

Client Alert

Energy

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Recent Developments In Environmental Justice Litigation

Louisiana remains at the forefront of environmental justice activity. In just four days from January 19 to January 23, 2024, two courts in Louisiana offered interpretations to environmental justice efforts in the State of Louisiana that may have wide-ranging ramifications for the rest of the country.

WESTERN DISTRICT OF LOUISIANA ENJOINS EPA'S TITLE VI DISPARATE IMPACT REQUIREMENTS

On January 23, 2024, a federal judge in the Western District of Louisiana granted a preliminary injunction against the Environmental Protection Agency ("EPA") and the Department of Justice ("DOJ"). The ruling temporarily enjoins the EPA and DOJ from imposing or enforcing disparate impact requirements against the State of Louisiana or any Louisiana state agency under Title VI of the Civil Rights Act ("Title VI"), unless specifically ratified by the President and based on requirements explicitly contained in the EPA's disparate impact regulations. Generally, Title VI prohibits recipients of federal funds from discriminating on the basis of race, color, or national origin. According to the federal agencies, Title VI covers both intentional discrimination and unintentional conduct that disparately impacts a protected group. On the other hand, the State of Louisiana contends that Title VI only prohibits intentional discrimination and the federal agencies' expanded interpretation is an unlawful attempt to impose environmental justice policy goals on state permitting decisions. Under its argument, the State also challenged EPA's imposition of extra-regulatory environmental justice requirements, such as a cumulative impacts analysis.

By way of background, in 2022 the EPA opened investigations into the Louisiana Department of Environmental Quality ("LDEQ") and the Louisiana Department of Health's ("LDH") practices to determine whether these agencies were in violation of Title VI with respect to minority communities near pollution-emitting facilities and for the lack of



environmental justice policies to protect such communities. The State of Louisiana sued the EPA in May 2023, alleging EPA impermissibly imposed disparate impact requirements under Title VI, which only prohibits intentional discrimination.

On June 21, 2023, Louisiana filed a Motion for Preliminary Injunction and Motion to Expedite the resolution of its request for injunction. Less than a week later, on June 27, 2023, EPA filed a notice that it closed its investigations into the complaints against LDEQ and LDH without any finding of discrimination or other Title VI violation, and on August 16, 2023, moved to dismiss the complaint or, in the alternative, for summary judgment. Despite closing its investigations, EPA has continued to object to state-issued permits under the Clean Air Act based on disparate impact concerns under Title VI. Because the State faced a credible risk of enforcement, the Court found it had standing to pursue its claims against EPA regarding EPA's disparate impact regulations and extra-regulatory mandates.

In its memorandum ruling, the Western District of Louisiana found EPA's actions ran afoul of the spending clause and major questions doctrine by enforcing conditions without explicit congressional authorization or statutory authority. As the Court noted, the "public interest here is that governmental agencies abide by its laws, and treat all of its citizens equally, without considering race. To be sure, if a decision maker has to consider race, to decide, it has indeed participated in racism. Pollution does not discriminate."

LOUISIANA FIRST COURT OF APPEALS REINSTATES FORMOSA PERMITS

On January 19, 2024, the Louisiana First Circuit Court of Appeal reversed a lower court's order and reinstated permits that LDEQ previously issued to Formosa Plastics Group for a proposed plastics manufacturing facility in St. James Parish, Louisiana. The proposed plant previously made headlines on September 8, 2022, when the lower court ruled in favor of citizens groups and environmental NGOs and revoked the permits on public trust, administrative procedure, and environmental justice grounds. The Court of Appeal reviewed LDEQ's decision, not the lower court's, and found its Clean Air Act and Public Trust Doctrine analyses not to be arbitrary or capricious, a standard that gives deference to LDEQ's decision.

In a win for plaintiffs, the Court held that Louisiana's public trust doctrine required LDEQ to analyze environmental justice as defined by EPA. But the Court also held that LDEQ's environmental justice analysis was neither arbitrary nor capricious.

One of the reasons the Court accepted LDEQ's environmental justice analysis was its treatment of adverse impact and disparate impact. Even though this case involved the environmental justice analysis required by the Louisiana public trust doctrine, throughout its opinion, the Court frequently referred to this analysis as an "environmental justice/civil rights Title VI" analysis and the Court considered LDEQ's disparate impact analysis in the context of "EPA's current approach to environmental justice/civil rights Title VI issues." Title VI of the Civil Rights Act, as interpreted by EPA, requires an analysis of whether a proposed action will result in an adverse impact on members of a group identified by race, color, or national origin; whether a disproportionate share of the adverse impact will be borne by such a group; and whether there is a causal link between the action and the disparate impact.

The Court accepted LDEQ's finding that emissions from the proposed facility would not violate the Clean Air Act's National Ambient Air Quality Standard's or Louisiana's Ambient Air Standards and, for this reason, would not adversely affect human health or the environment. With that finding, the Court held "DEQ's determination that there were no 'adverse impacts' made it unnecessary to reach the issue of "disparate impact." Even though there was no adverse impact, LDEQ considered the impact on nearby minority communities and found there was no disparate impact. The



Court approved, noting: “[t]hat the proposed facility is situated near a minority community alone is insufficient to establish a disproportionate impact on a minority community.”

The Court of Appeals then took up the lower court’s interpretation of EPA’s environmental justice screening tool, EJScreen, in revoking the permits. Based on its review, the Court of Appeals held LDEQ was in its discretion to reject or not rely on EJScreen data because that approach was in line with EPA’s own guidance. Indeed, EPA’s website states EJScreen is not used by EPA “[a]s a means to identify or label an area as an “EJ community; [t]o quantify specific risk values for a selected area; or [a]s the sole basis for EPA decision-making or making a determination regarding the existence or absence of EJ concerns.” Accordingly, the Court took no issue with LDEQ’s determination that EJScreen data is unsuitable to “quantify specific risk values for a selected area and as a basis for agency decision-making regarding the existence or absence of environmental justice concerns.”

That said, however, the Court then noted, LDEQ did assess EJScreen data and found that it showed nearby residents “do *not* bear a disproportionate share of the negative environmental consequences resulting from industrial operations.”

The Court considered cumulative impacts in a different portion of its opinion, finding Formosa was not required by public trust doctrine or LDEQ’s modeling protocol to model cumulative impacts from its emissions. But LDEQ did address the “net effect of individual permitting decisions” over time in its environmental justice discussion when addressing LDEQ’s analysis of EJScreen data, noting LDEQ’s finding that emissions had declined “over the recent timeframe.” Considering all of this as a whole, the Court found LDEQ met the requirement to meaningfully engage via the public comment period and by responding to EJ-focused comments.

KEY TAKEAWAYS

Owners, operators, investors, lenders and contractors of current and planned facilities in environmental justice communities should take note of these decisions. While other courts have questioned federal agencies’ disparate impact requirements under Title VI of the Civil Rights Act, the Western District’s injunction prohibits EPA from enforcing such requirements against the State of Louisiana. Other courts may follow suit, with further litigation and appeals likely over the next few years, although Congressional action to clarify Title VI’s requirements seems unlikely.

For jurisdictions where a Title VI disparate impact analysis remains mandatory as part of state EJ policies, the Formosa Court’s approval of LDEQ’s environmental justice analysis is likely to be informative. The Court’s finding that a lack of adverse impacts made it unnecessary to reach the issue of disparate impact could have ramifications for Civil Rights Act Title VI analyses in other jurisdictions, as may the finding that a facility’s location in a majority minority community did not alone suffice to establish a disproportionate impact on such a community. Similarly, that a regulatory agency could reject or choose not to rely on EJScreen data may limit its use by regulators and courts in other states.

However interpreted, these decisions will not stop private and governmental advocates from continuing to push environmental justice initiatives, and litigation in this area is quickly evolving. K&S is actively monitoring developments and is uniquely positioned to assist in all facets of environmental justice questions and concerns.



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