordinators.