

ECOS EJ and Title VI Questions for EPA

Questions related to EPA's [‘Interim EJ and CR in Permitting FAQs’](#)

Question 1: What recommendations can you offer to states that do not have EJ specific statutes or legislation? How can states navigate the tension between Title VI and environmental statutes (particularly for any new requirements EPA would impose in permitting under the Clean Air Act (CAA), Clean Water Act (CWA), Resource Conservation and Recovery Act (RCRA), Safe Drinking Water Act (SDWA) or other relevant statute).

- *Refer to FAQ Footnote 7:* Title VI is inapplicable to EPA actions because it only applies to programs and activities of recipients of federal financial assistance, not to federal agencies
- *Refer to FAQ #5 on page 6:* 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.
 - *Note:* Federal civil rights laws apply to the programs and activities of applicants for and recipients of federal financial assistance.

Question 2: How can states and EPA coordinate better on specific questions and complex issues? What could successful implementation of these FAQs look like?

Question 3: How can states preemptively avoid violating Title VI, especially as many complaints are rooted in very program-specific work, and states are managing multiple legal authorities?

- What is EPA's "trigger" for a violation of Title VI (e.g. upon receiving draft permit vs. when a complaint is filed)? What is the criteria?
- Where should states look to understand (and follow) "good" examples of Title VI implementation of programs and activities?
- Where and when will EPA weigh in when reviewing states' Title V permits?

Question 4: Many of the terms provided in the FAQs (e.g. FAQ #11 -13) are subjective and may be interpreted differently depending on the regulating authority. Does EPA have any additional guidance for phrases such as "mitigation measures," "disparate impacts," and "sufficient justification." Are there any examples states can look to?

*** Note sensitivities around EPA's ability to comment on active litigation*

EPA FAQ #13: What if a Title VI disparate impact analysis by a permitting program concludes that the permit decision will have adverse disparate impacts on the basis of race, color, or national origin (including LEP status)?

"If the permitting action will have a disparate impact on the basis of race, color, or national origin (including LEP status) (i.e., it raises a possible violation of Title VI), then the next steps in a civil rights disparate impact framework discussed in FAQs #9 and #11-12 include:

- *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.” (FAQ #13, pg 15)*

Question 5: What has evolved since the S. Camden Citizens in Action v. New Jersey Dept. of Environmental Protection decision that legally informs the FAQs document as laid out? How is what you’ve laid out legally defensible given the S. Camden decision?

- The Camden Citizens in Action v. New Jersey Dept. of Environmental Protection case is referenced several times in this FAQs document when discussing “disproportionality” and “cumulative impacts” when evaluating whether there is an adverse impact.

Question 6: What are the increased expectations for state regulators? What is the takeaway message states should have in mind following the issuance of these FAQs?

Optional Questions for EPA

- **General:**
 - States feel that they need closer coordination with EPA on Title VI and related EJ issues. How can EPA ensure this happens through additional liaisons, or other means?
 - How has and does EPA plan to embed EJ into their regulatory framework?
- **Mapping Tools:**
 - EJ analyses, informed by mapping tools like EJScreen, continue to play an important role in state assessments and evaluations. How are state EJ mapping tools, like EJScreen, being used to assess whether the permitting action raises environmental justice or civil rights concerns?
 - How can states address the limitations of these tools (e.g. limited water quality data & information)?
- **Other:**
 - How will EPA work with states to assess resource needs for EJ priorities and to ensure those additional resources are put in place?

States appreciate the effort EPA has made to provide trainings and webinars on Title VI in collaboration with ECOS. As we look at increased work for environmental programs to address Environmental Justice priorities, an assessment of additional state agency resource needs in current and future fiscal years is critical.

ECOS recently provided [testimony](#) to the Senate Appropriations Subcommittee on needs and shortfalls in federal funding for baseline delegated environmental programs, along with a number of suggestions, prior to new EJ expectations set forth in EPA strategic planning and program guidance.

Note: This document reflects ongoing ECOS Members’ questions for EPA. ECOS will look to update and revise it periodically, as appropriate.



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 (1) fair treatment by evaluating, and identifying ways to mitigate, adverse and disproportionate impacts and (2) meaningful involvement of affected community.
- Health Impact Assessments are a promising practice for conducting EJ analyses.
- The 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 whether there is a disparate impact from a recipient's policy or practice.



Adverse and Disproportionate Impacts (Questions 13 & 14)

- When a permitting decision will have a disparate impact on the basis of race, color or national origin (including LEP status) and, as a result, raises a potential violation of Title VI, the next steps in ensuring compliance include evaluating the following questions:
 - Is there a substantial legitimate justification for the decision, action or inaction?
 - Is there a comparably effective alternative practice with a less discriminatory impact? Are there mitigation measures available to lessen or eliminate adverse impacts?
 - If not, denial of the permit action may be necessary to avoid a Title VI violation. This will be a fact-specific determination.
- Mitigation measures may include enhanced permit terms using environmental or non-environmental authorities (e.g., public health laws), or measures outside the permit (e.g., community benefits agreements).

Questions related to Justice40 – Opportunities for continued EPA and other federal-state coordination

Question 7: How can States and EPA best participate in conversations regarding EPA's development and implementation of Justice40 requirements? How is EPA coordinating with Regions on new language requirements referenced in documents like the National Program Guidance, Performance Partnership Agreements/Grants (PPAs & PPGs)?

Question 8: Where are there opportunities for collaboration around how expenditures of resources flow to the right projects ensuring increased investments in EJ Communities?

Question 9: How can States and EPA coordinate on new reporting requests to minimize administrative burden? This is especially of interest as it relates to new metrics and tracking of key data to support these metrics.

Question 10: What does successful engagement look like as we center community needs, yet continue to collaborate across programs and all levels of government?

Optional Question for EPA

- How do we bridge the gap between J40 implementation and application of the Climate and Economic Justice Screening Tool (CEJST)?

From: (b)(6) Privacy
To: [EJ.permitting](#)
Subject: Copies of EJ Questions
Date: Tuesday, October 11, 2022 1:16:54 PM
Attachments: [image001.png](#)

Hi,

Does EPA have a database of comments submitted on the EJ FAQ? If so, is there a way to access or request copies?

Thanks

(b)(6) Privacy

SIDLEY AUSTIN LLP

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Cell (b)(6) Privacy (Please use to contact)

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From: (b)(6) Privacy
To: [EJ.permitting](#)
Subject: FW: comments on the EPA FAQ on EJ and civil rights in permitting
Date: Tuesday, October 11, 2022 1:26:26 PM
Attachments: [EJ and CR in PERMITTING FAQs 508 compliant.pdf](#)

Good afternoon, I am seeking the state's comment letters to this FAQ and can't seem to find on the EPA site. Can you please point me in the right direction or perhaps send me the link to where I can find those state comment letters?

Thank you,

(b)(6) Privacy

(b)(6) Privacy
Senior Research Analyst
Vinson & Elkins LLP
(b)(6) Privacy

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From: (b)(6) Privacy
To: [EJ.permitting](#)
Subject: Feedback Deadline
Date: Thursday, October 13, 2022 12:29:22 PM

Hello,

I am a reporter with InsideEPA, and I have a couple of questions regarding EPA's Interim Environmental Justice and Civil Rights in Permitting FAQs. I know the document says to send this email any questions or feedback, so I was curious if there's a deadline for when EPA is accepting feedback on these FAQs, and what it plans to do with that feedback and any of those questions? As these FAQs are labeled as interim, I was curious if there's going to be formal rulemaking or guidance that we'll see in the future that will solidify some of what these FAQs are encouraging states to consider in their permitting processes?

Also, I had a colleague previously ask this question, but I just wanted to re-up it just in case, but I spoke with an industry lawyer who said there was a state letter, perhaps from a state agency of sorts, and I wanted to see if there is a letter like what I'm referring to, and if it would be possible to obtain a copy of that letter?

Please let me know if you have any questions, and I hope to hear back soon.

Thank you,

(b)(6) Privacy
Reporter, *InsideEPA*
(b)(6) Privacy