

Environmental Justice 101: Leveling the Playing Field in the Permitting Process

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The concept of 'environmental justice' (or 'EJ' among environmental practitioners) is not new.

It developed in response to the inordinate number of industrial facilities and contaminated sites located near underrepresented or overburdened communities, which adversely and disproportionately affected the health and well-being of those communities. With the change in federal administrations and intense global discourse on climate change, EJ has now evolved and matured into concrete requirements to be considered in the realm of environmental permitting. Considering EJ concerns in permitting decisions gives affected communities a voice in the process for projects planned near them.

It Starts at the Top

President Biden began his term by addressing the climate crisis head-on. Among his early Executive Orders, he created the Environmental Justice Interagency Council. The Council is comprised of 15 federal agencies, including the United States Environmental Protection Agency ("EPA"), which chairs the Council, and the Department of Justice. The EPA has had an EJ Strategic Plan since 1994 when President Clinton directed federal agencies to develop EJ strategies to address the disproportionately high and adverse human health or environmental effects of federal programs on minority and low-income populations. Now, EJ principles are to be implemented in projects, initiatives, and enforcement actions across all federal agencies, using metrics of the affected population's exposure to pollution, to provide an opportunity for community involvement in the project process.

The EPA, now led by Administrator Michael S. Regan, former Secretary for the North Carolina Department of Environmental Quality ("DEQ"), describes EJ 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." Every four years, it establishes a strategic plan to: (1) communicate priorities and strategies that serve as a planning and budgeting framework; and (2) provide the regulated community a glimpse of where the EPA's focus will be. The draft 2022-2026 Strategic Plan was published in October 2021 and is expected to be finalized by the second quarter of 2022. One of four overarching principles in the Plan is "Advance Justice and Equity"—defined as taking decisive action to advance EJ and civil rights at the federal, state, local, and tribal level by embedding EJ and civil rights in all EPA work and strengthening civil rights enforcement in EJ communities.

The EPA plans to narrow its focus from the broader concept of EJ by vigorously enforcing civil rights protections within its programs. Under Title VI of the Civil Rights Act of 1964 ("Title VI"), federal agencies like the EPA can issue rules and regulations to ensure that no person is unlawfully discriminated against, or excluded from protection by, any of its programs or activities. Title VI states that "no person shall, on the grounds of race, color, national origin, sex, age, or disability be excluded from participation in, be denied the benefits of, or be subjected to discrimination." Section 601 of that Act prohibits intentional discrimination and disparate adverse impacts resulting from what may appear to be a neutral decision by entities that receive federal funds. Disparate adverse impacts are the most common violation in an environmental setting. Although there is no private right of action against an offending agency, Section 602 enables affected EJ communities to file an administrative complaint with the EPA. When the EPA receives such a complaint alleging prohibited disparate impacts, it investigates the permitting process of the project at issue. If the agency overseeing the project has not sufficiently considered impacts on an EJ community in its decision-making process, it risks losing its federal funding.

To assist in its investigations, the EPA has developed a color-coded mapping tool known as the EJSCREEN. This tool collects environmental and demographic indicators for a nationally consistent dataset and approach for environmental decision-making. The EJSCREEN: Environmental Justice Screening and Mapping Tool | US EPA is publicly available, and users can input a geographic location to identify demographic and environmental conditions within a certain distance of an industrial facility.

In 2021, at least six Title VI complaints and investigations were initiated. Of note, one of these complaints involved the DEQ's issuance of three swine waste management and treatment system permits for farms in Duplin County. The complaint asserted that Black and Latino communities near the farms would be disproportionately impacted by the pollution and adverse health effects caused by the hog farms' operation. On January 13, 2022, the EPA agreed to investigate the DEQ's issuance of these permits.

What does EJ look like in NC?

During his tenure at the DEQ, former Secretary Regan raised the profile of EJ by creating an Environmental Justice and Equity Advisory Board and prioritizing efforts to enhance the state's Environmental Justice Program. This Program "works to ensure 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." The EJ Program uses public data and tools to determine if the location of a proposed project is in an area populated by underrepresented communities that the project may disproportionately impact. It uses a Community Mapping System similar to the EPA's EJSCREEN. This System gathers and uses location, demographics and health, and permit or incident information for nearby projects to inform DEQ decisions to implement specific plans for local outreach and accessibility for public participation in meetings and the permitting process. An online comment tool the public to provide information or complaints anonymously about an environmental concern or an incident of discrimination involving an environmental concern. If the DEQ determines the project location is in an EJ community, it will initiate enhanced public outreach to determine if the community is interested or concerned, and will facilitate ways for the community to participate in the permitting process.

At the legislative level, House Bill 784 was introduced in early 2021 to statutorily address EJ considerations. The bill proposes revisions to several enabling statutes (such as those covering solid waste management, actions involving expenditures of state money or use of public land, water quality permits, and animal waste management systems) to incorporate Title VI requirements considering disproportionate adverse impacts to minority or low-income communities. In addition, a new statute section has been proposed to address permit applications for new or expanded facilities in an overburdened community by including public hearings within

the community as part of the particular permitting program. While it is unlikely that this particular bill will be addressed in the upcoming term, given DEQ Secretary Biser's emphasis on EJ following Administrator Regan's efforts, there remains a possibility of further administrative action.

Considerations for the Regulated Community

EJ should become part of any diligence review and project planning. Expect that project permitting will require EJ assessments. Meeting the applicable statutory health standards will no longer suffice. The EPA has been clear in expressing its view that compliance with environmental laws does not equal compliance with Title VI. Here are some factors to consider under this new EJ landscape.

First, owners and managers should identify EJ communities early in the planning process by utilizing the EJSCREEN or DEQ's community mapping system to understand how the agency will be viewing the neighborhood and proposed facility. Since there are not sufficient statutory or regulatory structures in place to follow, each project will proceed on a case-by-case basis, considering how the community's health in that particular location has been affected by historical environmental decisions. Applicants will need to anticipate more community engagement and public scrutiny of a project during the permitting process. Engaging with local communities before and outside of the formal permitting and environmental review process will serve the project well.

A recent federal appellate court decision is informative. In *Friends of Buckingham v. State Air Pollution Control Board*, 947 F.3d 68 (4th Cir. 2020), the Virginia permit-issuing authorities approved an air emissions permit for a natural gas pipeline compressor station planned for construction in a predominantly Black community. In doing so, they relied predominantly on a proposed design intended to exceed national requirements for ambient air standards. The Fourth Circuit, which covers North Carolina, vacated the permit decision and remanded the case for further proceedings because the permit-issuing authorities failed to properly conduct the EJ analysis required by Virginia's statute. In its analysis, the Fourth Circuit noted that the purpose of an EJ analysis is to determine whether a project will have a disproportionately adverse effect on the minority or low-income population in the proposed project's location. The court found the underlying pipeline permit analysis lacked factual findings on the character of the local community population when considering the potential injury to the health of that population, independent of national and state emissions standards under the Clean Air Act. Thus, meeting statutory health standards will not create a rebuttable presumption that no adverse impact will arise from a project; it's only part of the analysis.

Second, prepare for increased federal enforcement of activities in disadvantaged or overburdened communities. The EPA has increased its review of state-delegated permitting matters that normally would only involve the DEQ. Implementing proactive compliance measures, including self-audits and community outreach or engagement, can aid in staying ahead of potential friction points.

Third, expect enhanced regulatory scrutiny for projects, sites, operations, and cleanups. Facility inspections in burdened communities may increase; thus, implementing facility compliance programs and personnel training can manage issues before complaints are made.

Finally, the DEQ views its EJ Program as promoting a good neighbor policy as much as a constitutional requirement, and it expects regulated parties to participate. Legal counsel familiar with the EPA's and DEQ's requirements can assist early in the process.

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