

What Recent Setbacks In Court Mean For Enviro Justice

By **Mandie Cash, Erich Almonte and Douglas Henderson** (February 27, 2024, 2:48 PM EST)

Under the Biden administration, environmental justice has been at the forefront of agency action and regulatory policy. The emphasis on EJ initiatives, however, has not been without staunch opposition and legal setbacks — particularly with respect to the federal government's reliance on the Civil Rights Act to address EJ issues.

In just four days, from Jan. 19 to Jan. 23, two courts in Louisiana dealt legal blows to EJ efforts by limiting the federal government's ability to require consideration of disparate impacts under the federal Civil Rights Act when evaluating state-issued permits, as described more fully below. These rulings may provide a framework for similar opposition and litigation in other states.



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Western District of Louisiana Enjoins EPA's Title VI Disparate Impact Requirements

On Jan. 23, in *State of Louisiana v. U.S. Environmental Protection Agency*, a judge in the U.S. District Court for the Western District of Louisiana granted a preliminary injunction against the EPA and the U.S. Department of Justice.

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, 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 extraregulatory environmental justice requirements, such as a cumulative impacts analysis.



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By way of background, in 2022, the EPA opened investigations into practices at the Louisiana Department of Environmental Quality, or LDEQ, and the Louisiana Department of Health, or LDH, 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 the 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 a motion to expedite the resolution of its request for injunction. Less than a week later, on June 27, the EPA filed a notice that it closed its investigations into the complaints against the LDEQ and LDH without any finding of discrimination or other Title VI violation. On Aug. 16, the EPA moved to dismiss the complaint or, in the alternative, for summary judgment.

Despite closing its investigations, the 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 the EPA regarding the EPA's disparate impact regulations and extraregulatory mandates.

In its memorandum ruling, the Western District of Louisiana found the 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." [1]

Louisiana First Court of Appeals Reinstates Formosa Permits

On Jan. 19, 2024, in *Rise St. James v. Louisiana Department of Environmental Quality*, the Louisiana First Circuit Court of Appeal reversed a lower court's order and reinstated permits that the 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 Sept. 8, 2022, when the lower court ruled in favor of citizens groups and environmental nongovernmental organizations and revoked the permits on public trust, administrative procedure and environmental justice grounds.

The Court of Appeal reviewed the 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 the LDEQ's decision.

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

One of the reasons the court accepted the 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 the

LDEQ's disparate impact analysis in the context of the "EPA's current approach to environmental justice/civil rights Title VI issues."

Title VI of the Civil Rights Act, as interpreted by the 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 the LDEQ's finding that emissions from the proposed facility would not violate the Clean Air Act's National Ambient Air Quality Standards 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 that the LDEQ'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, the LDEQ considered the impact on nearby minority communities and found there was no disparate impact. The court approved, noting: "The fact that the proposed facility is situated near a minority community alone is insufficient to establish a disproportionate effect on a minority community."

The Court of Appeals then took up the lower court's interpretation of the EPA's environmental justice screening tool, EJScreen, in revoking the permits. Based on its review, the Court of Appeals held the LDEQ was in its discretion to reject or not rely on EJScreen data because that approach was in line with the EPA's own guidance.

Indeed, the EPA's website states EJScreen is not used by the 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 the 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 of absence of environmental justice concerns."

That said, however, the court then noted, the 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 the public trust doctrine or the LDEQ's modeling protocol to model cumulative impacts from its emissions. But the LDEQ did address the "net effect of individual permitting decisions" over time in its environmental justice discussion when addressing the LDEQ's analysis of EJScreen data, noting the LDEQ's finding that emissions had declined "over the recent timeframe."

Considering all of this as a whole, the court found the LDEQ met the requirement to meaningfully engage via the public comment period and by responding to EJ-focused comments.[2]

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 of Louisiana's injunction prohibits the 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 the 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 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.

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[1] The case is State of Louisiana v. U.S. Environmental Protection Agency et al., case number 2:23-cv-00692, in the U.S. District Court for the Western District of Louisiana.

[2] The case is RISE St. James et al. v. Louisiana Department of Environmental Quality, case number 2023 CA 0578, in the Louisiana Court of Appeal, First Circuit.