Federal Interpretations of Environmental Justice Claims Threaten State Programs

Natural Resources Policy Studies Division
Center for Best Practices
Author: Debbie Spiliotopoulos
NGA Contact: Jim Whitter: 202/624-7825
October 28, 1997

Summary
Environmental justice seeks to protect minority and low-income communities from bearing a disproportionate share of pollution. Title VI of the Civil Rights Act of 1964 prohibits federally funded programs and activities from discriminating on the basis of race, color, or national origin. Because many state programs are delegated by federal law, Title VI complaints have been brought against some state environmental permitting decisions that involve pollution sources near minority and low-income communities.

Recent federal court and agency environmental justice actions threaten state programs by:

- delaying the permitting process;
- requiring states to perform assessments well beyond the scope of environmental laws; and
- reducing or eliminating the federal funding available to state environmental agencies and revoking state permits that have been issued in compliance with environmental laws.

This *Issue Brief* examines a recent *amicus curiae* brief and administrative actions reflecting federal interpretations of Title VI and their potentially significant and far-reaching effects on state environmental permitting programs. It also presents the recommendations of state officials who participated in a May 1997 roundtable on facility siting and environmental justice convened by the National Governors' Association (NGA) Center for Best Practices. The states agreed that the U.S. Environmental Protection Agency (EPA) and other federal agencies working to develop the federal position on Title VI and facility siting should:

- recognize the limitations of current environmental laws to address environmental justice concerns;
- respect local land-use plans and authorities;
- recognize that state programs already involve the public in decisionmaking; and
- study the impacts of cumulative exposures from legally permitted facilities to determine whether concerns about these exposures are warranted.

The Concept of Environmental Justice
Environmental justice seeks to protect minority and low-income communities from disproportionate adverse effects from pollution. The concept of environmental justice emerged in the late 1970s among grassroots organizations as an offshoot of the civil rights movement. By the early 1980s, demonstrations against the siting of hazardous facilities and highways in poorer and predominantly minority areas were receiving national attention. These demonstrations spurred a number of studies, including the first national analysis of environmental justice published in 1987 by the United Church of Christ Commission for Racial Justice. This report, *Toxic Wastes in the United States: A National Report on the Racial and Socioeconomic Characteristics of Communities Surrounding Hazardous Waste Sites,* compared the location of toxic waste facilities with the racial composition of geographic areas defined by zip code. The study concluded that minorities were significantly more likely than whites to live in proximity to toxic waste facilities. Other studies have since been conducted that both support and dispute the commission's findings.

The Limitations of Environmental Laws Relative to Environmental Justice
Current environmental laws focus on environmental parameters, limiting their applicability to environmental justice concerns. Environmental laws are further limited in addressing environmental justice concerns because of antidegradation biases to protect pristine areas and because environmental laws do not govern land-use decisions.

Environmental Laws Are Ill-Suited to Address Environmental Justice Concerns.
Environmental laws require compliance with emissions goals and other environmental parameters that are designed to protect human health and the environment. These standards may not reflect the socioeconomic goals associated with environmental justice. Regulations that address human health protect the general population from adverse effects and allow facilities to site in locations where these regulations can be met. For example, the Clean Air Act does not preclude the siting of a facility in a particular location as long as air quality standards are met. Environmental laws contain no provisions for examining the demographics of a particular neighborhood.

Environmental Laws' Antidegradation Biases May Conflict with Environmental Justice Goals. Many environmental laws also include the concept of antidegradation. Under this concept, new pollution sources are discouraged from siting in pristine areas and often are encouraged to site in industrialized areas. The Clean Water and Clean Air Acts have antidegradation provisions to protect unpolluted resources. Consequently a national park may have stricter discharge limits than more developed areas. These provisions isolate or concentrate pollution sources in zones of development while discouraging new pollution sources in less developed areas. The antidegradation biases of environmental laws may conflict with environmental justice goals, especially when minorities and low-income populations live in areas of high industrial development.

Environmental Laws Do Not Govern Land-Use Decisions. Federal and state environmental laws ensure that every citizen is afforded a basic level of environmental protection; they do not govern the land-use decisions central to environmental justice concerns. Land-use decisions follow the zoning and other planning controls of municipal and county governments, which provide opportunities for the public to participate in developing these controls. Notwithstanding local requirements, land-use decisions are driven by the free market; industries will site their facilities based on infrastructure, labor supply, land costs, and other factors.

The Enforcement of Environmental Justice
Environmental justice complaints have been based largely on Title VI of the Civil Rights Act of 1964 and have taken the forms of administrative complaints and civil suits (see appendix). The federal government has addressed environmental justice internally in Executive Order 12898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations." EPA also is developing guidance to address the influx of Title VI administrative complaints to the agency.

Scope of Title VI. Title VI codifies the equal protection and nondiscrimination guarantees of the U.S. Constitution by ensuring that any program or activity funded by the federal government does not contribute to discriminatory practices. "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."

Title VI is enforced by the twenty-six agencies that distribute federal funds and issue rules and regulations. It applies to states, localities, and other entities that receive federal funding through grants and programs. Title VI governs activities such as education, disaster relief, or construction implemented with federal funds that result in discriminatory impacts on individuals or communities. If a funded recipient is judged in violation of Title VI, injunctive penalties may include orders to desist activities or steps to reduce federal funding.

Use of Title VI to Address Environmental Justice. Environmental justice advocates seek to use Title VI to address environmental justice complaints by focusing on state permitting programs—a new application of this thirty-three-year-old law. Environmental programs are covered by Title VI because they have been delegated authority from EPA and receive substantial federal funding. However, Title VI typically addresses federally funded actions where the recipient owns and controls the facility. State permitting programs perform neutral assessments to determine the suitability of the site only in terms of environmental standards. Siting decisions are made by landowners.

Forty-four Title VI administrative complaints have been filed at EPA since 1993, many of which relate to environmental permitting. Of these complaints, EPA has accepted fourteen, achieved voluntary compliance in four, and dismissed two. The agency still is considering the other complaints. EPA has not forwarded any complaints to the U.S. Department of Justice for litigation.

Anyone can file a Title VI administrative complaint or civil suit. The open process allows activists to file on behalf of alleged victims of discrimination. Recently, environmental justice advocates and environmental groups have filed complaints to stop planned facilities already approved by state and local governments. Sometimes community residents do not support the claims filed on their behalf. For example, Greenpeace has an international mission to halt polyvinyl chloride production. Claiming environmental racism, Greenpeace, the Tulane Environmental Law Center, and other organizations have filed a number of complaints, including a Title VI complaint against Shintech, Inc., to halt its siting of a polyvinyl chloride facility in Convent, Louisiana. Evidence from the Louisiana chapter of the National Association for the Advancement of Colored People indicates that 73 percent of the African-American residents living closest to the site support the facility.

Application of Executive Order 12898 to Federal Agencies. Executive Order 12898 requires each federal agency to make environmental justice part of its mission and to address "disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States." Key differences between this mandate and Title VI are the executive order's applicability to federal agency policies, its emphasis on the discriminatory effects of policies or decisions, and its broadening of the scope of environmental justice to include discrimination based on income. The order also establishes an interagency working group to address adverse human health or environmental impacts, cooperate on environmental justice research efforts, and coordinate on environmental justice strategies.

To implement Executive Order 12898, EPA created the National Environmental Justice Advisory Council (NEJAC), a group of stakeholders interested in environmental justice. NEJAC constitutes an advisory committee under the Federal Advisory Committee Act. Its membership includes three state representatives among the twenty-seven council members. This group reports directly to the EPA administrator and is supported by staff from EPA's Office of Environmental Justice within the Office of Enforcement and Compliance Assessment. Most of NEJAC's decisions have been made on a case-by-case basis.

EPA Efforts to Develop a Title VI Policy. In addition to Executive Order 12898 activities, EPA is developing a policy to respond to the influx of Title VI administrative complaints to the agency regarding environmental permitting. It has established a task force composed of EPA program office representatives and U.S. Department of Justice officials. This task force is determining how to interpret Title VI claims and is examining several administrative cases to develop strategies to address the issue.

Although EPA's activity has major implications for state programs and environmental justice advocates, the task force has sought no input from states or other stakeholders. EPA may issue

the task force determinations as internal EPA guidance for deciding Title VI complaints, and the agency has indicated that it would then ask for stakeholder comment. No date has been set for public review or comment on task force activities or guidance.

Environmental Justice Cases and Their Impacts on States
Recent actions reflect federal interpretations of Title VI and their implications for states.

***Amicus Curiae* Brief in Pennsylvania Case Calls on States to Do More.** In 1996 a Title VI suit was filed in Chester, Pennsylvania, by a group of citizens protesting the Pennsylvania Department of Environmental Protection's permitting of a solid waste facility. On behalf of EPA, the U.S. Department of Justice filed an *amicus curiae* (i.e., friend of the court) brief in support of the plaintiffs in the suit. Although the *amicus* brief does not have the weight of official EPA policy, it suggests EPA's position on Title VI and state environmental permitting programs. The *amicus* brief makes the following points.

- **Environmental justice claims can be based on discriminatory impact without proof of discriminatory intent.** The *Chester* decision stated that civil court cases require proof of intentional discrimination defined by case law, rather than the unintentional effect of discrimination allowed in an administrative decision under federal regulations. The *amicus curiae* brief opposes this decision and supports the appeal. Arguments are now being heard.
- **States must oversee local land-use and siting decisions.** The *amicus curiae* brief argues that states are obligated to ensure that their environmental permits do not have discriminatory effects, regardless of the state role in facility siting. The *amicus* brief's interpretation changes dramatically the relationship between state and local governments by making states responsible for overseeing local zoning and siting decisions. Traditionally, facility siting and all other land-use decisions are controlled by local and regional planning boards, zoning commissions, and county councils. These local authorities determine the number, placement, and types of facilities that may be sited in an area.
- **States must perform demographic analyses during the permitting process.** The brief asserts:

  > [The state] has an obligation under Title VI and EPA regulations to insure that its approval of a permit does not subject a minority community to disproportionate and adverse human health, environmental, and other effects. Solid waste permit applications specify the precise location of a proposed facility, and therefore, [the state] . . . is aware of, or should be aware of the geographic area that will be affected by the operation of the facility.

  The assertion that states should perform demographic and disparate impact analyses when issuing environmental permits represents a significant departure from current environmental programs. Environmental laws assume equal protection of all communities based on environmental standards, and the permitting process ensures only the structural and environmental suitability of a facility. No major federal environmental law requires these analyses.

Federal Response in California Case Reveals Broad Interpretation of Environmental Justice. The response of the U.S. Department of Interior (DOI) to the siting of a low-level radioactive waste facility in Ward Valley, California, indicates that federal agencies are using a very broad interpretation of discriminatory impact that includes claims of emotional distress. The agencies base their concerns on claims of emotional distress that go well beyond the human health and environmental impacts covered by existing environmental laws and regulations. This

federal action could potentially affect any facility siting. How are emotional impacts to be measured? Are these impacts to be given the same weight as statutory-based environmental standards? Until these questions are answered, state permitting decisions will be vulnerable to the vaguest of environmental justice claims.

California was extremely sensitive to minority impacts when it permitted the Ward Valley Low-Level Radioactive Waste Facility. After a thorough analysis, California determined that Ward Valley was the most suitable location for siting a low-level radioactive waste facility because of its low rainfall and limited risk of seismic activity. The state worked with representatives of Native American tribes and historians to determine the site most responsive to Native American cultural concerns. Based on their recommendations, the state identified an already disturbed site twenty miles from the nearest reservation. The site is technically superior to the alternative sites and provides the greatest margin of public health and safety protection.

The state conducted thorough archeological and ethnographic studies that included a Native American observer. These studies also addressed the protection of key species of concern to certain tribes. The state worked closely with the Mojave and Chemehuevi Indian Tribes on a number of other analyses, concluding that there were no sacred sites in the valley.

Despite this extensive analysis, Ward Valley has been the subject of an environmental justice claim by the Fort Mojave Indian Tribe, California Rural Legal Assistance Foundation, and Bay Area Nuclear Waste Coalition based on "emotional impacts" from a facility sited anywhere in the Colorado River Valley. These groups, in conjunction with Greenpeace and others, successfully lobbied DOI and EPA to explore their claims and perform a supplemental environmental impact analysis. The agency's investigation has blocked construction of the facility because DOI owns the proposed site.

Ironically, the four-year delay of a disposal facility has increased the potential human health risks for minority communities where the waste is being temporarily stored or alternatively disposed. The absence of the regional facility sited for Ward Valley has forced many generators to dispose of their waste in a commercial facility in Barnwell, South Carolina, an area where 55 percent of the population is African American. In addition, the transportation of waste to South Carolina has potential environmental impacts along transportation routes.

State Recommendations Regarding EPA's Policies on Title VI and Permitting

At a recent workshop sponsored by the NGA Center for Best Practices, Governors' representatives, including state agency executives, counsel, and managers involved in environmental justice, made the following recommendations. Noting the far-reaching effects of EPA's environmental justice guidance and administration initiatives on state permitting programs, the states agreed that EPA and other federal agencies involved in developing positions on Title VI and facility siting should do the following.

Recognize the Limitations of Current Environmental Laws to Address Environmental Justice Concerns. Current EPA interpretations of state responsibility go beyond the scope of any environmental law or regulation and threaten states with delays in permitting and the loss of federal funding because of Title VI complaints. States believe that EPA is incorrectly interpreting Title VI in its emerging policy and has gone well beyond the scope of Executive Order 12898 by suggesting that states consider subjective impacts, such as emotional distress in the Ward Valley case.

Respect Local Land-Use Plans and Authorities. Federal environmental justice policies must respect local land-use plans and authorities. Federal interpretations of Title VI hold states responsible for the autonomous decisions of local governments and recommend that states perform demographic and disparate impact analyses not required in current laws. Traditionally,

land use is limited by the local planning controls and requirements of county or municipal governments. These decisions are made at the local level with no interference from states. Federal interpretations that require states to oversee local decisions using demographic and other analyses are inappropriate and are not based in law.

Recognize That State Programs Already Involve the Public in Decisionmaking. States stress the importance of ensuring that all affected communities have a say in facility siting, land-use, and permitting decisions. In fact, most state programs reach out to involve affected communities in an open decisionmaking process. States believe that full public involvement in zoning, environmental permitting, and other land-use decisions is the best approach to address facility siting questions.

Study the Impacts of Cumulative Exposures From Legally Permitted Facilities to Determine Whether Concerns About These Exposures Are Warranted. EPA needs to scientifically study the impact of cumulative exposures. Environmental justice complaints against legally permitted facilities often claim concerns regarding the human health effects of cumulative exposures from multiple permits or facilities. However, there are limited data and few analytical methods that measure the cumulative risks of multiple exposures. EPA needs to support further research to investigate this issue for all population groups, regardless of their ethnic, racial, or economic status.

Conclusion

The federal government's broad interpretations of Title VI reflected in the *amicus curiae* brief and administrative actions undermine state and local rights and lack any basis in law or regulation. Governors need to be aware of the significant impacts that EPA's guidance on Title VI will have on state permitting programs. They need to ensure that any federal environmental justice policy is based on laws and regulations and respects the state role in environmental permitting. EPA should be encouraged to support further research on cumulative health risks rather than develop a far-reaching policy on Title VI environmental justice complaints in a closed process.

Appendix: Title VI Complaint Process

This appendix presents an overview of the complaint process for Title VI. Claims can be made against states under Title VI by filing administrative complaints or civil suits in district court. Administrative complaints rely on EPA's or other administrative agency's regulations. In an administrative complaint, the burden of investigation is on the administrative agency's Office of Civil Rights. Civil suits must be based on Title VI statute and supporting case law. In a civil suit, the plaintiff has the burden of investigation and remains actively involved in the suit.

Administrative Complaints. In an administrative complaint, the complainant needs to identify an unjustifiable disparate impact on a minority community compared with the community at large. Unlike civil court litigation, EPA's administrative review does not require proof of intent. Claims must show that the defendant's actions result in the effect of discrimination. This is an important difference, because proving intentional discrimination is very difficult. A discriminatory impact could result from using standard criteria or practices. The complaint must be filed within 180 days of the alleged discrimination. Once a complaint is made, EPA begins a preliminary investigation to determine whether the complaint will be accepted, rejected, or referred to another appropriate federal agency.

If the complaint is accepted, the EPA Office of Civil Rights will notify the complainant and the EPA official in charge of the assistance agreement. The applicant can then submit a written rebuttal or denial of the allegations, and the plaintiff is given an opportunity to respond. If EPA judges an administrative complaint, the agency will attempt to achieve an informal resolution before issuing

an administrative order. EPA may also refer a case to the U.S. Department of Justice for litigation.

Civil Court Suits. Unlike federal agency administrative complaints, civil suits must prove intentional discrimination because they follow the statute rather than the agency regulation. Court decisions have identified three points required to prove the discriminatory intent under Title VI. These points must be proved in civil suits and are applied generally in administrative investigations. First, the claim must identify the practice that causes a disparity and prove a tangible effect. Second, the defendant must be unable to show legitimate, substantive reasons for pursing the practice or activity. Third, there must be a less discriminatory alternative to the challenged activity or an unjustified reason for the impact.

Endnotes

1. See, for example, Brett Baden and Don Coursey, *Locality of Waste Sites Within the City of Chicago: A Demographic, Social, and Economic Analysis* (Chicago, Ill., University of Chicago, Irving B. Harris Graduate School of Public Policy Studies, February 2, 1997); Theodore S. Glickman, "Measuring Environmental Equity with Geographic Information Systems," *Resources* (summer 1994): 2–6; Rae Zimmerman, "Issues of Classification in Environmental Equity: How We Manage What We Measure," *Fordham Urban Law Journal*, Vol. XX1, No. 3 (1994); and Doreen Weisenhaus, ed., "A Special Investigation; Unequal Protection: the Racial Divide in Environmental Laws," *National Law Journal* (September 21, 1992).
2. *Civil Rights Act of 1964, U.S. Code*, vol. 42, sec. 2000d (1964).
3. http: //www.greenpeace.org/~usa/actnet/shintech.html (August 18, 1997).
4. *Federal Register 59*, no. 32 (16 February 1994), 7629–33.
5. *Chester Residents Concerned for Quality Living, et.al., v. James M. Seif*, No. 96–3960, U.S. District Court E.D. Pa. (November 5, 1996).
6. Brief of United States as Amicus Curiae in Opposition to Defendants' Motion to Dismiss, *Chester Residents, et.al., v Seif et.al.*, No. 96-3960, U.S. District Court E.D. Pa. (August 23, 1996), 19–20.
7. "Ward Valley Low-Level Radioactive Waste Disposal Facility," memorandum from John Pierson and Peter Baldridge, California Department of Health Services, to cross-media division of the U.S. Environmental Protection Agency Region 9 (March 12, 1997).
8. "GAO Concludes Most Ward Valley SEIS Issues Previously Addressed: New Information Favors Facility," *Low Level Waste Forum*, vol. 12, no. 6 (July 1997).
9. See, for example, EPA's regulations covering administrative review, found at 40 CFR §7.10–7.135.
10. *Guardians Association v. Civil Service Commission of City of New York*, 463 U.S. 582, 77 L. Ed. 2d 866, 103 S. Ct. 3221 (1983).
11. *Alexander v. Choate*, 469 U.S. (1985), 661–70.