EPA's Permitting FAQ Goes Beyond The Letter Of The Law

By **Karen Bennett and Cameron Dorais** (October 3, 2022)

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The U.S. Environmental Protection Agency's "Environmental Justice and Civil Rights in Permitting Frequently Asked Questions," released in August, shows the agency's latest thinking on how to incorporate environmental justice into permitting programs.

The FAQ announces the agency's intent to broadly "use the full extent of its enforcement authority under federal civil rights laws, including Title VI of the Civil Rights Act of 1964" to address what the EPA has determined is a legacy of environmental injustice and a systemic deficit in public health and environmental protection.

Section 601 of Title VI prohibits the discrimination of individuals in federally assisted programs or activities on the ground of race, color or national origin. If any recipient of federal funds is found in violation of Title VI, then that recipient may lose its federal funding. The agency is accepting feedback on the document, which is currently classified as interim.

There is widespread recognition across industries of the need to treat all people fairly under the law, and to provide the opportunity for meaningful participation in public processes, without discrimination based on race, color or national origin. But the way in which civil rights and environmental justice concerns are addressed in permitting processes must be consistent with statutory authority and judicial precedent, and provide investment certainty to the regulated community.

Despite acknowledging in the recently published FAQ that Title VI is inapplicable to EPA actions, the agency announced in a document released in May by its Office of General Counsel, titled "EPA Legal Tools to Advance Environmental Justice," that it plans to make environmental justice a major consideration in all areas of its regulatory authority.

For example, in the May document, the EPA claimed that it will assert its authority under the Clean Air Act to consider disparate environmental justice impacts as a relevant concern in deciding what new source categories to add when characterizing emissions from stationary sources; under the Resource Conservation and Recovery Act, in the development of regulations and standards for solid waste management; and under the Safe Drinking Water Act, in providing drinking water grants.

The agency also indicates in the August FAQ that the source of its authority to incorporate environmental justice in permitting programs is grounded in nonbinding Executive Orders No. 12898, issued in 1994, and No. 14008 and No. 13985, issued in 2021, and potentially found in other environmental statutes.

In addition, the August FAQ directs states and other recipients of EPA funding to ensure compliance with federal civil rights laws — including Title VI of the Civil Rights Act of 1964.

The EPA's Recommendations

State regulatory authorities should screen for environmental justice and civil rights concerns early in the permitting process using tools such as EPA's EJScreen or state EJ mapping tools, along with other information such as social determinants of health — including social, physical and health services.

If the screening analysis suggests disproportionately subjecting persons to adverse health, environmental or quality of life impacts based on race, color or national origin — including limited English proficiency — the permitting authority should:

- Investigate further, including conducting a health impact assessment, consideration of cumulative impacts and enhanced community engagement;

- Exercise statutory and regulatory authority to prevent or mitigate any adverse disproportionate impacts, including consideration of mitigation outside the permit, where mitigation included in the permit is not sufficient; and

- If the permitting action is likely to have a disparate impact, evaluate whether there is a substantial legitimate justification, and whether there are comparably effective alternative practices that would achieve the same legitimate objective — including modifying permit operating conditions, employing mitigation measures or not renewing the permit.

If there are no mitigation measures that can address the disparate impacts, and no legally sufficient justification for the disparate impacts, denial of the permit may be the only way to avoid a Title VI violation.

Concerns Raised by the EPA's Guidance

The EPA suggests that these actions must be taken to avoid a claim under Title VI. But the agency ignores that Title VI protects only against intentional discrimination.

As the U.S. Supreme Court explained in its 2001 decision in Alexander v. Sandoval, Title VI does not convey the right to be free of disparate impact discrimination in the administration of programs or activities receiving EPA assistance. The agency should revise the guidance to clarify the limits of Title VI.

Additionally, the EPA's broad definition of environmental justice goes beyond Title VI protections, to include low-income individuals, persons with disabilities and persons who live in rural areas. While these individuals may be protected under other federal statutes, none of these categories of people are protected classes under the Civil Rights Act. It is inappropriate for the agency to suggest that Title VI applies more broadly to include the full scope of the agency's definition of environmental justice.

The EPA fails to state that the response to state program noncompliance with federally imposed conditions would be action by the federal government to terminate funds to the state. Termination of federal funds is based upon deprivation of rights, privileges or immunities secured by the constitution and laws of the U.S., and does not extend to the

broader categories the agency has determined would benefit from the protection.

The EPA also fails to explain how the regulatory authority will enforce mitigation outside a permit. For example, federal and state programs require that mitigation requirements must be enforceable conditions on the permit. The agency should be asked to explain how such off-permit mitigation requirements will be monitored and enforced.

Finally, the EPA should address concerns regarding the constitutionality of requiring off-permit mitigation, and clarify how the agency intends to use mitigation to address past environmental injustices. The EPA's broad call for reparations and redress for historic injustices in permitting actions must be closely examined, and the agency should be asked to address these legal questions.

Meanwhile, the EPA's External Civil Rights Compliance Office — the office responsible for enforcing civil rights and other laws that prohibit discrimination by recipients of federal financial assistance from the agency — is experiencing an uptick in discrimination complaints based primarily on race. This presumably puts pressure on state program recipients to understand the EPA's expectations, particularly where they may extend beyond a state's jurisdiction and authority under environmental laws.

Conclusion

The EPA admits that the document, by itself, has no legally binding effect. But the question is whether it will have a coercive effect — and if so, to what degree will regulatory authorities feel pressured to adopt the agency's recommendations. This is something to keep an eye on as the guidance is further interpreted and updated.

Correction: A previous version of this article incorrectly stated Dorais' title. This error has been corrected.

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