

## EPA Guidance Signals Greater Enviro Justice Focus In Permits

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The U.S. Environmental Protection Agency's External Rights Compliance Office recently released a document titled "Interim Environmental Justice and Civil Rights in Permitting Frequently Asked Questions."

Stressing that "it is time to use the full extent of its enforcement authority under federal civil rights laws," the EPA released the FAQ as interim guidance to provide resources and information to help federal, state and local permitting agencies meet their obligations to integrate environmental justice and civil rights into the permitting process, with the intent to issue additional civil rights guidance in the near future.

While quietly released, the FAQ is likely to reverberate loudly in environmental permitting for years to come.

### Permits Must Pass Environmental and Civil Rights Review

As the FAQ's title suggests, it addresses both environmental justice and civil rights in permitting. The EPA and other agencies have rolled out a steady stream of environmental justice tools and resources over the last 18 months, such as the EPA's strategic plan, EJScreen and the Environmental Justice Legal Toolkit.

The FAQ continues the trend. For example, it suggests using EJScreen to identify possible environmental justice concerns, and then using a health impact assessment to further analyze those concerns. But the FAQ goes further, focusing on the impact of civil rights legislation on permitting.

The FAQ cites Title VI of the 1964 Civil Rights Act, which applies to public and private entities that receive federal funds. The EPA interprets Title VI, and the agency's own related regulations, as prohibiting intentional discrimination and disparate impacts in permitting policies, processes and decisions.

One of the biggest, if not the biggest, takeaway from the FAQ is that a project could pass environmental review, but a permitting agency still could deny a permit on civil rights grounds.



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Even if a permitting policy, process or decision is not intentionally discriminatory, the FAQ states that Title VI requires an analysis of whether the action disparately affects members of a group identified by race, color or national origin. The analysis should consider the following questions:

- Is there an adverse impact on members of such a group?
- Is a disproportionate share of the adverse impact borne by such a group?
- Is there a causal link between the permitting policy, process or decision and the disparate impact?

If so, then the FAQ says there must be what it calls a "substantial legitimate justification" for the action. If there is no legally sufficient justification, and no mitigation measures can address the disparate adverse impact, the FAQ instructs that permit denial may be the only way to avoid a Title VI violation.

But even if there is a substantial legitimate justification, the FAQ says Title VI requires the permitting agency to determine if there are "comparably effective alternative practices" with less discriminatory effect.

That, in turn, requires consideration of mitigation measures to address the adverse impact — and the EPA includes "not renewing the permit" as one possible alternative.

### **Cumulative Impacts of Permitting Decisions**

The FAQ includes cumulative impacts analysis within the Title VI disparate impact analysis to assess whether the adverse impact from the permitting decision "may be even greater considering cumulative impacts from other chemicals and non-chemical stressors."

The EPA has issued guidance on cumulative impacts in the past — for example, in the context of the National Environmental Policy Act — but has not yet issued formal guidance in the context of environmental justice. Nevertheless, the FAQ adopts a definition of "cumulative impacts" from EPA draft research recommendations:

"Cumulative impacts" refers to the total burden — positive, neutral or negative — from chemical and nonchemical 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.

Notably, and quite broadly, cumulative impacts include not just current exposures from the subject of the permit application, but also current exposures "in various environments where individuals spend time and past exposures that have lingering effects."

Depending on how the permitting agency or the EPA conducts the cumulative impacts analysis, companies may find it challenging to overcome a disparate impact analysis and obtain permit approvals for their projects.

### **Implications for Regulated Entities**

Through the FAQ, the EPA emphasizes environmental justice and civil rights considerations in permitting for a wide range of commercial activities across many industries.

Owners, operators and developers of energy production facilities, oil and gas pipeline and processing facilities, refineries, chemical plants, manufacturing facilities, warehouses, and agricultural facilities in environmental justice communities particularly should take note.

### ***Conducting a Permit Analysis Early in the Planning Process***

Companies have always planned, budgeted and scheduled to obtain needed permits, with the assumption that the permitting agency would approve the permit as long as it met the requisite environmental requirements.

But now companies must undertake environmental justice and civil rights risk assessments — and must do so early in the planning process — to mitigate the risk of permit denial or cost-prohibitive modifications by the permitting agency after the company has spent significant time and money on the project.

As noted above, a permit application might pass traditional environmental review, but still face denial under civil rights law and environmental justice policies.

### ***Engaging With the Community Early in the Planning Process***

Early community engagement will also be required. According to the FAQ, environmental justice and civil rights laws require community engagement.

And practically speaking, effective community engagement by the project proponent may help limit community pressure on the permitting agency to deny or modify the permit and reduce the threat of citizen suits challenging the permitting process or decision.

On the other hand, lack of community engagement by the project proponent may have the opposite effect.

### ***The Rise of Civil Rights in Environmental Enforcement Actions and Civil Litigation***

Because all the civil rights requirements in the FAQ already exist, but have been sparingly used to date, companies should expect state attorneys general and local officials to aggressively use Title VI in enforcement actions.

The FAQ likely is not subject to Administrative Procedure Act challenge in its current form, because the EPA characterizes it as an interim compilation of preexisting statutes and regulations that does not, in and of itself, have legal effect or affect any legal rights or obligations. Thus, politicians and agencies have the tools they need right now to incorporate civil rights in environmental enforcement actions.

Companies also should be wary of aggressive plaintiffs lawyers alleging civil rights violations in environmental civil litigation like toxic tort cases, and environmental justice nongovernmental organizations mounting civil rights challenges to current operations or to permits governing future projects.

Conducting environmental justice and civil rights assessments will help companies identify their risks for these types of enforcement actions and lawsuits.

If a company assesses a high risk in its environmental justice and civil rights assessment, the FAQ suggests measures to mitigate adverse disparate impacts. While mitigation measures are necessarily fact- and project-specific, the FAQ's suggested measures include the following — some of which mirror relief frequently sought in citizen suits, and many of which could have significant impacts for project proponents:

- Alternative siting;
- Continuous compliance monitoring equipment;
- Enhanced compliance assurance programs and reporting requirements;
- A public-facing website with compliance information and real-time data;
- Additional pollution controls or more stringent pollution limits;
- Enforceable and/or best practices to minimize emissions and discharges;
- Expanded buffer zones;
- Modified operational hours;
- Working with other agencies, such as with a public health authority to establish a mobile health monitoring program in the affected community, or with state or local transportation authorities to implement a new traffic pattern to reduce vehicle emissions;
- Funding and establishing third-party monitoring of community complaints;
- Community monitoring; and
- Community benefit agreements.

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