

City of Cincinnati



Date: May 12, 2009
To: Mayor and Members of Council
From: Milton Dohoney, Jr. City Manager *MD*
Subject: Environmental Justice Ordinance

200900696

Reference Document # 200900635

At its meeting on April 28, 2009, the Health, Environment and Education Committee referred the following item for report:

ORDINANCE, dated 04/28/2009, submitted by Vice Mayor Crowley, from John P. Curp, City Solicitor, AMENDING, the provision of Title X, Environmental Code, of the Cincinnati Municipal Code, by enacting Chapter 1041, Environmental Justice.

Summary of the Proposed EJ Process

The proposed ordinance would amend the Cincinnati Municipal Code to establish new regulations and processes aimed at incorporating an "environmental justice standard" and requiring an "Environmental Justice Permit" for "Proposed Projects." The ordinance establishes a review process intended to determine whether a "proposed project" "is likely to have a material, cumulative, adverse impact on the health or environment of any EJ community." Under the ordinance, those "proposed projects" determined by an "EJ review" to be likely to have a material, cumulative, adverse impact on an "EJ community" (the EJ Standard) will be denied an EJ Permit and would therefore be prohibited.

Proposed projects subject to the requirements of the proposed ordinance include those new or expanded businesses that trigger specified notification or permit requirements under existing state and federal environmental regulations.

The ordinance requires any party that has a proposed project to apply for an EJ Permit. The permit application must contain "Comprehensive Information" about the proposed project. Within 10 days following receipt of the permit application, OEQ will determine whether the application is complete. If OEQ determines that the application is complete, OEQ will mail notice of the application, at the applicant's expense, to "any community council, hospital, school, daycare, or other key community stakeholders located within one-mile of the proposed project" and "all readily ascertainable addresses located within one quarter of a mile of the proposed project." OEQ will make all information submitted by the applicant available to the public. Following a 30 day public comment period, the EJ Examiner will determine whether the proposed project "is likely to have a material, cumulative, adverse impact on the health or environment of any community." The EJ Examiner may impose

conditions on the project to mitigate effects of the proposed project, including the requirement of a bond or surety to insure compliance.

The EJ Examiner's decisions may be appealed to a five-member EJ Board of Appeals appointed by the Mayor with approval of City Council.

Administration comments on the proposed EJ Ordinance

1) The Administration supports the purposes underlying the proposed EJ Ordinance. It is recognized that industrial pollutants adversely affect the health, welfare and quality of life of many people throughout the United States, including in Cincinnati. Cincinnati currently has ordinances designed to minimize the impact of industry on residents, including zoning laws and air quality regulations. If Council finds that the current laws are providing citizens with inadequate protection, it would be appropriate for Council to enhance that protection.

2) The Administration recommends amendment of the current proposal to address several identified concerns:

1041-5-D – The proposed Ordinance calls for creation of an EJ Examiner position and will require other expenditures to ensure successful implementation. OEQ has estimated the cost of implementation at \$125,000 per year for 1 staff person and contracted technical support. This estimate is somewhat speculative because the actual volume of EJ reviews is not known. Funding for these expenses should be added to the Ordinance, perhaps by charging an application fee for an EJ Permit.

1041-5-J – The definition of "Interested Party" should include people who own land within the community.

1041-5-L – The "Proposed Project" definition makes the Ordinance applicable to facilities that "either seek to be or are currently located" in Cincinnati. If the intention is to grandfather facilities that already exist, this language should be clarified.

1041-5-L(b) – It is not uncommon for a site to require an air permit to cover demolition or construction related emissions during the construction phase of a project. Such construction-related emissions should probably not trigger an EJ Review (especially if the duration of such emissions will be relatively brief) and should be exempted from this section.

1041-5-L(g) – It is not uncommon for a construction project to encounter contaminated soil at a site that requires disposal as hazardous waste. The Administration believes that the disposal of hazardous waste due to the cleanup of historic soil contamination during the construction phase of the project should not trigger an EJ review, and should be exempted from this Section.

1041-5-L(i) – The Administration has been unable to locate any published listing of facilities that have filed Notification pursuant to 40 CFR 63.9. It is recommended that this criteria be deleted.

1041-5-M(c) – Most environmental permits need to be renewed periodically. A new paragraph should be added to state explicitly that a pre-existing operation does not become subject to the EJ Permit requirement simply because an existing permit comes due for periodic renewal.

1041-7 – The EJ Standard is somewhat ambiguous about whether any public nuisance satisfies the EJ Standard, or whether it must be a public nuisance related to health or the environment. The second paragraph of 1041-7 can be read as including all public nuisances. If a narrower meaning is intended, the language should be clarified.

New Provision – The Administration recommends inclusion of a sunset clause or requirement for periodic reviews of the EJ Ordinance. Because the EJ Ordinance is the first of its kind in the country, it would be appropriate to assess its performance after 2 or 3 years and make adjustments based on lessons learned.

Whereas Provisions – One point not addressed in the whereas provisions is that, in addition to physical health effects from environmental nuisances, there often are mental health effects such as increased stress experienced by residents. Addition of a whereas provision discussing mental health impacts should be considered.

3) The Administration observes that the proposed ordinance will have benefits and drawbacks, and the Administration lacks the ability to quantify many of these impacts:

A. Benefits of the EJ Ordinance may include:

1. Improved public health – Adverse health effects associated with poor air quality in Cincinnati and across the nation are well documented. The degree to which the EJ Ordinance will improve the air quality is hard to predict.
2. Reduced health care costs – Improved public health yields monetary as well as human benefits. Reduced absenteeism, increased productivity, lessened utilization of doctors and hospitals all flow from air quality improvements. The Administration has no way to predict or measure the magnitude of these benefits.
3. Enhanced green reputation as the first City to adopt an EJ Ordinance – The City is gaining notoriety in environmental circles for its Green Cincinnati Plan, LEED Tax Abatements, and other cutting edge sustainability initiatives. The EJ Ordinance would add to the City's growing list of green credentials.
4. Economic development benefits related to the enhanced green reputation – Sustainable communities are attractive to both employers and employees. The EJ Ordinance and other green initiatives will help the City position itself as a place that people want to be.

B. The EJ Ordinance may inhibit economic development.

1. EJ determinations under this ordinance take time. The timeline from application to permit issuance is 80 days, and the appeal process can add another 125 days. While few proposals would require an EJ review, and not every EJ review will go through the whole appeal process, it should be noted that any person within a mile of the proposed site is entitled to appeal EJ determinations.

2. EJ determinations are expensive for the project proponent. The proponent must pay for a mailing to all neighbors within 1/4 mile, gather and present environmental and health data on the area surrounding the site, and hire a consultant to demonstrate that the proposed project meets the EJ standard. The consultant must generate a written submittal to the City, and defend that submittal through a series of meetings and perhaps appeals.

C. The EJ Ordinance will require resources to effectively administer.

1. Implementation of the EJ Ordinance will require expertise that the City does not have. To predict the impact of a not-yet-built facility on existing human and non-human communities would require specialized expertise in the fields of industrial engineering, air dispersion modeling, toxicology and epidemiology. The City does not currently have employees with expertise in any of these areas. To obtain technical consultants on a contract basis to support this ordinance is estimated to cost \$50,000/year.

2. It is estimated that 10 proposals each year will require an EJ review. EJ reviews are estimated to each require 160 hours of staff work. Monitoring and enforcement of the Ordinance will consume approximately 400 hours per year. This will require 1 new staff position, estimated to cost \$75,000/year. These resource requirements are the Administration's best estimates but are somewhat unreliable due to an inability to predict the number of proposals that will require EJ reviews, or the complexity of the process based on as-yet-unwritten guidance documents. These estimates do not include expenses for appeals beyond the EJ Board of Appeals.

cc: Larry Falkin

