

**Arkansas Water & Wastewater Managers Association
Fall Conference
Environmental Justice**

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Arkansas Environmental Energy and Water Law Blog

<http://www.mitchellwilliamslaw.com/blog>

Three combined posts every business day
addressing federal/Arkansas legislation,
regulation, administrative/judicial decisions and
personnel transitions

- Today's presentation will address the increasing focus on a concept known as "Environmental Justice."
- In particular, we will consider the prior and evolving impact on the federal and Arkansas environmental regulatory and grant programs.
- Potential Impacts on:
 - Enforcement?
 - Siting or expanding facilities?
 - Grants?
 - Regulations?


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- Is EJ relevant to water and wastewater facilities?
 - Pipelines
 - Land Application
 - Pump Stations
 - Drinking water/wastewater treatment facilities
 - Etc.



To what does the term “Environmental Justice” refer?

- EPA defines “EJ” as:

the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations and policies.



Fair treatment – No group shall bear a disproportionate share of negative environmental consequences for government/private activities

Disproportionate Burden – The concern is:

- Exposed community did not generate problem
- Exposed community receives marginal benefits
- Exposed community bears environmental burden

Differential Solid Waste Exposure?

What drives concern about “Environmental Justice”?

Example:


- Local or Regional studies (Example)
 - Houston study finds 8 of 9 landfills in neighborhoods with high % of minorities.
 - NC study finds block groups with 50% minorities are 2.8 times more likely to have a facility than block groups less than 10% minorities.
- Has there been an overt or unconscious decision to place landfills, wastewater facilities, pipelines, land application sites, etc., in certain types of areas?

Differential Exposure to Hazardous Waste Facilities (HWFs)

- National studies
 - UCC Commission on Racial Justice found ZIP codes with HWFs had an average of 24% minority pop while ZIP codes without HWFs had an average of 12% minority pop.
 - A restudy using census tract found no significant racial differences between tracts with and without HWFs. However, tracts with facilities appear to be in industrial districts which are surrounded by working class neighborhoods that are disproportionately minority and poor.

Differential Exposure to Uncontrolled Hazardous Waste?

- National Studies
 - 2 studies of the 800 Superfund sites
 - These studies agreed that Superfund sites were more likely to be in higher % minority counties controlling for other factors.
 - One study suggested this was due to high minority pop in a few cities with many sites.
 - They disagree on the relationship of exposure and poverty



- Meaningful involvement:

- Opportunity for people to participate in decisions about activities that may affect their environment and/or health
- Decision-makers will seek out and facilitate the involvement of those potentially affected.
- Public's contribution can influence the regulatory agency's decision
- Community concerns will be considered in the decision-making process

EJ Evolution

It grew out of, in part, the 1987 study conducted by the United Church of Christ's Commission for Racial Justice. . . . finding that race, even more than income, was the most significant variable in predicting residential proximity to hazardous waste facilities.

Environmental Justice

Minority & poverty


Minority or poverty

Title VI Civil Rights Act

prohibits intentional discrimination (§ 601), or
discriminatory effect (§ 602)

No private right of action

Still, federal agencies (such as EPA) have
regulations (e.g. 40 C.F.R. pt 7)



EPA Administrator Regan has directed EPA offices to consider EJ in their activities.

- EJ focus at US EPA is intended to extend to:
 - Setting standards and promulgating regulations
 - Permitting facilities and issuing licenses
 - Making grants (prioritize EJ communities)
 - Reviewing actions of other agencies
 - Strengthening enforcement of violations in pollution burdened and underserved communities
- EJ in Practice – Effective or meaningful??

Current Federal/Arkansas Statutory Authorities Currently Address
These Issues to Some Extent:

- National Environmental Policy Act (federal actions that significantly affect the human environment must prepare an Environmental Impact Statement [must consider a variety of issues such as disproportionate impacts, etc.])
 - Federal Funding
 - Federal Permits (Rivers and Harbors, 404, FERC, etc.)
- Clean Water Act/U.S. Corps of Engineers 404 Wetland Public Interest Review
- Arkansas Solid and Hazardous Waste Siting Requirements
- Executive Order 12898 (1994) requires federal agencies to address EJ concerns in considering grants or financial assistance to evaluate the potential impacts from their projects or minority and lower income communities.

Key Issue

- Issue being driven to a great extent by Biden Administration federal initiatives (some state exceptions)
- What does this mean for a state like Arkansas which has been delegated the various federal environmental programs?
- Three avenues:
 - Federal programs such as CWA 404 and National Environmental Policy Act
 - Federal grant programs and delegation oversight
 - Federal Overfiling Enforcement (Example- Crossett)

Biden Administration Executive Order 14008

- Address EJ, Climate Change and Equity
- Two White House Councils formed for EJ Implementation
- Funding for EJ programs

EPA


External Civil Rights Compliance Office (ECRCO)

- ECRCO is responsible for enforcing several civil rights laws which prohibit discrimination on the basis of race, color, national origin, sex, disability, age and retaliation by those that seek or receive federal funding from EPA.
- Where ECRCO finds a violation of Title VI has occurred, removal of all EPA funding could be the result. (Is that a realistic option?)

EPA

External Civil Rights Compliance Office (ECRCO)


- EPA indicates they will be developing a number of new products and processes for improving how ECRCO fulfills its responsibilities, including the development of a cumulative impacts guidance document to assist investigators and others with determining whether environmental permitting decisions by EPA and states have been discriminatory.



ECRCO intends to achieve the following, all within dates certain:

- Clarify interpretations of requirements and expectation through issuance of guidance documents:
 - This includes civil rights guidance in the permitting context and, particularly, how cumulative impacts are considered when evaluating disparate impacts under civil rights law;

- Systematize review of compliance with foundational procedural requirements for applicants of federal financial assistance and recipients of federal financial assistance;
- Ensure that civil rights compliance goes beyond a checklist of procedural requirements and, toward that end, develop ECRCO capacity to evaluate whether specific actions, policies, and practices by recipients – including permitting – comply with civil rights laws;

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- Launch post-award compliance reviews and a process for prioritizing compliance reviews on an annual basis
 - Provide greater transparency to the public about ECRCO's work; and
 - Meaningfully engage stakeholders

EPA Oversight/Delegation

Example

- Sierra Club objection to Title V Air Permit for Texas facility (Oxbow Calcining) alleging violations of Title VI EPA civil rights regulation (40 C.F.R. Part 7)
- Filed against TCEQ
- EPA accepted complaint for investigation
- Alleges subject individuals to discrimination or impairing objectives of the program on basis of race.

EPA – Clean Air Act Regional Haze

Example

EPA states it encourages states to consider the following in developing Regional Haze Plans:

- Outreach to EJ communities
- Consider equity and EJ impacts as part of technical analyses supporting State Implementation Plan
- Consider EJ in source selection/emission control options

EPA Oversight - Grants

Example

Disadvantaged Communities/Drinking Water State Revolving Fund Loan Subsidies: U.S. Environmental Protection Agency Office of Inspector General Project Notification

- EPA Office of Inspector General issued an October 20th Project Notification entitled:

Drinking Water State Revolving Fund Loan Subsidies to Disadvantaged Communities

EPA Oversight - Grants

OIG is initiating an audit of drinking water state revolving fund loan subsidies to disadvantaged communities.

OIG states the two objectives are to determine to what extent:

- Have states have met their drinking water state revolving fund loan subsidy goals for disadvantaged communities as identified in their intended-use plans?
- Has EPA identified and addressed barriers, if any, that hindered states from spending the maximum allowed on loan subsidies for disadvantaged communities in their drinking water state revolving funds?

EPA Strategic Plan

Specific goals for the next five years. Examples include:

- Conduct 55% of inspections annually at facilities that affect communities with potential environmental justice concerns.
- Provide 1,722 Tribal, small, rural, or underserved communities with technical, managerial, or financial training or assistance to improve operations of their drinking water or wastewater systems.
- Ensure that each year, 40% of Superfund, Oil, Homeland Security, and FEMA exercises with EPA participation address environmental justice concerns.

Title VI Requirements for Applicants and Recipients of EPA

Applicants	Recipients
<ul style="list-style-type: none"> • Provide assurance that they will comply with requirements. • Disclose any pending lawsuits alleging discrimination. • Describe other federal assistance and pending applications to other federal agencies for assistance. • Describe other civil rights compliance reviews conducted during the previous two years. 	<ul style="list-style-type: none"> • Collect, maintain, and, upon request, provide: <ul style="list-style-type: none"> ○ Description of any pending lawsuits that allege discrimination. ○ Racial or ethnic, national origin, and age data that were submitted with the application. ○ EPA Form 4700-4. ○ Log of discrimination complaints. ○ Compliance review reports conducted by other agencies. • Keep records for three years after completing the project. • Post notice of nondiscrimination in a prominent place; provide the notice in a language other than English, if appropriate; and include a point of contact. • Adopt grievance procedures, unless certain conditions apply. • Submit other data and information, as required, "where there is reason to believe that discrimination may exist," that is relevant to determining compliance.

Applicability to Non-Governmental Projects/Activities?

Example – USDA Farm Service Agency funding of confined animal feeding operations

- Analysis driven by:
 - National Environmental Policy Act
 - 404

Note federal involvement.



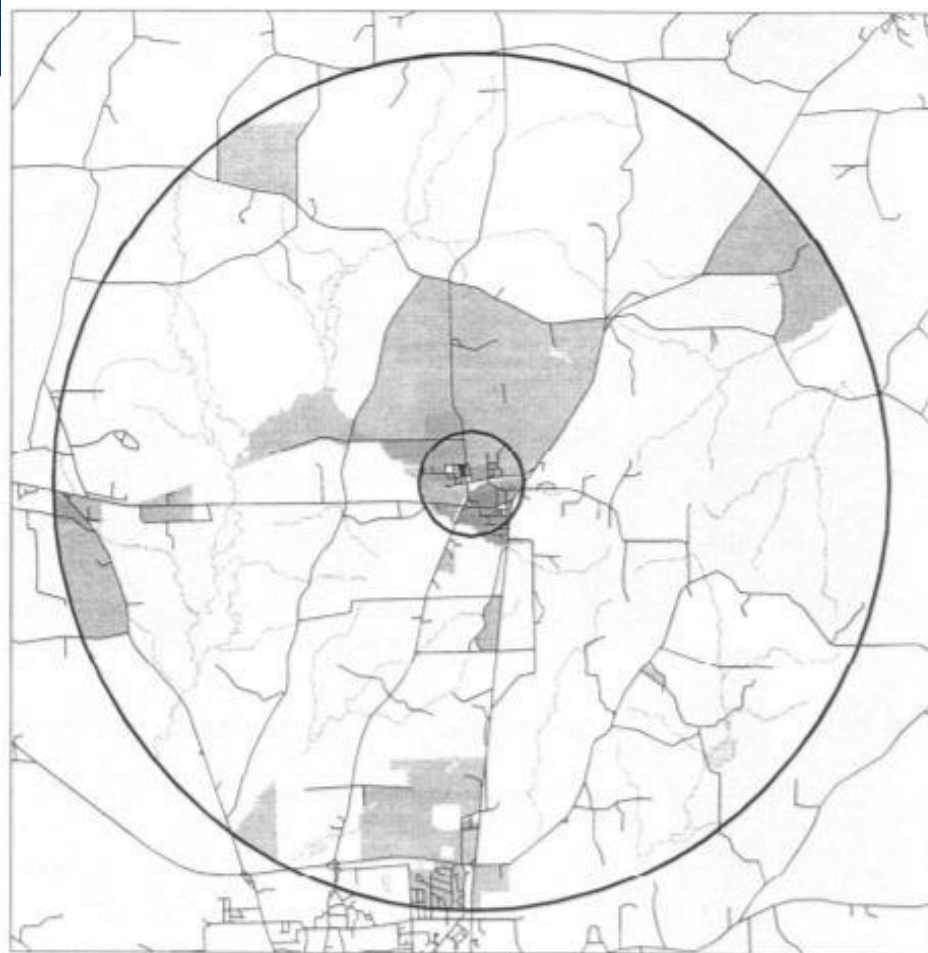
Example

Grant Programs

- Watershed, drinking water and subsurface sewage treatment systems grants and loan programs include additional scoring for environmental justice areas of concern
- Scoring will continue to consider whether anticipated negative impacts are considered disproportionate to any particular population based on ethnicity or income.

McNeil, McNeil, AR

Potential Environmental Justice Index (EJ)



Longitude: -93 12 35.68 Latitude: 33 20 52.45

Criteria Ranked by Census Block (DVECO * PF)

- 1 to 12
- 13 to 25
- 26 to 37
- 38 to 50
- 51 to 100



Potential Environmental Justice Index for Two Study Areas

	1 Sq. Mile	50 Sq. Mile
Total Population	590	2935
Population Ranking (PF)	2	1
Percent Minority	60.5%	35%
Minority Status (DVMAV)	5	3
Percent Economically Stressed	45.8%	31.9%
Economic Status (DVECO)	3	2
Environmental Justice Index	30	6



Arkansas Statutory Language Addressing EJ?

Minimal except – Ark. Code Ann. 8-6-1501

Siting High Impact Solid Waste Management Facilities

- Developed during 1989, perceived “solid waste crisis (limited landfill space, too many ill-advised underfunded landfills, etc.)
- Supplement to regionalization of landfills and forecasting need
- Rebuttable presumption against permitting construction or operation of any high impact solid waste management facility within 12 miles of another one
- Includes solid waste or hazardous waste landfill or incinerator
- Excludes recycling, non-commercial private industry facility
- Addresses “concentration”
- Despite being a delegated state, Arkansas will get pressure from EPA programs

Port Arthur-Texas Community and CIDA Example of “Engagement”

Community in Power and Development Association (CIDA)

Represented “fenceline” communities

They used air samples and other strategies to document excess pollution from the refineries and then opposed permit applications for major expansions.

The result was a Community Enhancement Agreement with Motiva that provided for community financial support and other specific air pollution control and abatement measures.

Port Arthur – Agreement with Motiva

Initial funding of \$2 million was provided by Motiva with another \$1.5 million pledged to match grants from other sources.

The goal is to provide seed money to support a long-term effort to revitalize West Port Arthur.

Among the provisions are:

- The installation of pollution controls for cancer causing benzene air emissions from its waste water system not required by law.
- The funding of a new ambient air quality monitor to measure air pollutants such as hydrogen sulfide that are not being measured at this time in Port Arthur
- Funding for the community for better access to community health facilities; and
- An annual environmental report to the community for a better exchange of information.

Key Points


EJ has not yielded a bright legal test for either intentional discrimination or disparate impact

It has had strong influence on EPA's (and other agencies') priorities and choices

As a result, while not a typical legal obligation enforceable in court, you must account for it in environmental legal strategy and litigation

Environmental Justice – Predictions

- What to Expect Now – Enforcement
 - Enhanced enforcement
 - Is allegation of environmental justice an additional pressure point?
 - Citizen Suit potential
 - Use of the issue to attempt to involve EPA citing such concerns (abandoned site example)
 - Public access to emissions/discharge data
- What to Expect Now – Other priorities
 - Focus on EJ community Superfund sites
 - Brownfield redevelopment grants

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- Increased attention to compliance
 - Awareness of publicly available information
 - Possible misinterpretation and errors
 - Increased citizen suit risk
 - Understand your community
 - Who lives there/who else emits and discharges there
 - Build relationships
 - Start before there is problem
 - Proactive > Reactive

Example

Benefits of Effective Community Engagement

- Legitimacy and increased support for plans and projects.
- Improved community/government relations.
- Deeper understanding of the issues.
- Increase in community collaboration abilities to achieve equitable outcomes and leverage additional resources, outside of public processes.

Practical Impact on Environmental Law

Development of rules and public notice procedures?

Permits for facilities?

The decision to pursue enforcement, both civil and criminal?

Sentencing and punishment?

Where is EJ going?

- Increased communication
- Good Neighbor Agreements
- Buyouts
- Corporate social responsibility
 - Funding to local charities
- Services to the community
 - Warnings
 - Donating emergency response equipment
 - Health Clinics