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**ENVIRONMENTAL JUSTICE:
ORIGINS, BACKGROUND, AND
SITE SELECTION CONSIDERATIONS**

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ENVIRONMENTAL JUSTICE: ORIGINS, BACKGROUND, AND SITE SELECTION CONSIDERATIONS

INTRODUCTION

Environmental justice is not a new concept, but it is one that promises to receive renewed and vigorous attention in the Biden Administration. On his first day in office, President Biden issued Executive Order 13990 that in part requires the federal government to advance and prioritize environmental justice.¹ He followed up that order with Executive Order 14008 on January 27, 2021, which includes a section on “Securing Environmental Justice and Spurring Economic Opportunity.”²

President Biden has selected a committed advocate as the head of the Environmental Protection Agency (EPA), North Carolina Department of

¹ Executive Order on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis, Jan. 20, 2021, <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-protecting-public-health-and-environment-and-restoring-science-to-tackle-climate-crisis/>.

² Tackling the Climate Crisis at Home and Abroad, Jan. 27, 2021, <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/27/executive-order-on-tackling-the-climate-crisis-at-home-and-abroad/>. See also FACT SHEET: President Biden Takes Executive Actions to Tackle the Climate Crisis at Home and Abroad, Create Jobs, and Restore Scientific Integrity Across Federal Government, Jan. 27, 2021, <https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/27/fact-sheet-president-biden-takes-executive-actions-to-tackle-the-climate-crisis-at-home-and-abroad-create-jobs-and-restore-scientific-integrity-across-federal-government/>.

Environmental Quality Secretary Michael Regan, who has promised a pronounced emphasis on environmental justice concerns.³

As a result, regulated businesses must understand the legal underpinnings of environmental justice, the current EPA approach to investigating environmental justice complaints, and the steps they can take during site selection to minimize or eliminate serious environmental justice risks.

I. THE STATUTE

The Civil Rights Act of 1964 contains multiple titles designed to address discrimination based on race, color, and national origin. Title VI, codified at 42 U.S.C. § 2000d, *et seq.*, has been invoked to support claims of discrimination in environmental permitting. Generally, Title VI prohibits discrimination in programs and activities receiving federal financial assistance and contains two main provisions: Section 601 and Section 602.

Section 601 simply states: “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. § 2000d.

The United States Supreme Court has reviewed Section 601 over the years and has made two important points. First, it is “beyond dispute that private individuals

³ See Kevin Bogardus, *Five Takeaways from the Michael Regan Hearing*, E&E NEWS, Feb. 4, 2021, <https://www.eenews.net/stories/1063724353>.

may sue to enforce §601.” *Alexander v. Sandoval*, 532 U.S. 275, 280 (2001). Second, Section 601 “prohibits only intentional discrimination.” *Sandoval*, 532 U.S. at 280. Indeed, “Title VI itself directly reach[es] only instances of intentional discrimination.” *Sandoval*, 532 U.S. at 281, citing *Alexander v. Choate*, 469 U.S. 287 (1985).

Establishing discriminatory intent or purpose “demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.” *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252, 266 (1977). Disproportionate impact is “not irrelevant, but it is not the sole touchstone of an invidious racial discrimination.” *Arlington Heights*, 429 U.S. at 265, citing *Washington v. Davis*, 426 U.S. 229 (1976). Importantly, “impact alone is not determinative, and the Court must look to other evidence.” *Arlington Heights*, 429 U.S. at 266. Other factors or evidence can include: the historical background of the decision; the specific sequence of events leading up to the decision; departures from the normal procedural sequence; departures from the normal substantive standards; and the legislative or administrative history of the decision. *Arlington Heights*, 429 U.S. at 267-68.

Section 602 states that each Federal department and agency that extends Federal financial assistance to any program or activity “is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability.” 42 U.S.C. § 2000d-1. However, the Supreme Court notes a critical limitation. In *Sandoval*, the

Supreme Court held: “Neither as originally enacted nor as later amended does Title VI display an intent to create a freestanding private right of action to enforce regulations promulgated under §602.” *Sandoval*, 532 U.S. at p. 293. Thus, unlike Section 601, private litigants cannot enforce regulations promulgated pursuant to Section 602.

Although Congress provided the authority to issue regulations, it also identified the method of enforcement of “any requirement adopted pursuant to this section.” 42 U.S.C. § 2000d-1. Initially, no action may be taken until the Federal department or agency providing the assistance “has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means.” Then, there must be “an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement.” Only then may the Federal department or agency providing the assistance terminate, refuse to grant, or refuse to continue assistance under such program or activity. There is a catch-all allowing compliance to be affected by “any other means authorized by law.” 42 U.S.C. § 2000d-1.

Section 606 defines “program or activity” as, among other things, “all of the operations of ... a department, agency, special purpose district, or other instrumentality of a State or of a local government ... any part of which is extended Federal financial assistance.” 42 U.S.C. § 2000d-4a. Under this provision, the operations of a state environmental protection agency would be included within the

definition of “program or activity.” Further, the operations of the whole agency are a “program or activity” if “any part” of the agency “is extended Federal financial assistance.”

Finally, Title VI was amended in 1986 to remove claims of sovereign immunity by a State. A State “shall not be immune ... from suit in Federal court for a violation of ... title VI of the Civil Rights Act of 1964.” 42 U.S.C. § 2000d-7. In other words, a State can be sued in federal court under Title VI.

II. EXECUTIVE ORDER 12898 AND EPA’S REGULATIONS

Although several executive orders were issued over the years that generally directed federal agencies to implement Title VI, President Clinton’s issuance of Executive Order No. 12898 (EO 12898) in February 1994 ushered in the modern era of environmental justice considerations. 59 Fed. Reg. 7629 (Feb. 16, 1994). For the first time, federal agencies had to mandate focus on the environmental effects of federal programs on minority and low-income populations.

EO 12898 mandates that “each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations.” Federal agencies were directed to develop an “agency-wide environmental justice strategy” that identified and addressed “disproportionately high and adverse human health or environmental effects of its programs, policies,

and activities on minority populations and low-income populations.” Among other things, the strategy should promote enforcement of all health and environmental statutes in areas with minority and low-income populations and ensure greater public participation.

EO 12898 specifically tasks each federal agency with a responsibility: “Each Federal agency shall conduct its programs, policies, and activities that substantially affect human health or the environment, in a manner that ensures that such programs, policies, and activities do not have the effect of excluding persons (including populations) from participation in, denying persons (including populations) the benefits of, or subjecting persons (including populations) to discrimination under, such programs, policies, and activities, because of their race, color, or national origin.” Thus, while EO 12898 does not define environmental justice, presumably environmental justice is achieved when a federal program does not exclude persons from participation, does not deny persons the benefits of the federal program, and does not subject persons to discrimination under the federal program because of their race, color, or national origin.

While EO 12898 is broad and issues sweeping directives for federal agencies, the order sets forth limitations to its scope. First, the order is to be implemented “consistent with, and to the extent permitted by, existing law.” Thus, it clearly did not attempt to impose on federal agencies greater requirements or duties than those

imposed by Title VI itself. Indeed, federal agencies were required to act “consistent with” Title VI.

Further, EO 12898 was not intended to create any right or benefit “enforceable at law or equity by a party against the United States, its agencies, its officers, or any person.” Further, it did not create any “right to judicial review involving the compliance or noncompliance” with the order. Courts have generally found that the order does not allow a person to sue to enforce its requirements. *See e.g., Coliseum Square Association, Inc. v. Jackson*, 465 F.3d 215, 232 (5th Cir. 2006): “The Order does not, however, create a private right of action”; *see also, Hausrath v. US Department of the Air Force*, --- F. Supp. 3d ---, 2020 WL 5848094, at 14 (D. Id. 2020): “There is thus no cause of action created by Executive Order 12898.”

Finally, President Clinton issued a Memorandum along with EO 12898. In discussing the responsibilities of federal agencies noted above, the Memorandum states that each federal agency “shall analyze the environmental effects ... of Federal actions, including effects on minority communities and low-income communities, when such analysis is required by the National Environmental Policy Act of 1969 (NEPA).” Thus, when EO 12898 and the Memorandum are read together, they could be read to limit the scope of the environmental justice analysis required under EO 12898 to those federal efforts requiring “analysis” under NEPA, such as major Federal actions significantly affecting the quality of the human environment. 42 U.S.C. § 4332(2)(C); 42 CFR § 1502.3.

In accordance with Section 602, EPA promulgated regulations to implement Title VI. 40 CFR Part 7. The regulations apply “to all applicants for, and recipients of, EPA assistance in the operation of programs or activities receiving such assistance.” 40 CFR § 7.15. The definition of “program or activity” in Part 7 is similar to the definition in Title VI.

Part 7 contains general and specific prohibitions. It generally prohibits the exclusion from participation in, denial of benefits of, and discrimination under any program or activity receiving EPA assistance on the basis of race, color, or national origin. 40 CFR § 7.30.

It also contains specific prohibitions relating to recipients of EPA assistance. 40 CFR § 7.35. A recipient shall not use criteria or methods of administering its program or activity which have the effect of subjecting individuals to discrimination. 40 CFR § 7.35(b). Further, a recipient “shall not choose a site or location of a facility that has the purpose or effect of ... subjecting [persons] to discrimination under any program or activity to which this part applies on the grounds of race, color, or national origin.” 40 CFR § 7.35(c).

Relief for violations by a Federal-funds recipient is, as discussed above, somewhat limited. The Supreme Court has found that “Title VI [does not] display an intent to create a freestanding private right of action to enforce regulations promulgated under § 602. We therefore hold that no such right of action exists.”

Sandoval, 532 U.S. at 293

Instead of a private right of action, Part 7 establishes a complaint process. Any person “who believes that he or she or a specific class of persons has been discriminated against” may file a complaint. 40 CFR § 7.120(a). The complaint “must be filed within 180 calendar days of the alleged discriminatory acts,” unless EPA waives the “time limit for good cause.” 40 CFR § 7.120(b)(2). EPA must “promptly” investigate all such complaints. 40 CFR § 7.120.

Once a complaint is filed, EPA will “immediately initiate [its] complaint processing procedures” and conduct a “preliminary investigation” to determine if it will accept, reject, or refer the complaint to the appropriate agency. 40 CFR § 7.120(d). If EPA accepts the complaint, it will notify the recipient of the allegations and allow the recipient to submit a response to the complaint. If EPA finds “no violation,” it will dismiss the complaint. 40 CFR § 7.120(g).

Once EPA accepts the complaint, the agency will attempt to resolve it informally. 40 CFR § 7.120(d)(2). If EPA cannot resolve the complaint informally, it may issue a preliminary finding of noncompliance, which the recipient can agree with or contest. Ultimately, based on the investigation and information submitted by the recipient, EPA will make a final determination of either compliance or noncompliance.

The finding of noncompliance should include the actions EPA proposes to undertake. 40 CFR § 7.130(b). EPA “may terminate or refuse to award or to continue assistance” and “may also use any other means authorized by law to get compliance.”

40 CFR § 7.130(a). Such a finding allows the recipient to request a hearing to contest EPA’s determination. Ultimately, the decision “shall be limited to the particular applicant or recipient who was found to have discriminated, and shall be limited in its effect to the particular program or activity or the part of it in which the discrimination was found.” 40 CFR § 7.130(b)(4).

Interestingly, the remedies available to EPA for non-compliance with Part 7 (that is, termination of or refusal to award or continue assistance) are similar to, if not identical to, those set forth in Section 602. The statute allows compliance to be “effected” by “the termination of or refusal to grant or to continue assistance under such program or activity” and “any other means authorized by law.” 42 U.S.C.A. § 2000d-1. The similar wording of Part 7 and Section 602 could be a result of EPA attempting to carry out the provisions of EO 12898 that require agencies to implement the order “consistent with” existing law. Thus, it seems neither Section 602 nor Part 7 provide the authority to address, overturn, or revise the terms and conditions of an individual permit issued by an agency that is the subject of a complaint or EPA investigation.⁴ Indeed, EPA has stated that “the filing or acceptance of a Title VI complaint does not suspend an issued permit. Title VI complaints concern

⁴ EPA does have authority to review and comment on permits issued under delegated or approved state programs. *See generally*, 40 CFR § 70.8(c) (air), §123.44 (water), and §271.19 (waste). Further, any person may petition EPA to object to the terms and conditions of a Title V air permit. 40 CFR § 70.8(d). However, EPA’s review is currently limited to whether the Title V air permit is “in compliance with applicable requirements or requirements under” Part 70. 40 CFR § 70.8(c) and (d); 85 Fed. Reg. 6445 (Feb. 5, 2020).

the programs being implemented ... and any EPA investigation ... primarily concerns the actions of recipients rather than permittees.” 65 Fed. Reg. 39651 (June 27, 2000).

Section 602 regulations generally encompass both intentional discrimination and discrimination based on disparate impacts. As set forth in *Sandoval*, Section 601 “prohibits only intentional discrimination.” *Sandoval*, 532 U.S. at 280. Section 602 authorizes agencies to promulgate regulations “to effectuate the provisions of” Section 601. 42 U.S.C.A. § 2000d-1. *Sandoval* created uncertainty as to whether regulations promulgated pursuant to Section 602 may address disparate impact.

In *Sandoval*, the Supreme Court assumed, for the purposes of that decision, “that regulations promulgated under §602 of Title VI may validly proscribe activities that have a disparate impact on racial groups, even though such activities are permissible under §601.” *Sandoval*, 532 U.S. at 281. Justice Scalia noted skeptically that “no opinion of this Court has held that” and that discussions in prior cases “are in considerable tension with the rule of *Bakke* and *Guardians* that §601 forbids only intentional discrimination.” *Sandoval*, 532 U.S. at 281-82, mentioning *Guardians Association v. Civil Service Commission of New York City*, 463 U.S. 582 (1983) and *Alexander v. Choate*, 469 U.S. 287 (1985) as the cases creating that tension. As Justice O’Connor noted in her concurring opinion in *Guardians*: “If ... the purpose of Title VI is to proscribe only purposeful discrimination ..., regulations that would proscribe conduct by the recipient having only a discriminatory *effect* ... do not simply ‘further’

the purpose of Title VI; they go well *beyond* that purpose.” *Guardians*, 463 U.S. at 613.

III. EPA GUIDANCE—THE 2000 DRAFT REVISED INVESTIGATIVE GUIDANCE

EPA defines environmental justice 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.” The goal of environmental justice “will be achieved when everyone enjoys the same degree of protection from environmental and health hazards, and equal access to the decision-making process to have a healthy environment in which to live, learn, and work.” *See* www.epa.gov/environmentaljustice. To determine whether the goal has been achieved in individual situations, EPA has issued various guidance documents over the years that govern EPA’s investigation of environmental justice complaints.

EPA issued Interim Guidance in February 1998 that provided an internal framework for EPA’s processing of complaints alleging discrimination in environmental permitting. After a series of public meetings and evaluation of public comments on the Interim Guidance, EPA issued the Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits (the Draft Revised Investigative Guidance). 65 Fed. Reg. 39650 (June 27, 2000).⁵ None of the

⁵ EPA also issued the Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs (the Draft Recipient Guidance). The Draft Recipient Guidance

actions President Biden has taken on environmental justice supersede or revoke the Draft Revised Guidance.

EPA developed the Draft Revised Investigative Guidance to address the application of Title VI to alleged adverse disparate impacts caused by environmental permitting. It does not address other applications of Title VI in the environmental context, such as unequal enforcement or public participation. It also does not address discriminatory intent.

The Draft Revised Investigative Guidance provides detailed information on EPA's process and procedures for investigating permit-related Title VI complaints, including acceptance and rejection of complaints, investigation procedures, informal resolution, and the "due weight" that the agency must give to the information submitted by a permit recipient in an investigation. Importantly, though, the Draft Revised Investigative Guidance also provides EPA's adverse disparate-impact analytical framework and the recipient's justification of any adverse disparate impact.

EPA's framework for an adverse disparate-impact analysis consists of six steps:

- 1) Assess Applicability (determine the type of permit action at issue);
- 2) Define Scope of Investigation (determine the source or sources of an alleged impact and which of the sources should be included in an analysis);

was designed to aid recipients of federal assistance in designing programs to address situations that might otherwise result in the filing of complaints.

- 3) Conduct Impact Assessment (determine if the activities of the permitted entity, either alone or in combination with other relevant sources, are likely to result in an impact);
- 4) Make Adverse Impact Decision (determine whether the estimated risk or measure of impact is significantly adverse);
- 5) Characterize Populations and Conduct Comparisons (determine whether a disparity exists between the affected population and an appropriate comparison population); and
- 6) Make Adverse Disparate Impact Decision (determine whether the disparity is significant).

The evaluation in most of the steps could result in the termination of the investigation. For example, EPA could determine in Step 1 that the permit action *decreases* emissions, in which case EPA would likely close the investigation. Additionally, EPA could determine in Step 4 that any impact is not adverse and if so, “the allegation will not form the basis of a finding of non-compliance.” 65 Fed. Reg. at 39676.

In Step 3, EPA assesses whether the alleged discriminatory act may cause or is associated with one or more impacts. EPA will review whether the entity emits or releases pollutants or substances (called stressors by EPA) that could be the source of the alleged impacts and whether there is a plausible exposure route. For example, the entity could release fine particulate matter into the air and the alleged impact is respiratory ailments or asthma. In this step, EPA reviews, among other things, any direct links to potential impacts, the risks associated with compounds, and concentration levels.

Assuming there is an impact, EPA will determine in Step 4 whether an estimated risk or measure of impact is significantly adverse. EPA would evaluate the risk or measure of impact compared to benchmarks for significance provided under any relevant environmental statute, EPA regulation, or EPA policy. If the risks or other measure of potential impact meet or exceed a relevant significance level, the impact generally would be recognized as adverse under Title VI.

EPA provided an example of potential outcomes of this Step 4 evaluation using a range of risk values. EPA would expect that cumulative cancer risks of less than 1 in 1 million (10^{-6}) would be very unlikely to support a finding of adverse impact while cumulative cancer risks above 1 in 10,000 (10^{-4}) would likely support a finding of adverse impact. EPA may make an adverse impact finding when the risks fall in between those ranges. It is important to note that a “finding of adverse impact at this stage of the investigation does not represent a finding of noncompliance under Title VI, but rather represents a criterion for proceeding further in the analysis.” 65 Fed. Reg at 39680.

EPA also provided guidance on the role of the National Ambient Air Quality Standards (NAAQS) in a finding of adverse impact. NAAQS are set at levels that are protective of human health and the environment with an adequate margin of safety. As such, air quality that adheres to such standards “is presumptively protective of public health in the general population” and “emissions of that pollutant should not be viewed as ‘adverse’ within the meaning of Title VI.” 65 Fed. Reg. at 39680.

However, this presumption may be overcome, or rebutted, “if the investigation produces evidence that significant adverse impacts may occur.” *Id.*

This “rebuttable presumption” originated in an EPA decision in 1998 on a Title VI complaint for a permit awarded to Select Steel Corporation. However, in 2013, EPA stated that it would “eliminate application of the rebuttable presumption when investigating allegations about environmental health-based thresholds.” 78 Fed. Reg. 24740 (Apr. 26, 2013). Although compliance with a health-based threshold “is a serious consideration in an evaluation of whether adverse disparate impact exists” and “strongly suggests that the remaining risks are low and at an acceptable level,” applying the presumption “may not give sufficient consideration to other factors that could also adversely impact human health.” 78 Fed. Reg. at 24740-41. EPA did eliminate application of the rebuttable presumption on January 18, 2017 when it issued its Compliance Toolkit (discussed in Section IV).

EPA would then, in Step 5, determine whether a disparity exists between the affected population and an appropriate comparison population. The affected population is one which suffers the adverse impacts of the stressors from assessed sources. The comparison population would be drawn from those who live within a reference area and may include the general population or the non-affected population for the reference area.

Disparity will be assessed using comparisons of both the different prevalence of race, color, national origin, or income level of the two populations and

comparisons of the level of risk of adverse impacts experienced by each population. There is no one formula or analysis to be applied and EPA will “use appropriate comparisons to assess disparate impact depending on the facts and circumstances of the complaint.” 65 Fed. Reg. at 39681. EPA could compare the demographic characteristics of most likely affected to the least likely affected or the average risk or measure of adverse impact by demographic group within the general population or within an affected population.

EPA will then determine in Step 6 whether the disparity is significant. EPA will review the comparisons in Step 5 to determine if the results are consistent across the various comparisons made. Further, EPA announced that disparity “would normally be statistically evaluated to determine whether the differences achieved statistical significance to at least 2 to 3 standard deviations.” 65 Fed. Reg. at 39682. EPA will also consider uncertainties, such as the accuracy of predicted risk levels. Regardless, EPA made clear that the significance of a given level of disparity may vary depending upon the facts and circumstances of the complaint.

Based on the above analysis, EPA may make a finding that an impact is both adverse and borne disproportionately by a group of persons. That, however, does not end the inquiry. The recipient may be able to show that the impact is justified. To do so, the recipient must show “that the challenged activity is reasonably necessary to meet a goal that is legitimate, important, and integral to the recipient’s institutional mission.” 65 Fed. Reg. at 39683. Such a showing could include such

interests as economic development “if the benefits are delivered directly to the affected population and if the broader interest is legitimate, important, and integral to the recipient’s mission.” *Id.*

IV. EPA GUIDANCE—THE TOOLKIT

On January 18, 2017, EPA issued a “Dear Colleague” letter to introduce Chapter 1 of its Compliance Toolkit and clarify existing law and policy to promote and support compliance with federal civil rights laws.⁶ The letter first reminds those who receive EPA financial assistance of their duty to comply with federal civil rights obligations. EPA then asserts that “enforcement of civil rights laws and environmental laws can be achieved in a manner consistent with sustainable economic development and that ensures the protection of human health and the environment.” The Trump Administration did not withdraw the Dear Colleague letter or Chapter 1 of the Compliance Toolkit—released in the waning days of the Obama Administration—nor has any action President Biden has taken on environmental justice altered their applicability.

Generally, the Toolkit attempts to explain what constitutes intentional discrimination and disparate impact, as well as the proof necessary to establish such claims based on the case law cited therein. Unlike the 2000 Draft Revised Investigative Guidance, which detailed EPA’s investigation and decision-making

⁶ https://www.epa.gov/sites/production/files/2017-01/documents/toolkit-chapter1-transmittal_letter-faqs.pdf.

process and procedures, the Toolkit is primarily a summary of legal standards that EPA will use in investigating and resolving complaints.

EPA defines intentional discrimination (or disparate treatment) as occurring when a recipient “intentionally treat[s] individuals differently or otherwise knowingly causes them harm because of their race, color, national origin, disability, age, or sex.” Toolkit at 3. Intentional discrimination “requires a showing that ‘a challenged action was motivated by an intent to discriminate’” but does not require showing bad faith, ill will, or evil motive. *Id.*, citing *Elston v. Talladega Cty. Bd. Of Educ.*, 997 F.2d 1394, 1406 (11th Cir. 1993).

To determine if such discrimination exists, “EPA will evaluate the ‘totality of the relevant facts’ including direct, circumstantial, and statistical evidence to determine whether intentional discrimination has occurred.” *Id.*, citing *Washington v. Davis*, 426 U.S. 229, 242 (1976). EPA acknowledges that direct proof is often unavailable and, as a result, the agency will consider such evidence as “statements by decision makers, the historical background of the events in issue, the sequence of events leading to the decision in issue, a departure from standard procedure (*e.g.*, failure to consider factors normally considered), legislative or administrative history (*e.g.*, minutes of meetings), the foreseeability of the consequences of the action, and a history of discriminatory or segregated conduct.” *Id.* at 5, citing *Village of Arlington Heights v. Metropolitan Housing Redevelopment Corp.*, 429 U.S. 252, 266-68 (1977).

EPA also stated that intentional discrimination can be based on a showing of disparate impact coupled with other evidence of motive, such as the evidence noted above. EPA relied on *Elston*, 997 F.2d at 1406, which states: “Discriminatory intent may be established by evidence of such factors as substantial disparate impact, a history of discriminatory official actions, procedural and substantive departures from the norms generally followed by the decision-maker, and discriminatory statements in the legislative or administrative history of the decision.” Thus, disparate impact is “not irrelevant” and can be used with other pertinent facts to prove intentional discrimination. *Arlington Heights*, 429 U.S. at 265.

EPA also suggested that it may analyze claims of intentional discrimination using the “burden shifting analytic framework” utilized in Title VII cases and explained in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Toolkit at 6. Under that framework, the complainant must carry the initial burden of establishing a prima facie case of racial discrimination, which EPA stated may be done by showing that:

(1) the complainant is a member of a protected class; (2) the complainant was eligible for the recipient’s program, activity, or service; (3) the complainant was excluded from that program, activity or service or was otherwise treated in an adverse manner; **and** (4) an individual who was similarly situated with respect to qualifications, but was not in the complainant’s protected group, was given better treatment.

Id. (emphasis in original). If shown, the burden then shifts to the recipient to establish a legitimate, non-discriminatory reason for the challenged policy or decision and the different treatment.

According to EPA, disparate impact (or discriminatory effects) occurs when a “recipient uses a facially neutral procedure or practice that has a significantly adverse (harmful) and disproportionate effect based on race, color, or national origin.” *Id.* at 8. In a disparate impact case, the focus is on the consequences of the recipient’s policies or decisions, including the failure to act, rather than the recipient’s intent.

EPA provides only cursory discussion of a disparate impact analysis, saying that EPA must establish a prima facie case by identifying the specific policy or practice at issue, and then establish adversity or harm, disparity, and causation.

Adversity exists when “a fact specific inquiry determines that the nature, size, or likelihood of the impact is sufficient to make it an actionable harm.” *Id.* at 18, n.

41. The Toolkit does not define what harms may be actionable. To assess disparity, EPA analyzes:

whether a disproportionate share of the adversity/harm is borne by individuals based on their race, color, national origin, age, disability or sex. A general measure of disparity compares the proportion of persons in the protected class who are adversely affected by the challenged policy or decision and the proportion of persons not in the protected class who are adversely affected. ... When demonstrating disparity using statistics, the disparity must be statistically significant.

Id. at 18-19, n. 42 (internal reference omitted).

If the prima facie case is established, EPA must first determine whether the recipient can “articulate a ‘substantial legitimate justification’ for the challenged policy or practice” and then decide whether there are any “comparably effective

alternative practices that would result in less adverse impact” (that is, are there less discriminatory alternatives?). *Id.* at 9

The Toolkit also makes two important additional points. First, it makes clear that compliance with a NAAQS “would be insufficient ... to find that no adverse impacts are occurring for purposes of Title VI.” *Id.* at 13. Thus, the Toolkit eliminated the rebuttable presumption established by *Select Steel* and the 2000 Draft Revised Investigative Guidance. Second, “complainants do not bear the burden of proving adversity.” *Id.* EPA assumes the responsibility for investigating the allegations to determine if there is an adverse impact.

V. CONSIDERATIONS IN SITE SELECTION

A permit applicant faces any number of hurdles when seeking approval to construct and operate a new facility or even expand an existing facility.

Environmental justice concerns add a layer of complexity and uncertainty to capital investment decisions. Because of the prevailing social-justice climate and a newly sympathetic EPA, permit applicants will need to take such concerns seriously.

Applicants must prepare for an organized resistance whose goals can range from greater community involvement to absolute opposition to any new site or site expansion. For those on the full-opposition end of the spectrum, likely no amount of community involvement or mitigating measures will satisfy their concerns. They may consider the siting of any facility to be a per se environmental injustice. Nevertheless, whether an opponent’s environmental justice claims are

brought up in the Title VI complaint process through EPA or in an administrative or judicial appeal of an individual permit decision, permit applicants will need to address such claims tactfully, while making clear to any reviewing decision maker that, to succeed, opponents must meet the legal standards and factual thresholds set out under Title VI, the case law interpreting it, and EPA's own regulations and policies.

Administrative or judicial review of environmental permits is usually confined to an administrative record. Applicants must place information developed to counter environmental justice concerns into the administrative record during the application and public comment process. Without supporting information in the record, the agency and permittee will not be able to rely on and reference the information in a decision document, the permit decision will lack valuable supporting evidence, and a reviewing tribunal or court will lack a basis to uphold the permit decision.

The obvious, but perhaps unrealistic, strategy to limit or eliminate environmental justice claims is to locate a facility in an area where no one lives in proximity. These may be in rural areas or within much larger tracts used or set aside for industrial purposes (sometimes called "mega-sites"). If such tracts are available, they should be given serious consideration. However, rural tracts may not meet the needs of the proposed facility, such as access to transportation infrastructure for raw materials or products, and even the larger tracts set aside for industrial purposes may have residents in some degree of proximity.

As a result, available industrial sites will most likely be in areas where some population resides in some degree of proximity. Determining if those sites are suitable for selection, from an environmental, economic, and environmental justice perspective, requires a searching inquiry that should begin prior to making any purchase commitments.

Site selection can be based on a number of considerations. Economic considerations, such as price, property size, local zoning or land use ordinances, proximity and access to transportation (pipelines, rail, truck, barge, or ship), and access to electrical infrastructure, are standard. Many companies make decisions based solely on these considerations.

However, environmental considerations must also be addressed. For example, in Louisiana, an applicant and the environmental agency must give due consideration to environmental aspects of the project and an applicant cannot simply rely on business or economic considerations. *See, e.g., In re: Supplemental Fuels, Inc.*, 94-1596 (La. App. 1 Cir. 5/9/95), 656 So.2d 29, 39. Environmental considerations could include the attainment status of the area, the amount of wetlands on or adjacent to the property, the property's location in a floodplain, the water quality standards for the waters receiving permitted discharges from the facility, the level of emissions, and the proximity of residents to the proposed facility.

Applicants must also consider whether the new facility or expansion of an existing facility imposes a disproportionate environmental impact on nearby

communities. In general terms, applicants should obtain the demographics of the population in proximity to the proposed site and analyze the effects of pollution (such as generated waste, wastewater discharges, and air emissions) on that population. Applicants should also devise strategies for community outreach and involvement.

Permit applicants must give special attention to its site selection team and the team's organization. The team should include members representing real estate, economics, and environmental professionals. In addition, if the circumstances warrant, applicants should consider including counsel. The counsel should hire a modeler, statistician, and toxicologist as consulting experts and those individuals should report only to counsel. This will assist in preserving the confidentiality of any communications from those team members on pollution's effects on the community.

The demographics of the community in proximity, down to zip codes and census blocks, can be obtained from the U.S. Census and other sources. Further, there may be reliable information available regarding actual impacts in a given area. For example, the Louisiana Tumor Registry compiles actual cancer incidences and mortality data for specific cancers at the census block level.

Once available data is gathered, the modeler, toxicologist, and statistician can evaluate potential impacts on a neighboring community. In these efforts, counsel and these team members should be guided by the legal and policy framework set out in the Draft Revised Investigative Guidance and the Toolkit, or any forthcoming Biden

Administration guidance. In other words, the “disparate impact” framework set forth in those documents should shape those team members’ efforts and analysis.

The modeler can use air-emission models to predict or identify off-site locations, or receptors, where air emissions are predicted to locate. For example, receptors can be located within the model at locations in and around the community to predict the level of emissions at that location or receptor based on the maximum levels of emissions estimated from the proposed facility. The toxicologist can utilize the predicted information from the model to determine the potential impacts on that population and the statistician can determine if that potential level of impact is statistically significant.

During the permit application and public comment processes, opponents are likely to insert their own information into the record that supports their claims. Such information may include the demographics of an area, the results of screening model runs, such as EPA’s Risk-Screening Environmental Indicators (RSEI) model, and data obtained from EPA’s EJ Screen. However, the RSEI model and EJ Screen have important caveats as to their use. For example, EPA notes that it developed EJ Screen to merely “highlight places that may be candidates for further review.” There is “uncertainty in the data” and EJ Screen is “a screening tool and “not a detailed risk analysis.” See www.epa.gov/ejscreen/limitations-and-caveats-using-ejscreen. The applicant and its team should address and refute any comments and submissions utilizing this type of basic screening-level information.

The result of the process should be a report that can be placed into the record for each potential site to support the siting decision. If the analysis indicates that a particular site will not have a disparate impact, based on EPA's own analytical framework, the site can be evaluated based on economic or other environmental considerations. If the analysis indicates that a particular site will have or may have a disparate impact, that site can be ruled out, additional analysis performed to further define the extent of any impact, or perhaps there may be facts supporting a claim of substantial legitimate justification. In this way, the decision to choose a specific site has a viable and supported administrative record that should survive administrative or judicial review and should serve to counter or negate opposition and/or unsupported rhetoric in the record.