

## Update on Cincinnati Environmental Justice Ordinance

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As of December 21, 2009, it will become more difficult to build a new manufacturing facility or expand an existing one in the City of Cincinnati. The law which will take effect is the Cincinnati Environmental Justice Ordinance and is believed to be the only one of its kind in the United States. The stated purpose of the Ordinance is to protect persons living in disadvantaged communities from the adverse impacts of industrial pollution. The means to achieve this purpose is through the use of an "Environmental Justice Permit."

The Ordinance requires certain "Proposed Projects," consisting of new manufacturing or industrial facilities, or changes or expansions of existing manufacturing facilities, that potentially create a public nuisance to obtain an Environmental Justice Permit. To obtain this City permit the applicant must demonstrate the proposed manufacturing operations will not cause a "cumulative, material adverse impact" on the community. An Environmental Justice Permit is required for a Proposed Project to proceed even if all other federal, state and local permits and approvals have been obtained.

"Proposed Projects" consist of those activities that are required by USEPA or Ohio EPA to: i) obtain a Title V air permit; ii) obtain a "major source" air permit; iii) obtain a "synthetic minor" air permit; iv) file a EPCRA extremely hazardous substance notification; v) file an EPCRA Toxic Release Inventory report; vi) obtain a hazardous waste treatment, storage or disposal facility permit; vii) provide a notification of hazardous waste activity as a large quantity generator; or viii) obtain a license or permit to operate a solid waste landfill or transfer station. An expansion or alteration of an existing activity also constitutes a Proposed Project under the Ordinance if the expansion or manufacturing activity requires a major modification to the air, hazardous or solid waste permit, or requires new filings or disclosures under EPCRA, or the filing of an amended RCRA hazardous waste generator notification.

Under the Ordinance, the permit application must be accompanied by "Comprehensive Information," which includes a detailed risk analysis. The Environmental Justice Permit Application is required to be submitted within 14 days of receipt of the permit or license, or submission of any report or notification, noted above. Subject to a ten-day completeness review, the City, at the applicant's expense, will notify any community council, hospital, school or daycare within one mile of the Proposed Project, and notify all "readily ascertainable addresses" within ¼ mile of the Proposed Project concerning receipt of the permit application. For a 30-day period, any interested party or member of the public may submit information about the Proposed Project or the community to the City's Environmental Justice Examiner, who is obligated to consider all such information in making a determination whether to issue the Environmental Justice Permit for the Proposed Project. The City's Examiner has 30 days to act on the permit application. No comparable process exist under federal or state environmental laws.

The standard of review for the permit application by the Examiner is whether the Proposed Project will have a "material, cumulative adverse impact" on the health or environment in the community within which the Proposed Project would be located. The Proposed Project will be deemed to have a "material, cumulative adverse impact" if it will cause a "public nuisance, significantly interfering with a public health or environmental right common to the general public." A Proposed Project is deemed to constitute a public nuisance if it will: i) cause an excess cancer risk; ii) cause an excess risk of acute health effect; iii) cause an excess risk in the event of an accident; or iv) constitute an air pollution nuisance, as defined in OAC 3745-15-07. Upon appeal of a permit approval or denial, the decision of the City's Examiner is subject to review by an Environmental Justice Board of Appeals, appointed by the mayor and approved by City Council, which Board is

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required to conduct an evidentiary hearing. If no decision is made by the Board within 90 days of the filing of the appeal the decision of the Examiner is deemed to have been affirmed.

Noncompliance with the Environmental Justice Ordinance or Permit may result in the imposition of penalties not to exceed \$15,000 per day and the commencement of a civil injunctive action. Any person "knowingly" violating the Ordinance or knowingly omitting material information from the permit application, or knowingly including any false material representation in the permit application is guilty of a first degree misdemeanor, and may be subject to a fine not to exceed \$1,000 per day or imprisonment not to exceed 180 days, or both.

Implementation of the Ordinance requires the City to develop and prepare application forms and instructions. However, the City has not yet developed such materials, nor hired an Environmental Justice Examiner nor appointed members of the Board of Appeals, reportedly, due to a lack of funding. It is not known whether the City will enforce the Ordinance in the absence of such materials or if all facilities subject to the Environmental Justice Ordinance will be grandfathered prior to the actual implementation of the permit program after the effective date of the Ordinance.

**February 23, 2010 Update:** On February 10, 2010, the Cincinnati City Counsel approved an ordinance to formally delay the effective date of the City's new environmental justice ordinance until February 1, 2011. Implementation and enforcement of the ordinance was delayed due to a lack of funding. The ordinance will require new or expanding manufacturing facilities to obtain an environmental justice permit.

*Nothing in this alert is intended to be legal advice. Please consult with counsel of your choice with regards to any specific questions you may have.*

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