Title VI, the Civil Rights Laws, and Interim Environmental Justice and Civil Rights in Permitting Frequently Asked Questions

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GOALS:

- Provide brief background on Title VI laws and authorities.
- Discuss the EJ and CR in Permitting FAQs.
- Answer any question you might have.

Title VI of the Civil Rights Act of 1964

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.

42 U.S.C. Section 2000d

EPA Regulations

Programs or activities receiving EPA assistance "shall not directly or through contractual, licensing, or other arrangements on the basis of race, color, or national origin…":

- Subject a person to segregation or separate treatment;
- Deny a person or group the opportunity to participate as members of any planning or advisory body;
- Restrict a person in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, aid, or benefit ...;
- Use criteria or methods of administration "which have the effect of subjecting individuals to discrimination…";
- "Choose a site or location of a facility that has the purpose or effect of excluding individuals from, denying them the benefits of, or subjecting them to discrimination" among other things.

40 C.F.R. § 7.35

Compliance With Envt'l Laws ≠ Civil Rights Laws

- A recipient's compliance with federal environmental laws in carrying out its permitting programs does not necessarily mean that the recipient is complying with federal civil rights laws.

- State, local, and other recipients of federal financial assistance have an independent obligation to comply with federal civil rights laws with respect to all of their programs and activities, including environmental permitting programs.

Recipient, Federal Financial Assistance, and Programs or Activities

- **Recipient is**: Any state or its political subdivision, instrumentality of a state or its political subdivision, or any public or private agency, institution, organization, or other entity.
- **Receive means:** directly or through another recipient.
- **Federal financial assistance:** more than just funds (loans, property, etc.)
- **Program or activity:** If any part of entity receives FFA, entity must ensure nondiscrimination throughout all of its programs and activity, not just the part receiving assistance.

Discrimination
Under the Civil Rights Laws, Including Title VI
Includes

Intentional Discrimination

(Disparate or Different Treatment)

Disparate Impact

(Discriminatory Effects)

Retaliation and Intimidation

Title VI and Environmental Justice
Compare and Contrast

	Title VI	Environmental Justice
Source of Authority	Federal civil rights statute	Executive Orders
Purpose	Ensure that federal funds are not being used to discriminate	Advance EJ through integrating EJ into federal environmental law
Who is Covered	Recipients of federal financial assistance	Federal agencies as designated by Executive Order
What is Covered	Race, Color, National Origin	Race, Color, National Origin, Income
How Enforced	Fed court (discriminatory intent only), Fed Agency (discriminatory intent **and** effect), Compliance Reviews	Not enforceable in court; does not create any rights, benefits, or trust responsibilities enforceable against the United States

EJ and CR FAQs: Things to Consider

- The Permitting Frequently Asked Questions (FAQs) are not new guidance or policy and do not create new obligations.

- Interim: FAQs are a “living” document that will be updated based on comments received as well as additional resources as they become available.

How and Why Did the FAQs Come About

Questions were raised within EPA and from state and other external partners:

- What is the intersection of EJ and civil rights in environmental permitting?
- What information is available now to help states and other permitting agencies address EJ and meet civil rights obligations in environmental permitting?

This presentation will summarize main points of the 18 FAQs.

Why is EJ Important (Question 1)

People of color, as well as low-income and indigenous populations, suffer disproportionate burdens of pollution and are denied equal access to a healthy environment.

- Finding solutions is our collective obligation:
  - Consider principles of environmental justice
  - Comply with federal civil rights laws
  - Comply with applicable state environmental justice and civil rights policies and laws.

What are EPA's Responsibilities (Questions 2 and 3)

- EPA follows direction from:
  - EO 12898 (1994) *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*
  - EO 13166 (2000), civil rights laws, and EPA's civil rights regulation requires EPA provide meaningful access to EPA programs and activities for persons with limited English proficiency (LEP) and persons with disabilities.
  - EO 14008 (2021) *Tackling the Climate Crisis at Home and Abroad*
  - EO 13985 (2021) *Advancing Racial Equity and Support for Underserved Communities Through the Federal Government*

What are EPA's Responsibilities, cont'd (Questions 2 and 3)

- Title VI does not apply to EPA actions
- EPA is committed, however, to a policy of nondiscrimination **in its own permitting programs.**
- EO 12898 directs federal agencies to ensure that federal actions substantially affecting human health or the environment do not have discriminatory effects based on race, color, national origin, or low-income status.

What are EPA Responsibilities to Ensure Compliance with Civil Rights Requirements by Recipients (Questions 3 and 6)

- Federal civil rights laws, including Title VI of the Civil Rights Act of 1964, and EPA's civil rights regulation prohibits state, local, or other entities that receive federal financial assistance, either directly or indirectly from EPA, from taking actions that are discriminatory.
  - Intentional discrimination **(different treatment)**
  - Actions that have an unjustified discriminatory effect **(disparate impacts)**, including on the basis of race, color, or national origin (including LEP)

What Actions Can EPA Take to Advance Environmental Justice and Ensure Compliance with Civil Rights Requirements by Recipients, cont'd (Questions 3 and 6)

- When reviewing environmental permits issued by states and other recipients, EPA can provide comments on EJ and civil rights issues raised by such permits, including:
  - Potential for adverse and disproportionate impacts
  - Meaningful involvement and fair treatment of any population adversely and disproportionately affected
- EPA can provide technical assistance on advancing environmental justice and civil rights compliance.

Relationship Between EJ and Civil Rights (Questions 4, 5, 6)

- EJ and civil rights compliance are complementary.
- Integrating both into decision-making can together address:
  - Disproportionate distribution of environmental burdens and benefits that adversely affect persons on the basis of race, color or national origin
  - And per EJ policies, also income-based adverse and disproportionate impacts.

Relationship Between EJ and Civil Rights, cont'd (Questions 4, 5, 6)

- Enforcement of federal civil rights laws and implementation of environmental laws are also complementary. However:
  - Civil rights laws and environmental laws function separately
  - State, local, and other recipients have an independent obligation to comply with federal civil rights laws.
- Compliance with federal environmental laws does not necessarily mean a recipient is complying with civil rights laws.

Environmental Laws (Question 7)

- Certain environmental statutes allow for and may even require consideration of EJ in permitting in some contexts (NEPA, CWA, CAA, SDWA, RCRA).

- State and local authorities may also support consideration of EJ and civil rights in the permitting process.

Screening for EJ and Civil Rights (Questions 8 & 9)

- A routine process of screening for EJ and civil rights concerns early in the permitting process is critical. Such a process will indicate:

  - Potential for adverse health/environmental impacts
  - Vulnerability of affected community to adverse effects
  - Existing disproportionate burden of affected community
  - Best practices for meaningful engagement of community
  - Whether additional analysis for Title VI compliance is needed

EJ and Civil Rights Analyses and Cumulative Impacts (Questions 10, 11, 12)

- Appropriate scoping of an EJ analysis is important - no “one size fits all” approach to EJ analyses exists.

- But all EJ analyses should address:
  - fair treatment by evaluating, and identifying ways to mitigate, adverse and disproportionate impacts, and
  - meaningful involvement of affected community.

- Health Impact Assessments (HIAs) are a promising practice for conducting EJ analyses. (See Q. 10)

EJ and Civil Rights Analyses and Cumulative Impacts, cont'd (Questions 10, 11, 12)

- Under Title VI:

  - disparate impact analysis is used to examine whether a recipient's policy or practice has an unjustified disparate impact on the basis of race, color, or national origin.
  - EPA considers cumulative impacts when evaluating the disparate "impacts" (or harms) of a recipient's policy or practice.

Adverse and Disproportionate Impacts (Questions 13 & 14)

- When a permitting decision has a disparate impact on the basis of race, color or national origin (including LEP status), it raises a potential violation of Title VI.

Elements of a disparate impact claim?

1. A facially neutral policy or practice (for example, permitting decision)
2. Adverse (harmful) impact
3. Disproportionate (disparate) on the basis of race or ethnicity, *etc.*, and
4. Causal link between the facially neutral policy or practice and the adverse disproportionate impact.

Adverse and Disproportionate Impact Cont'd. (Questions 13 & 14)

- Next steps to ensure compliance with Title VI include evaluating the following questions:

  - Is there a substantial legitimate justification for the decision, action or inaction?

  - Is there a less discriminatory alternative?

Adverse and Disproportionate Impacts, cont'd (Questions 13 & 14)

- Less discriminatory alternative: Is there a comparably effective alternative practice with a less discriminatory impact or mitigation measures available to address adverse impacts? (Alternative decision? Alternative location? Mitigation?)

- Mitigation measures may include enhanced permit terms using environmental and/or non-environmental authorities.

- If not, denial of the permit action may be necessary to avoid a Title VI violation. This will be a fact-specific determination.

Community Engagement (Question 15)

Community engagement should:

- Occur as soon as possible in the permitting process
- Ensure that the people most affected by the permit have input into the decisions
- Consider the site-specific circumstances of the permitting action
- Meaningfully involve all persons regardless of race, color, national origin (including LEP status), disability, sex, and age.

Tribal Consultation vs. Community Engagement (Question 16)

- Conducting government-to-government tribal consultation is separate and distinct from public engagement and involvement.
- Community engagement, including with tribal and indigenous communities, cannot replace tribal consultation, and tribal consultation cannot replace community engagement.
- States should consider tribal interests in their permitting processes.

Additional Resources and Information (Questions 17 & 18)

- The Permitting FAQs provide a small bibliography of resources. We reinforce the point that the FAQs are based on existing information and that the materials and resources are available to stakeholders. We hope this will lead readers to sources for more detailed information.

- The FAQs are a living document. We are soliciting feedback, questions and suggestions to expand and revise the document. An email box has been established and it currently receiving responses: ej.permitting@epa.gov