

U.S. EPA Offers Roadmap for Environmental Justice-Based Permit Denials

Publications

September 1, 2022

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On August 16, 2022, U.S. EPA released its Interim Environmental Justice and Civil Rights in Permitting Frequently Asked Questions (FAQ) that provides guidance to federal, state, and local environmental permitting entities on integrating environmental justice (EJ) and civil rights into relevant environmental permitting decisions. Lilian Dorka, director of U.S. EPA's External Civil Rights Compliance Office (ECRCO), emphasized that the information in the FAQ isn't new and that environmental permitting decisions are always supposed to consider the EJ and civil rights impacts of the permit. Rather, according to Director Dorka, the FAQ is an effort by U.S. EPA to compile existing information on integrating EJ and civil rights into the permitting process into a single document. She also noted that this is an interim document and EPCRO is working on separate guidance document to provide further direction on how permitting entities should consider civil rights in permitting decisions, including Title VI's disparate impact analysis.

One of the more interesting parts of the FAQ is the following paragraph:

If there are no mitigation measures the permitting authority can take, whether within or outside the permitting program, that can address the disparate impacts, and there is no legally sufficient justification for the disparate impacts, denial of the permit may be the only way to avoid a Title VI violation. Whether denial of a permit is required to avoid a Title VI violation is a fact-specific determination that would take into account an array of circumstances, including whether the facility will have an unjustified racially disproportionate impact, as well as the less discriminatory alternatives available.

This is one of the first times that U.S. EPA has clearly articulated its position that a permit can be denied solely because it may violate Title VI although the occasions when a permit has been denied on this basis have historically been far and few between. However, a recent example of how EJ and civil right issues can impact the permitting process is currently playing out in Chicago where the City of Chicago denied a permit for a metal recycling facility following receipt of a letter from U.S. EPA noting significant civil rights concerns associated with the facility's operations. Notwithstanding that the Illinois Environmental Protection Agency had already issued the facility an air permit allowing

the facility to commence operations, the City of Chicago denied the facility an operating permit based primarily on the purported disparate impact of the facility on disadvantaged communities. The City's permit denial is currently being challenged in an administrative proceeding.

The FAQs are clearly consistent with U.S. EPA's ongoing efforts to integrate President Biden's Justice40 Initiative that sets a goal of ensuring that 40% of the overall benefits of certain federal investments flow to disadvantaged communities. We will continue to track U.S. EPA's efforts to ensure that its permitting decisions are appropriately protective of disadvantaged communities at the *Corporate Environmental Lawyer* blog.

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