EPA’s Focus on Environmental Justice: New Obstacles For Permitting

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John B. King
Breazeale, Sachse & Wilson, L.L.P.
Baton Rouge, Louisiana
john.king@bswllp.com
OUTLINE OF TOPICS

- Title VI of the Civil Rights Act
- EPA’s EJ Regulations – 40 CFR Part 7
- Executive Orders
- EPA Guidance
- EPA EJ Screen
- Considerations, Obstacles, and Uncertainties in Site Selection and Permitting

Available at www.bswenviroblog.com
Civil Rights Act of 1964 – Title VI

- Section 601: “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” 42 U.S.C. §2000d.

  - Private individuals may sue to enforce §601
  - Directly reaches only intentional discrimination
Civil Rights Act of 1964 – Title VI

- Section 602: Each Federal department and agency which extends Federal financial assistance to any program or activity “is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability.” 42 U.S.C. §2000d-1.

  - “Neither as originally enacted nor as later amended does Title VI display an intent to create a freestanding private right of action to enforce regulations promulgated under §602.”

- Some question whether Section 602 regulations may address non-intentional discrimination
  - Most assume they may, but Supreme Court statements seem to suggest otherwise
EPA Regulations – 40 CFR Part 7

- 40 CFR §7.15
  - Applies to all applicants for, and recipients of, EPA assistance in the operation of programs or activities receiving such assistance

- General prohibition - 40 CFR §7.30
  - No person shall be excluded from participation in, denial of benefits of, and discrimination under any program or activity receiving EPA assistance on the basis of race, color, or national origin.

- Specific prohibitions - 40 CFR §7.30
  - Recipient shall not use criteria or methods of administering its program or activity which have the effect of subjecting individuals to discrimination
  - Recipient shall not choose “a site or location of a facility that has the purpose or effect of ... subjecting [persons] to discrimination under any program or activity to which this part applies on the grounds of race, color, or national origin.”
EPA Regulations – 40 CFR Part 7

- Complaint process
  - EPA conducts “preliminary investigation” of a complaint
  - May accept, reject, or refer
  - Will attempt to resolve through an Informal Resolution Agreement
  - EPA may issue Preliminary Findings
    - Will include recommendations to achieve compliance
    - Recipient may file a response to complaint or Preliminary Findings

- Finding of non-compliance
  - Recipient can agree with findings, take corrective actions
  - Recipient can contest the findings

- Remedies
  - Terminate or refuse to award or to continue assistance
  - Recipient can request a hearing
    - Outcome subject to judicial review under APA
  - Use any other means authorized by law to get compliance
    - Includes referral to DOJ
  - Filing a complaint “does not suspend an issued permit.” 65 FR 39651 (6/27/00)
## EPA Regulations – 40 CFR Part 7

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[04R-22-R6 Complaint (pdf) (7.65 MB)](#)  [04R-22-R6 Acceptance REC (pdf) (150.42 KB)](#)  [2022-10-12 LEDO LDH 01R-22-R6, 02R-22-R6, 04R-22-R6 Letter (pdf) (1017.92 KB)](#)  [01R-22-R6 Complaint (pdf) (2.65 MB)](#)  [01R-22-R6 Acceptance REC (pdf) (150.42 KB)](#)  [2022-10-12 LEDO LDH 01R-22-R6, 02R-22-R6, 04R-22-R6 Letter (pdf) (1017.92 KB)](#)  [02R-22-R6 Complaint (pdf) (2.65 MB)](#)  [02R-22-R6 Acceptance REC (pdf) (143.06 KB)](#)  [2022-10-12 LEDO LDH 01R-22-R6, 02R-22-R6, 04R-22-R6 Letter (pdf) (1017.92 KB)](#)  [06RNO-22-R6 Complaint (pdf) (114.14 KB)](#)  [06RNO-22-R6 REA Acceptance (pdf) (123.93 KB)](#)  [06RNO-22-R6 REA Tolling Ltr (pdf) (226.8 KB)](#)  [05RNO-22-R6 Complaint (pdf) (4.68 MB)](#)  [05RNO-22-R6 REA Acceptance (pdf) (123.93 KB)](#)  [05RNO-22-R6 REA Tolling Ltr (pdf) (226.8 KB)](#)  [02R-21-R6 Complaint (pdf) (4.27 MB)](#)
Executive Orders

EO 12898 - Feb. 11, 1994

- Each agency shall make achieving environmental justice part of its mission
- Must ...
  - Identify and address disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations
  - Develop an agency-wide environmental justice strategy
  - Conduct its programs, policies, and activities that substantially affect human health or the environment in a manner that ensures that such programs, policies, and activities do not have the effect of
    - excluding persons from participation in,
    - denying persons the benefits of, or
    - subjecting persons to discrimination under, such programs, policies, and activities, because of their race, color, or national origin
Nation deserves an “ambitious whole-of-government equity agenda”

The term “equity” means the consistent and systematic fair, just, and impartial treatment of all individuals, including individuals who belong to underserved communities that have been denied such treatment

Requires
- An equity assessment in federal agencies
- Allocation of federal resources to advance fairness
- Promotion of equitable delivery of government benefits and equitable opportunities
Executive Orders

EO 14008 (Jan. 27, 2021)

- Agencies shall make achieving environmental justice part of their missions by developing programs, policies, and activities to address the disproportionately high and adverse human health, environmental, climate-related and other cumulative impacts on disadvantaged communities, as well as the accompanying economic challenges of such impacts.
- Establishes the White House Environmental Justice Advisory Council
- Provides advice to White House “on how to increase the Federal Government’s efforts to address current and historic environmental injustice
- Creates Justice40 Initiative
- Goal of “40 percent of the overall benefits flow to disadvantaged communities”
EPA Guidance

FY 2022-2026
EPA Strategic Plan

MARCH 2022

John B. King

John.King@bswllp.com
EPA Guidance

FY 2022-2026 EPA Strategic Plan

MISSION: To Protect Human Health and the Environment
PRINCIPLES: Follow the Science, Follow the Law, Be Transparent, Advance Justice and Equity

EPA Mission
To Protect Human Health and the Environment

Strategic Goals
1. Tackle the Climate Crisis
2. Take Decisive Action to Advance Environmental Justice and Civil Rights
3. Enforce Environmental Laws and Ensure Compliance
4. Ensure Clean and Healthy Air for All Communities
5. Ensure Clean and Safe Water for All Communities
6. Safeguard and Revitalize Communities
7. Ensure Safety of Chemicals for People and the Environment

Cross-Agency Strategies
1. Ensure Scientific Integrity and Science-Based Decision Making
2. Consider the Health of Children at All Life Stages and Other Vulnerable Populations
3. Advance EPA’s Organizational Excellence and Workforce Equity
4. Strengthen Tribal, State, and Local Partnerships and Enhance Engagement
Goal 2: Take Decisive Action to Advance Environmental Justice and Civil Rights

Achieve tangible progress for historically overburdened and underserved communities and ensure the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income in developing and implementing environmental laws, regulations, and policies.

Objective 2.1: Promote Environmental Justice and Civil Rights at the Federal, Tribal, State, and Local Levels

Objective 2.2: Embed Environmental Justice and Civil Rights into EPA’s Programs, Policies, and Activities

Objective 2.3: Strengthen Civil Rights Enforcement in Communities with Environmental Justice Concerns
EPA Legal Tools to Advance Environmental Justice: Cumulative Impacts Addendum

January 2023
Office of General Counsel
U.S. Environmental Protection Agency
Washington, D.C. 20460

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Publication No.: 360R22002
EPA Guidance

Environmental Protection Agency

Interim
Environmental Justice and Civil Rights in Permitting
Frequently Asked Questions

August 2022
Office of General Counsel
Office of Policy
What is a disparate impact analysis under Title VI?

- **Disparate impact**: Does a recipient’s criteria or method of administering its program or activities adversely and disparately affect members of a group identified by race, color, or national origin?
  - **Adverse Impacts**: Is there an adverse impact of the policy or practice? Adverse impacts could include harmful health effects, odor, noise, decrease in property values, etc.
  - **Disproportionality**: Is a disproportionate share of the adversity borne based on race, color, or national origin (including LEP status)? Disparity is a fact-specific inquiry that involves identifying an appropriate measure.29
  - **Causation**: Is there a causal link between the recipient’s policy or practice and the disparate impact?30

- **Justification**: If so, is there a substantial legitimate justification for the policy or practice? This question is unique to a disparate impact analysis. See FAQ #13.

- **Less discriminatory alternative**: Even if there is a substantial legitimate justification for the policy or practice causing the disparate impact, is there an alternative practice that may be comparably effective with less disparate impact?31
EPA Guidance

12 How would EPA consider “cumulative impacts” within the Title VI disparate impact analysis?

In the context of Title VI investigations, EPA considers cumulative impacts when evaluating whether there is an adverse impact from the recipient’s policy or practice. That is, EPA considers whether any adverse impact caused by the permitting decision—and borne disproportionately by persons on the basis of race, color, or national origin (including LEP status)—may be even greater considering cumulative impacts from other chemical and non-chemical stressors.

“Cumulative impacts” refers to the total burden – positive, neutral, or negative – from chemical and non-chemical stressors and their interactions that affect the health, well-being, and quality of life of an individual, community, or population at a given point in time or over a period of time. Cumulative impacts include contemporary exposures in various environments where individuals spend time and past exposures that have lingering effects. Total burden encompasses direct health effects and indirect effects to people through impacts on resources and the environment that affect human health and well-being. Cumulative impacts provide context for characterizing the potential state of vulnerability or resilience of the community, i.e., their ability to withstand or recover from additional exposures under consideration.
What if a Title VI disparate impact analysis by a permitting program concludes that the permit decision will have adverse disparate impacts on the basis of race, color, or national origin (including LEP status)?

- If there are no mitigation measures the permitting authority can take, whether within or outside the permitting program, that can address the disparate impacts, and there is no legally sufficient justification for the disparate impacts, denial of the permit may be the only way to avoid a Title VI violation. Whether denial of a permit is required to avoid a Title VI violation is a fact-specific determination that would take into account an array of circumstances, including whether the facility will have an unjustified racially disproportionate impact, as well as the less discriminatory alternatives available. 38
What are some examples of measures that a permitting program may be able to take to mitigate adverse and disproportionate impacts and/or develop and implement less discriminatory alternatives?

Permit terms:

- Enforceable requirements for continuous compliance monitoring equipment (e.g., opacity cameras) to ensure proper operation of control devices, compliance with permitted limits, and adherence to industry best practices.
- Enhancements to compliance assurance provisions, including additional continuous or periodic monitoring, recordkeeping, or reporting requirements.
- Establishment of a public-facing website with all relevant compliance information about the facility and real-time data measurements.
- Additional pollution controls or more stringent limits.
- Inclusion of enforceable work practices, operating plans, and/or best practices for minimizing emissions and/or discharges (e.g., a fugitive emission plan).
- Incorporating modeling assumptions as legally and practically enforceable limits or work practices (e.g., hours of operation).
- Expansion of buffers or modification of operational hours.

The use of non-environmental authorities:

- Use public health authority to implement a mobile health monitoring program in the affected community.
- Use transportation authority to develop new traffic plan to reduce diesel emissions in the affected community.
- Use public health authority to establish a citizen hotline with a 24-hour response time.

Other potential commitments:

- Third-party monitoring of community complaints.
- Support for public transparency of monitoring information, including community-driven monitoring.
- Other enforceable agreements (e.g., community benefit agreements).
MEMORANDUM

SUBJECT: Principles for Addressing Environmental Justice in Air Permitting

FROM: Joseph Goffman
Principal Deputy Assistant Administrator
Office of Air and Radiation

TO: Air and Radiation Division Directors
Regions I-X

December 22, 2022

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF AIR AND RADIATION

JOSEPH GOFFMAN
Digitally signed by
JOSEPH GOFFMAN
Date: 2022.12.22
11:23:37-05'00'

John B. King
John.King@bswllp.com
EPA Guidance

- Provides an “interim operating framework” to address EJ in CAA context
  - Encourages sharing with States to facilitate application in their air permitting actions

- Framework
  - Identify communities with potential environmental justice concerns
  - Engage early in the permitting process to promote meaningful participation and fair treatment
  - Enhance public involvement throughout the permitting process
  - Conduct a “fit for purpose” environmental justice analysis when a permitting action “may result” in disproportionality high and adverse effect
    - Evaluation of demographic data indicating vulnerabilities in the affected population
    - Evaluation of existing public health data about the affected community
    - Evaluation of the permitting action’s non-health adverse effects (e.g., noise, odor, and traffic)
    - Evaluation of existing environmental data, including air monitoring / modeling, or data from other media
    - Evaluation of the facility’s compliance record
    - Evaluation of the cumulative impact of the permitting action under consideration together with impacts from other regulated and non-regulated sources of pollution in the community
    - Evaluation of the potential effects of the permitting action under consideration on the health of a population and the distribution of those effects within the population
  - Minimize and mitigate disproportionately high and adverse effects associated with the permit action to promote fair treatment
  - Provide federal support throughout the air permitting process
  - Enhance transparency throughout the air permitting process
  - Build capacity to enhance the consideration of environmental justice in the air permitting process
EPA Guidance

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EPA Guidance

Cumulative Impacts Conceptual Diagram

Combined influences on the total (built, natural, social) environment for individuals, geographically defined communities, or definable population groups

epa.gov/healthresearch/cumulative-impacts-research

Adapted from Tulve et al., 2016
EPA Guidance

Cross-Cutting Research Priority

Cumulative Impacts

- Overburdened communities face cumulative impacts from:
  - chemical stressors in environmental media (air, water, land)
  - non-chemical stressors, including social determinants of health.
  - Changing climate exacerbates cumulative impacts.

- It is critical to bolster the scientific basis for identifying actions to improve community health and well-being, and to select, implement, and evaluate such actions.
EPA Guidance

Social Determinants of Health

What are social determinants of health?
Social determinants of health (SDOH) are the conditions in the environments where people are born, live, learn, work, play, worship, and age that affect a wide range of health, functioning, and quality of life outcomes and risks.

SDOH can be grouped into 5 domains:

- Economic Stability
- Education Access and Quality
- Health Care Access and Quality
- Neighborhood and Built Environment
- Social and Community Context

Source: US DHHS

John B. King
EPA’s EJ Screen

- EJ mapping and screening tool
  - Based on nationally consistent data and an approach that combines environmental and demographic indicators in maps and report
- Developed to highlight places that may be candidates for further review, analysis, or outreach
- No mandate or guidance expressed or implied that the tool or its underlying data should be used
- Caveats
  - Not a detailed risk analysis
  - Tool examines some of the relevant issues related to EJ
  - There is uncertainty in the data included
EPA’s EJ Screen
EPA’s EJ Screen

### EJScreen Report (Version 2.11)
3 miles Ring Centered at 30.264405,-97.743473, TEXAS, EPA Region 6
Approximate Population: 181,656
Input Area (sq. miles): 28.27
(The study area contains 1 blockgroup(s) with zero population.)

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John B. King

John.King@bswllp.com
Considerations

- EJ adds uncertainty to site selection/permitting
- Need proactive effort in early stages of planning process
- EJ claims...
  - will likely be made regardless of law/facts
    - To some, no site/facility is a good one
    - Claims made tactically or to galvanize opposition
  - may arise in permit comment period, administrative or judicial appeals of permit decisions, or post-permit Part 7 complaints
  - must still be analyzed based on ...
    - Title VI and case law
    - EPA’s regulations and policies
    - Facts/documents placed in administrative record
Obstacles / Uncertainties

- EPA’s new focus on EJ
  - Application of ‘relaxed’ Title VI standards
  - Community awareness, participation, empowerment
- Facility siting decisions
- Permitting
  - CIA / HIA
    - Currently uncertain criteria and/or methodology
    - Consideration of factors beyond control of permitting agency, such as social determinants of health
  - Mitigation measures to reduce emissions or pollutant discharges
  - Possible denial of permit
Site Selection

- Consider EJ in initial site selection

- Build a good site selection team
  - Composition/cost can vary depending on ...
    - Size of project/capital costs
    - Type of facility
    - Available sites
  - Possible members could include ...
    - Real estate, economist, environmental professionals
    - Counsel, modeler, statistician, toxicologist
  - Team needs to understand EJ considerations

- Prepare set of objective criteria for site evaluation
  - Economic criteria, such as ...
    - Costs, infrastructure, access to transportation
  - Environmental criteria, such as ...
    - Wetlands, attainment status
  - Other criteria, such as ...
    - Zoning, population in proximity
Site Selection

- For each site selected for evaluation...
  - Evaluate based on chosen objective criteria
  - Research, understand, and document the demographics of surrounding area
    - 1-mile, 3-mile, and perhaps 5-mile radius
    - EJScreen needs to be reviewed and addressed

- Assess potential impact of proposed facility on nearby population
  - Modeling of emissions (screening level or in-depth)
    - Follow EPA/agency modeling protocols
    - Ensure model receptors are within nearby community
    - Toxicologist to review potential impact on community
  - Effect of noise, odors, traffic, waste generation
  - Cumulative impact analysis ???

- Prepare report(s) of site selection and/or assessment process
  - Could be more than one document or report
Site Selection
Permitting

- Reviewing court may only review the administrivia record
  - Facts/documents not in the record can not be reviewed
  - So, all supporting facts must be included in administrative record
  - Appendices to application, studies / reports, response to comments

- Build the administrative record to establish no adverse impact
  - Submit the site selection report
  - Submit modeling results
    - Document that NAAQS/HAP AAS are met
      - NAAQS: Protective of public health with an adequate margin of safety
    - Include graphic/figure showing modeled receptors in community
  - Submit other studies (e.g., noise, odor) showing no effect
  - Provide any other supporting facts or documents
    - Toxicologist’s report regarding modeled receptors in community
    - EPA’s own comments regarding limited use of EJScreen/NATA

- Public comment period
  - Submit your own comments in support
  - Respond to major adverse comments in a written submittal
  - Include any supporting documents
Environmental Justice: Origins, Background, and Site Selections Considerations

Paper available at:
Washington Legal Foundation
and
BSW Environmental Blog
https://bswenviroblog.com
QUESTIONS??

John B. King
Breazeale, Sachse & Wilson, L.L.P.
Baton Rouge, Louisiana
john.king@bswllp.com