

ENVIRONMENTAL EQUITY: STATE IMPLEMENTATION OF ENVIRONMENTAL JUSTICE REQUIREMENTS

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ABSTRACT

President Clinton's Executive Order 12898 (February 1994) directed all Federal agencies to develop an Environmental Justice Strategy that identifies and addresses the potential for disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority and low income populations. While the EO focused on direction to Federal agencies, States have more recently turned attention to developing and implementing Environmental Justice policies. The impetus for State EJ program development stems from an increasing number of Title VI (Civil Rights Act of 1964) complaints filed with the U.S. Environmental Protection Agency (EPA) regarding environmental permitting by States and Local Units of government. As a condition of receiving funding under EPA's program grants, recipient agencies are required to comply with EPA's Title VI regulations. The EPA has developed interim guidance for investigating complaints filed under Title VI alleging discriminatory effects from issuance of pollution control permits by agencies that receive EPA funding. The guidance states that if EPA finds discrimination in a recipient's permitting program, and the recipients is unable to come into compliance voluntarily, EPA will initiate procedures to deny, annul, suspend, or terminate funding. The policy establishes that discriminatory effects exist if "the permit at issue will have a disparate impact on a minority community." Region 5 has prepared interim guidelines for identifying and addressing potential environmental justice cases including protocol for evaluating environmental justice issues relating to enforcement and permitting matters.

Recently, the focus of Title VI complaints has been on environmental permitting; most of the 44 Title VI administrative complaints filed with EPA since 1993, have related to environmental permitting. Because many state environmental programs are delegated by Federal law, these complaints have been brought against state environmental permitting decisions. Consequently, states have a strong interest in the interim guidance. Working through the Environmental Council of States (ECOS), states have expressed a number of concerns with the EPA interim guidance:

- Conflicts with current state and local land use planning;
- Scientific basis of the principles and processes
- Insufficient state involvement in the development of the guidance;
- Potential disruption in existing environmental programs;
- Viability of the intended outcomes and consequences beyond the recipients' authority.

However, the states also recognize the importance of issues relating to environmental equity and are working together, through ECOS, to offer guidance to states in developing environmental justice programs.

EPA IMPLEMENTATION OF TITLE VI TO ADDRESS ENVIRONMENTAL JUSTICE

The EPA interim guidance is intended to offer a framework for processing complaints filed under Title VI of the Civil Rights Act of 1964 that allege discriminatory effects from issuing pollution control permits by agencies that receive EPA funding. President Clinton's Executive Order 12898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations," (1) included an accompanying memorandum that directed Federal agencies to ensure compliance with the nondiscrimination requirements of Title VI for all Federally-funded programs and activities that affect human health and the environment. Section 2-2 of the Order is designed to ensure that Federal Actions substantially affecting human health or the environment do not have discriminatory effects based on race, color, or national origin. The Supreme Court has ruled that Title VI authorizes Federal agencies to adopt implementing regulations that prohibit discriminatory effects. The Court rulings recognize that policies and practices that appear to be neutral may have the effect of discrimination (2). Consequently, policies or practices that result in discriminatory effects violate EPA's Title VI regulations unless it is shown they are justified and there is no less discriminatory alternative.

EPA provides grants to many state and local governments that administer environmental programs under EPA statutes. Compliance with EPA Title VI regulations are a condition of receiving funding under EPA's continuing environmental program grants and this requirement is incorporated by reference into the grants. Title VI creates a contractual nondiscrimination obligation in exchange for accepting Federal funding. Furthermore, all programs and activities of an agency that received EPA funding are subject to Title VI, including those programs and activities that are not EPA funded (3). That is, permits issued or actions taken by an EPA recipient that are associated with a program that is not grant-funded by EPA are nonetheless part of a program or activity covered by EPA's Title VI regulations if the recipient receives any funding from EPA. If the EPA finds discrimination in a recipient's permitting program, including issuance of new permits or permit renewals, and voluntary compliance is not possible, EPA is required to being procedures to deny, annul, suspend or terminate EPA funding (4).

Processing Complaints

The basic steps the EPA uses for processing complaints of alleged discriminatory effects of environmental permitting include:

- Accepting the complaint following a determination of validity of the claim stated in the complaint.

- Conducting a factual investigation to determine if the permit will create a disparate impact or add to an existing disparate impact on a racial or ethnic population.
- Issuing a notice of initial finding of a disparate impact and providing the recipient an opportunity to rebut, mitigate or justify the disparate impact. If the recipient cannot rebut or mitigate the impact, the recipient can demonstrate it has a substantial, legitimate interest that justifies the decision to issue the permit despite the disparate impact.
- A preliminary finding of noncompliance results if the recipient fails to rebut the initial finding and can neither mitigate nor justify the disparate impact.
- If the recipient disputes the recommendations or fails to submit a written response demonstrating the preliminary finding is incorrect or that voluntary compliance can be achieved, a formal determination of noncompliance is issued.

If the recipient fails to come into voluntary compliance, procedures are initiated to deny, annul, suspend, or terminate EPA assistance (40 CFR 7.130(b)), and, if warranted, may initiate litigation.

If possible, complaints are to be resolved through informal processes and involvement of the affected interests in negotiating a settlement.

DISPARATE IMPACT ANALYSIS

The guidance uses proximity to a facility as the primary indicator to evaluate the population that is affected by the permit that resulted in the complaint. The racial or ethnic composition of the affected population is determined and mapped. Data is generated that estimates the race and/or ethnicity and density of populations within certain proximity or within the distribution pattern for a release/impact. This is to identify and characterize the affected population for the facility. If the affected population for the permit is of the racial or ethnic group named in the complaint the demographic analysis is repeated for each facility in a selected “universe” of facilities.

The “universe” of facilities may include other permitted facilities that are under the recipient’s jurisdiction that could contribute to the impact. The affected population for each facility is added together to identify the Total Affected Population. Generally, the focus is on cases in which the permitted facility at issue is one of several which together present a cumulative burden or which demonstrate a pattern of disparate impact (3). While a single permit may support a disparate impact, it is more likely that disparate impacts will occur where an individual permit contributes to or compounds a preexisting burden so that the cumulative burden is disproportionate when compared to other communities. An individual permit may also be part of a broader pattern in which certain types of facilities are located in a community with particular racial or ethnic characteristics.

The next step is to conduct the disparate impact analysis, which includes comparing the racial or ethnical characteristics within the affected population, and the racial characteristics of the affected population to the non-affected population. The expectation

is that rates of impact for the affected populations and comparison populations to be relatively comparable. The final step is to determine the significance of the disparity.

ECOS RESPONSE

Reaction to the guidance has been strong, controversial, and in most cases, negative. A number of organizations have expressed concerns with the guidance, including the National Association of Black County Officials, the National Association of Counties, and the US Conference of Mayors (5).

The Environmental Council of States (ECOS) has taken a leadership role in responding to the Interim Guidance and first raised the issue with EPA in February, 1998 asking that States be involved in helping draft the guidance. ECOS is the national, non-partisan, non-profit association of State and territorial commissioners who manage and direct the agencies within each state government that are responsible for implementing environmental protection programs. ECOS has made it clear that State environmental departments are committed to fair and equitable treatment for all people. The very nature of the work of State environmental departments is protection of public health and the environment for all members of the public. A resolution passed by ECOS requested that the guidance be withdrawn until outstanding issues associated with the guidance could be worked through.

There are five major issues that have generated criticism of the guidelines (6). First, the guidelines are vague and without a scientific basis or methodology. ECOS has expressed concern about the scientific basis of the principles and processes, particularly those related to clarity of definition and assessment of “disparate impacts” or measurement of “cumulative impact.” Disparate impact is not defined nor are any indicators for measuring it given. No procedure is suggested for measuring cumulative impact or what that means. There is no guidance on how to determine impacts from a variety of sources. If there are several sources in an area, one or more of which needs a new permit, permit modification or renewal and that the cumulative impact of these facilities is determined to be disparate, how is the determination made regarding which facility is denied the permit? Further, the guidance suggests that disparate impacts can be made for a number of environmental impacts from any media in a facility. This would lead one to believe that separate considerations must be made for every potential risk. Finally, the determination of the geographic area that is evaluated to determine the disparate impact is unclear.

The guidance does not consider or address situations in which a local minority community supports a facility only to have it stopped by groups from outside the community. This is a situation that has occurred in siting radioactive waste facilities—local communities have expressed interest in being considered for a facility but as the process unfolds, outside groups have raised environmental justice issues. These issues were raised in siting the low-level radioactive waste facility in Boyd County, Nebraska and the dry cask storage facility on the Mescalero Apache lands in New Mexico.

The guidance creates confusion in government responsibilities and intergovernmental relations. Local government associations such as the Council of Mayors and National Association of Counties are particularly concerned that the Guidance pre-empts local land use decisions. Zoning and land use decisions have historically been local government issues. The guidance, however, suggests a federal permitting system for environmental justice. If a local unit of government designates an industrial zone and a State approves a permit for a facility in this locally designated industrial zone, could the federal environmental agency overrule that decision on the basis of environmental justice?

The guidance may encourage industrialization of “greenfields” and discourage development in urban “brown fields.” In an era when local units of government are struggling with re-development of urban areas and control of urban sprawl and growth management, the guidance seems to exacerbate these problems. In urban “brown fields,” environmental clean up and economic development are desperately needed. But the guidance would appear to discourage industries from locating in these areas because they tend to be located in urban centers with large minority populations. Instead of locating in urban areas, industries may decide to locate away from other industries and businesses where cumulative impacts are not an issue, thus contributing to urban sprawl. These EPA programs designed to support minority populations—environmental justice and brownfield development, may, in fact, be in direct conflict.

The guidance directly affects the ability of States to effectively implement environmental protection programs but was developed without state involvement. It puts the burden of proof on the State to disprove, justify, or mitigate the impact rather than requiring the complainant to show harm. The States are responsible for implementing the actions the guidance regulates but have not been involved in its development.

Concerns with the guidance and a strong commitment to ensuring fair and equitable treatment of all member of the public have led ECOS to establish a work group to address issues with the guidance and with the broader subject of environmental justice. The group held a workshop to share ideas about state environmental justice programs and developed recommendations for States to use to develop environmental justice programs or to revise permitting processes to include environmental justice considerations. The recommendations recognize the potential for environmental justice concerns to conflict with laws, programs, and policies that address other important interests such as wise land use, brownfield cleanup, green space preservation and sustainable economic development. In developing the recommendations, ECOS was clear that, while the EPA guidance focuses on permitting, the same approaches apply to all environmental actions—cleanups, enforcement, outreach efforts -- to ensure equitable administration with appropriate consideration of environmental justice issues.

ELEMENTS OF STATE ENVIRONMENTAL JUSTICE PROGRAMS

The proposed recommendations initially reaffirm State commitment to equitable treatment of all citizens, encourage the use of scientific techniques to support assurances

of environmental safety, and note the importance of a common understanding of terms and definitions. Environmental justice is “concerned with exposure to environmental hazards and sharing of environmental benefits, and that environmental justice is not provided when health or environmental effects differ and adversely impact a group of citizens.” (6)

The proposed ECOS environmental justice program recommendations include eight elements:

- Intergovernmental cooperation
- Public participation
- Public education
- Finality of decisions
- Compatibility with other programs
- Clarity of terms and criteria
- Documentation of environmental justice considerations
- Distinguishing between kinds of permits

Intergovernmental Cooperation

This element encourages State environmental agencies to coordinate with other local, state, and federal agencies that share jurisdiction or that would be affected by an environmental decision. It recognizes that environmental justice issues involve a variety of problems (e.g., housing, transportation, and economic development) and all agencies must cooperate to resolve the larger problem. This intergovernmental cooperation is important because: impacts of a decision may affect conditions that are not under the jurisdiction of the environmental agencies; environmental agencies do not have all the expertise necessary to make decisions on other than environmental or public health grounds; state environmental departments may lack legal authority to affect the environmental justice issues; and finally, decisions that affect land use have the potential to create conflict if not coordinated among federal, state and local entities.

Public Participation and Public Education

These two elements of the recommendations address the need to ensure all citizens have fair, reasonable and timely opportunities to participate in the decision making process and the broader issue of on-going environmental education that allows all citizens to make more informed decisions. The public participation element focuses on early and meaningful participation in environmental decisions, the importance of addressing concerns, and the need to provide information and opportunities that are accessible, understandable, recognize diversity and special needs of affected interests. The public education element focuses on enabling citizens to better understand environmental concerns, environmental impacts, the decision making process, and industrial and commercial activities. This element recognizes a responsibility to offer the tools for people to effectively participate in decision making and this may involve an educational program that provides the tools for affected interests to understand issues and processes.

Finality of Decisions

This element calls for early consideration of environmental justice, prior to issuance of a permit. It responds to needs of applicants who have invested substantial resources in an application by emphasizing investigating and resolving environmental justice issues early without causing unnecessary delays in the permitting process. While a court may consider environmental justice issues after a permit is issued, applicants that have complied with all requirements are entitled to a presumption of finality when a permit is issued.

Compatibility with Other Programs

This element addresses the potential for conflict with other laws, programs, or policies that benefit communities, and emphasizes the need to develop an environmental justice program that is compatible and coordinated with other programs. Specifically, the recommendations discuss a “false dichotomy” between economic development and environmental protection. Rather, the belief is that there is not usually a need to choose between the two, that environmental protection can encourage economic development. Communities should not have to choose between economic development and environmental protection but a community should not be ruled out of consideration for development because of potential environmental issues.

Clarity of Terms and Criteria

One of the primary concerns with the EPA Guidance is the uncertainty and vagueness of terms such as “disparate impact.” This recommendation calls for environmental justice programs to have clear definition of terms using established criteria and identified thresholds. It cites the importance for States and the EPA to work together to establish these definitions and criteria.

Documentation of Environmental Justice Considerations

This element identifies the need to not only treat people equitably but document that treatment has been equitable. Official records where environmental considerations were made should clearly indicate what the considerations were and factors that led to the final decision. This documentation may be very important where a disparate impact is being justified or mitigated.

Distinguishing Between Kinds of Permits

Environmental justice impacts and remedies may require agencies to distinguish between existing facilities that require permit renewals, permit modification and new facilities, and between facilities that have been or are being added to communities and facilities around which communities are developed. This element recognizes that all permits are not equal and that different burdens for proving environmental injustice or different remedies may be appropriate depending on the type of permit or location of a facility. A

permit modification, for example, may be designed to reduce a discharge and it may be appropriate to treat that permit differently than a permit for a new facility. Similarly, there is a difference between a facility being “imposed” on a community and a facility around which a community has grown. Environmental justice complaints may need a higher standard of proof of harm in situations where people have chosen to move near an existing facility.

EPA REGION FIVE GUIDANCE

The U.S. EPA provides guidance in evaluating environmental justice issues as they relate to processing Title VI complaints. Region Five, encompassing the states of Illinois, Indiana, Michigan, Minnesota, Ohio, and Wisconsin, has prepared separate guidance that pertains specifically to determining if a case should be considered a potential environmental justice case and the course of actions for EPA-lead activities. In this case, the guidance is applicable to low-income populations as well as minority populations (only minority populations are covered under Title VI) and includes addressing enforcement and community involvement as well as permitting issues. Region Five bases its guidelines primarily on demographic evaluations to identify a potential environmental justice case and does not include an assessment of disproportionate impacts or cumulative impacts as criteria for identifying potential environmental justice cases. This is because the Region recognizes that scientific methods for this type of evaluation are still evolving and there is no proven methodology for conducting this assessment. The guidelines do, however, suggest this assessment if necessary on a case-by-case basis. The goal of Region Five is to provide a method to quickly identify if a case potentially involves an environmental justice issue.

The guidance is presented in a flow-chart format that initially involves obtaining demographic information for the block group in which the case is located then determining if the low income or minority population percentage of the block group is greater than or equal to two times the State low-income and/or minority percentage. Cases are addressed as potential environmental justice cases if they meet these criteria or if it is in response to an issue raised by a community that considers itself or the case to involve an environmental justice issue. If this initial evaluation identifies a potential environmental justice issue, then protocol for enforcement, permitting and/or community involvement are to be followed. The numeric measure of “two times the state low-income and minority population percentage” derives from the Inter-Agency Working Group that developed the guidance. The working group established a minimum numeric measure of minority population at 50 percent of the affected area and said that a minority population may be present if the minority population is “meaningfully greater” than the minority population in the general population or other “appropriate unit of government” (7). The meaningfully greater definition was then defined as the value above the State low-income and minority population percentages; consequently, any place in which the low-income or minority populations exceed the State percentage is considered a potential environmental justice area. The “two times” the State percentage is considered for priority setting as the worst case. Other potential environmental justice cases are to be considered in response to community recommendations.

Implementing Environmental Justice in Enforcement, Permitting and Community Involvement Processes

The Region V guidelines encourage prompt resolution of enforcement cases in environmental justice communities to minimize continuing pollution or risks of pollution to such communities. It also recognizes that the degree of activities may differ depending on the violation—administrative violations would not require the same degree of activity as violations that have resulted from violations with greater environmental impact or in which there is a greater degree of public interest. This is consistent with ECOS recommendations that not all situations are the same. The protocol focuses on enhanced public outreach in keeping citizens apprised of enforcement activity, including obtaining public input into settlement terms when appropriate. This is most appropriate when penalties may involve a Supplemental Environmental Project. Penalty calculations may also consider factors such as “sensitivity of surrounding area.”

Protocol for permit issuance includes consideration of other similar media-specific or multi media permits in the area, and the status of those permits (e.g., if a permit decision is pending or upcoming). If the issuance of the permit would provide additional risks to a community already affected by other sources, additional permit conditions may be imposed to mitigate or eliminate these risks.

Finally, protocol for community involvement suggest steps that can be taken to ensure residents are involved in the process and equitably informed on issues affecting their communities.

Region Five guidelines differ from federal guidelines in that they:

- Include low-income populations;
- Do not use evaluation of disproportionate impacts or cumulative impacts as criteria; and
- Include guidance for implementing environmental justice in enforcement processes and community involvement activities as well as permitting actions.

MINNESOTA'S DEVELOPING PROGRAM

Parallel to ECOS activities, the Minnesota Pollution Control Agency (MPCA), which administers EPA programs for the state, has initiated development of a strategy to address environmental justice issues associated with its activities. In developing the strategy, an MPCA workgroup focused first on identifying desired outcomes of an EJ policy. The group agreed that any program, policy, or strategy be aimed at enhancing Agency credibility in equitable implementation of environmental programs and activities, and ensuring that Agency programs and activities are conducted in such a manner that environmental inequities are minimized or eliminated. The desired outcome recognizes that not only should Agency program implementation be equitable, it should be perceived as equitable, and that the Agency must become recognized as one that is fair and

equitable in implementing rules, regulations, programs, and policies for which it has authority.

The MPCA program targets addressing EJ in three areas:

- Data and information
- Regulatory Processes
- Public Participation

Data and Information

The objective here is to develop accurate and useable data on minority and low-income populations throughout the state so that information is available to direct and target EJ issues and activities. Having these data available responds to EPA guidance that requires evaluating demographic characteristics as a first step in evaluating the merit of an EJ complaint. Agency staff has had discussions with and obtained information from the State Demographer's office and is now working to format the data. The Agency is pursuing an EPA grant to further this demographic characterization effort and to create a link between the demographic information and environmental risk data.

Regulatory Processes

This area focuses on integrating EJ principles into the Agency's primary activities: rule writing, permitting, enforcement, site remediation, and environmental review. A training program is to be initially developed to enhance staff awareness of environmental equity issues, particularly in the conduct of such regulatory processes as permitting and enforcement. In the areas of rule writing, the Statement of Need and Reasonableness would have a section that addresses how the rule could affect or be affected by environmental equity issues. Proposals subject to environmental review requirements would be screened for potential equity issues and Agency review of environmental documents would include equity issues. Site remediation decision making would consider community issues and desires with close coordination with local units of government in making land use decisions.

Public Participation

Agency public participation and involvement efforts are to be conducted in such a manner that ensures minority and low income populations are effectively informed of environmental issues and activities that affect them and that they have equitable opportunities to influence these activities and decisions. The goal is to create an open and accessible decision making process that results in decisions that support the Agency's environmental protection mission, that are technically and economically feasible, health and safety conscious, address public values and concerns, and that can be implemented. In order to accomplish this, a public involvement program must:

- Enhance knowledge of the legal, technical, political, regulatory, funding and resource opportunities and constraints, and the need to balance interests and considerations in environmental decision making;

- Solicit public help in identifying environmental equity problems and issues, and environmental, economic, social, and cultural values that relate to those issues;
- Solicit involvement in identifying the full range of alternative approaches for addressing environmental problems and issues;
- Facilitate resolution to problems and conflicts and work toward development of informed consent;
- Coordinate, integrate and communicate information about environmental issues.

REFERENCES

- 1 “Federal Actions to Address Environmental Justice in Minority Populations and Low Income Populations.” Executive Order 12898, February 11, 1994.
- 2 U.S. Department of Justice, Attorney General’s Memorandum for Heads of Departments and Agencies that Provide Federal Financial Assistance. “The Use of Disparate Impact Standard in Administrative Regulations under Title VI of the Civil Rights Act of 1964.” July 14, 1994.
- 3 U.S. Environmental Protection Agency. “Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits.” February 1998.
- 4 40 CFR 7.115(e), 40 CFR 7.130(b).
- 5 Bureau of National Affairs, *Daily Environmental Report*, June 29, 1998.
- 6 Roberts, Robert E., Molly Conrecode, and Carol Leftwich, “Environmental Justice and EPA’s Title VI Guidance: What Must Be Done.” ECOSTATES, August 1998.
- 7 Environmental Council of States (ECOS), “Proposed Elements of State Environmental Justice Programs” (draft), October 16, 1998.
- 8 U.S. EPA Region 5. “Region 5 Interim Guidelines for Identifying and Addressing a Potential Environmental Justice Case” (draft), October, 1997.