

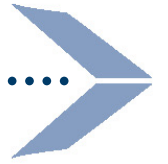
AIR: PERMIT CONSIDERATIONS IN LIGHT OF RECENT FEDERAL CASELAW

EMPLOYERS NETWORK
SC ENVIRONMENTAL HEALTH & SAFETY CONFERENCE
GREENVILLE, SC
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> <https://youtu.be/IYOen4Ni7Pg>



OVERVIEW



- > Test Cases for new state air permitting requirements
- > EPA Actions
 - Title VI Civil Rights Complaints
 - Environmental Justice Concerns
 - Settlements with States
- > Not through regulations/laws
- > Push Back

Pause....



TITLE VI OF CIVIL RIGHTS ACT



No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

CANCER ALLEY – ST. JAMES, LOUISIANA



- > Environmental Justice
- > 2022 – Residents filed VI Civil Rights Act Complaints with EPA
 - Denka, Formosa (haz waste emissions, EtO, chloroprene)
- > LA DEQ – gets federal funding, must not discriminate in its air permitting program
- > Alleged Racial Discrimination in Permitting Decisions

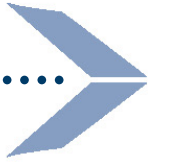
SETTLEMENT NEGOTIATIONS



> Settlement Draft:

To address “*concerns that LDEQ’s methods of administering its [air permitting] programs and activities and actions or inactions related to air pollution control and health risk mitigation and communication may have resulted and continue to result in disparate adverse impacts on Black residents*”

“DISPARATE IMPACT” UNDER TITLE VI



Whether:

- the permitting action will cause or contribute to adversity/harm when considering the total or cumulative burdens including exposure to pollution throughout a person’s lifetime;
- the adversity/harm identified is borne disproportionately by individuals on the basis of race, color or national origin, or borne disproportionately by a community, especially in light of the characteristics of that community and,
- there is a causal connection between the permitting action and the adversity/harm identified (that are “sufficiently substantial to raise an inference of causation”)

- > Requires LDEQ address Potential Adverse Disparate Effects of Air Permitting Decisions by
 - considering relevant demographic information to tailor public involvement efforts
 - identifying populations in potentially impacted areas within ¼ mile, ½ mile, 1 mile, and 3 miles from the pollution source or fenceline
 - Analyzing any potential adversity/harm by considering cumulative burdens

DISPARATE IMPACT REVIEW REQUIRED FOR



- > New major source
- > New major stationary source or major modification
- > New facility with proposed facility-wide emissions greater than 80% of the relevant major source threshold (synthetic minor source);
- > Title V permit renewals that propose an allowable emissions increase greater than 80% of a major source threshold; and
- > New air permits and amendments; modifications, or renewals for any permit:
 - Where EJ has been raised by community
 - Where in area of concern (i.e. lots of odor complaints)
 - For types of facilities where communities generally raise concerns

REQUIREMENTS IN SETTLEMENT AGREEMENT



> Cumulative Burdens analysis:

- existing environmental burdens from air and other pollution sources
- existing burden of disease and health vulnerabilities for the population living in the impacted area; and
- social conditions that contribute to a population's vulnerability to air pollution

OTHER CONSIDERATIONS (DISPARATE HARM)



- > Consider Compliance and Complaint information
 - facility and other facilities in impacted area
 - determine whether contribute to adverse non-health impacts
 - quality of life (e.g., noise, odor, lights) and
 - safety (e.g., industrial truck traffic, closure of evacuation routes)
- > Determine whether disproportionate share of adversity/harm will be borne by individuals based on race, color, or national origin
- > Implement measures to mitigate adverse disparate impacts identified
- > Demonstrate there are no less discriminatory alternatives

IF DISPARATE, MITIGATION MEASURES



- > Enhanced compliance assurance in Permits
 - More monitoring, recordkeeping, reporting
- > Alternative Sites/Projects Analysis
- > Permit limits based on modeling assumptions (hour limitations, etc.)
- > Enhanced fugitive emissions detection
- > Odor monitoring/response plan
- > Potential air quality monitoring

MITIGATION MEASURES



- > Pollution Prevention Techniques
- > Prioritize Grant Funding for projects that reduce emissions
- > Community Benefit Agreements
- > Permit Denial
- > Permit Conditions to reduce impacts (hour and process limits, reopeners if mitigation not working)
- > Prioritizing compliance inspections and enforcement

PUSH BACK



- > LA Attorney General (Governor) sued
- > State of Louisiana v. U S Environmental Protection Agency et al, Docket No. 2:23-cv-00692 (W.D. La. May 24, 2023)
- > Suit: EPA can't hold states are in violation if Civil Rights Act b/c of alleged disparate impact in state permitting decisions
- > District Court in LA: Judge agreed- unintentional discrimination not a violation of Title VI of Civil Rights Act
- > EPA withdrew Civil Rights Complaint Allegation

SINCE RULING....



- > EPA backing off complaints in Texas
- > Flint, Michigan Settlement
 - More public notice but no new permitting requirements
- > Why is EPA backing down?
 - Conservative Supreme Court?



Stay Tuned

Please note: This presentation contains general, condensed summaries of actual legal matters, statutes and opinions for information purposes. It is not meant to be and should not be construed as legal advice. Individuals with particular needs on specific issues should retain the services of competent counsel.

