

Lawyer Insights

Expansion of Environmental Justice and Title VI Scrutiny Raises New Questions for Heavy Industry Projects in Texas

By Matthew Leopold & Jason Hill

Published in The Texas Lawbook | June 30, 2023



Many may have heard the term “environmental justice” or “EJ,” which was formally recognized in an Executive Order (EO) signed by President Clinton in 1994. On April 21, President Biden significantly expanded the scope of federal EJ policy in a new EO. Current federal policy now includes a raft of new obligations on federal agencies that will require them to develop programs to embed EJ analysis into decision-making, increase access for EJ communities to participate in federal processes, centralize oversight of EJ policy implementation and track agency progress on implementation goals.

Complementing the new EJ policy is a longstanding, but now enhanced, legal requirement created by Title VI of the Civil Rights Act of 1964, which prohibits any state agency from engaging in discrimination on the basis of race, color or national origin in any program or activity that receives federal funds or other federal financial assistance. In the environmental context, this may manifest in Title VI violations for federal actions (such as project permits) which are associated with disparate environmental and health impacts in minority communities.

Increasing scrutiny around EJ impacts of infrastructure projects and permitting at the federal and state level could have massive impacts for industry in the form of permit delay and even denial where EJ impacts are identified and not adequately addressed. Companies in Texas should consider EJ impacts more systematically through their project planning processes to be prepared for increased scrutiny, inquiry and potential investigation around the impacts to surrounding communities and the demographic makeup of those communities.

What is Environmental Justice?

Environmental justice is defined by the current administration as “the just treatment and meaningful involvement of all people, regardless of income, race, color, national origin, Tribal affiliation, or disability, *in agency decision-making* and other Federal activities that affect human health and the environment. ...” An “EJ community” under this definition can be one which is disproportionately made up of people of color, people with low incomes or people otherwise adversely affected by poverty or inequality. The EPA’s EJ efforts consist of both environmental equity (ensuring environmental burdens are born equitably across communities) and community engagement (communities have an opportunity to participate meaningfully in processes that affect their health and environment). Agency decision-making under this definition includes authorization and permits for large infrastructure projects, meaning agencies are increasingly expected to review projects for EJ implications and ensure those impacts are mitigated where possible.

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How Does the 2023 Executive Order Expand Expectations for Federal Agencies Regarding EJ?

Generally, the 2023 EO requires federal agencies to do more when it comes to EJ than the Clinton EO in 1994. Importantly, it broadens the definition of “environmental justice” by expanding the scope of what EJ impacts must be addressed or prevented. Whereas the 1994 EO urged agencies to identify and address disproportionately high impacts to minority and low-income communities, the Biden EO *directs* that agencies “consider adopting or requiring measures to avoid, minimize, or mitigate disproportionate and adverse human health and environmental effects (including risks) and hazards of federal activities on communities with environmental justice concerns.” These measures include addressing cumulative impacts of environmental and other burdens. While the EO is not prescriptive about what it means to evaluate cumulative impacts, agencies will likely be required to consider the combined impacts from multiple sources of pollution and community-specific vulnerabilities. The new EO also increases agency oversight and accountability, directing that agencies submit EJ strategic plans to the White House and assess their efforts biannually. Agencies will also be required to build EJ more systematically into federal project review and authorization under the National Environmental Policy Act (NEPA), by evaluating the direct, indirect and cumulative effects of the project on EJ communities.

What is Title VI of the Civil Rights Act and How is it Applicable to the EPA’s Regulatory and Permitting Processes?

Title VI of the Civil Rights Act “prohibits discrimination on the basis of race, color, or national origin in programs and activities of an entity that receives federal assistance.” In the environmental realm, this subjects state agencies, like the Texas Council on Environmental Quality (TCEQ), to scrutiny by EPA, which can begin investigations on its own or in response to a petition filed by third parties. The Biden EPA recently issued unprecedented guidance stating that state agencies may violate Title VI where a permitting decision has disparate impacts to communities of color or low-income groups. If disparate impacts are found, EPA will push the state agency to assess whether there are comparable alternative practices with a less discriminatory effect. Under the Biden administration, EPA has publicly indicated it will take a more muscular approach to Title VI enforcement. “This agency wants to be a civil rights agency. ... We haven’t always used the full scope of our authority,” said Lilian Dorka, director of the EPA’s external civil rights compliance office in 2022.

One state agency, the Louisiana Department of Environmental Quality, has come under intense EPA scrutiny for allegations that the way it administers its permitting programs disproportionately impacts low-income and diverse communities. The U.S. Department of Justice (DOJ) has also recently made their first environmental investigation under Title VI. After an 18-month investigation into complaints of civil rights violations in Lowndes County, Alabama, the DOJ found that the Alabama Department of Public Health and the local health department failed to take “meaningful actions” to protect Black communities from exposure to raw sewage where residents were forced to bear the cost of installing private wastewater systems as required by the state. The federal government entered into an agreement with state and local agencies to provide sanitation services and stop exposure to untreated sewage and to suspend enforcement of sanitation laws that could result in charges against county residents who lack the means to purchase safe septic systems.

What Does Renewed Focus on Title VI and EPA Scrutiny Mean for Texas?

Texas’ abundance of natural resources — particularly in oil and gas — and its plethora of heavy industries are already subject to regulatory scrutiny, including extensive pollution control measures. EPA

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is now starting to raise Title VI as a new basis to check heavy industry operations and projects in EJ communities.

In September 2022 in Harris County, EPA announced that it would accept complaints against the TCEQ related to the issue of whether state regulators failed to properly permit concrete batch plants and discriminated against non-/limited-English speakers in the proposed plant communities. EPA is also investigating allegations from Corpus Christi residents who objected last October to that city's proposed Inner Harbor Desalination Plant, slated to be located in the historically Black Hillcrest neighborhood. What's becoming clear is that proposed heavy industrial projects with air emissions (or potentially other releases of pollution) are now going to be vetted not just on traditional regulatory metrics but also on the basis of location and potential impact on an EJ community. Projects may also receive more stringent review under this rubric if located in/adjacent to areas with historical (ongoing or past) pollution concerns based on EPA's emerging practice of assessing cumulative impacts of all environmental stressors. However, given that EJ is largely embodied in policy documents, rather than statutory requirements, it is unknown whether and how EPA might stop a project that otherwise meets all regulatory requirements.

How Can Companies Best Prepare for or Adapt to EJ and Title VI Scrutiny?

Companies looking to design, secure approvals and build commercial and industrial projects that have air emissions potentially impacting EJ communities should start by asking more questions internally in the planning process. For instance:

1. What are the demographics of the potentially affected community and have EPA screening tools identified it as an EJ community?
2. Would a proposed project have a disproportionate impact on this community as opposed to non-EJ communities?
3. What are the cumulative impacts of other heavy industry or existing environmental stressors in the proposed location?

With emerging EJ policies and more muscular Title VI enforcement, it is prudent to investigate and address these issues in advance rather than be subject to regulatory scrutiny after a permit is sought. Utilizing an expanded analysis, companies can more effectively evaluate the viability of a project that will be expected to comply with EJ and Title VI scrutiny from federal agencies in the permitting process.

Moving Forward

The U.S. continues to experience tight supply chains and energy prices remain volatile. Texas' strategic location, deep natural resources and pro-business/economic development environment ensure that heavy industrial projects will continue to be proposed and developed. The prudent approach for any company embarking on development is to ensure they are aware of updates related to EPA regulation and ensure that comprehensive due diligence and tough questions are asked internally before a plan is released and a shovel breaks the ground.

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