

A decorative geometric pattern consisting of a grid of squares, each divided into two triangles by a diagonal line. The squares and triangles are in various shades of gray, creating a complex, abstract design.

# Environmental Justice Legal Update

**Emily von Qualen &  
Clare Bienvenu**

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# EJ Legal Updates

- **Policy and Regulation**
  - **Federal**
  - **Louisiana**
  - **Texas**
- **Recent and Pending EJ Challenges:**
  - **Title V Petitions**
  - **Civil Enforcement**
  - **Title VI Investigations**
- **Key Takeaways**

# EJ – Policy and Regulations

- **Federal Agencies:**

- EJ concerns often arise as part of the NEPA process. Federal agencies are required to consider the environmental and social impacts a permitting decision will have, including EJ concerns.
- New proposed NEPA regulations would codify consideration of EJ in NEPA process for first time.
- EJ concerns also play a role in enforcement discretion.

- **Louisiana Agencies:**

- Public Trust Doctrine: Agencies must consider whether adverse environmental effects have been avoided to the maximum extent possible; the cost-benefit analysis of the environmental impacts and social/economic benefits; and whether there are alternatives that would offer more protection to the environment.

- **Texas Agencies:**

- Texas does not have an analogous NEPA-law, however, agencies often follow a similar review process (especially in delegated programs).
- TCEQ recently implemented a Public Participation Plan.



# Federal EJ Policy and Regulations

January 2021:  
Executive Order  
14008 prioritizes  
EJ across the  
federal  
government



August 2022:  
Inflation Reduction  
Act and EPA  
interim guidance  
on Environmental  
Justice and Civil  
Rights in  
Permitting



May 2022: DOJ  
created the Office  
of Environmental  
Justice and  
Comprehensive  
Environmental  
Justice  
Enforcement  
Strategy.



September 2022:  
EPA announced a  
new Office of  
Environmental  
Justice and  
External Civil  
Rights

# Federal EJ Policy and Regulations

April 2023:  
Executive Order  
14096-Revitalizing  
Our Nation's  
Commitment to  
Environmental  
Justice for All



August 2023:  
EPA's National  
Enforcement and  
Compliance  
Initiatives  
incorporate EJ into  
each initiative



July 2023:  
Proposed NEPA  
regulations  
incorporate EJ



# Federal EJ Priorities – Agency Directives



- Revitalizing Our Nation's Commitment to Environmental Justice for All (EO 14096 ), signed April 21, 2023:
  - More expansive definition of EJ.
  - Directs federal agencies to:
    - Identify, analyze, and address EJ concerns, historical inequities, and systemic barriers;
    - Help provide opportunities for workforce training and job creation in EJ communities;
    - Avoid federal actions that disproportionately and adversely effect EJ communities;
    - Provide opportunities for meaningful engagement;
    - Conduct NEPA reviews which analyze EJ and direct, indirect and cumulative effects; and
    - Ensure compliance with Title VI of the Civil Rights Act.
- CEQ was to issue interim guidance within 6 months, and final guidance by Oct. 2024.

# Proposed NEPA Regulations & EJ - Background



- NEPA was signed into law in 1970. Established CEQ, which issues regulations to implement NEPA.
  - Federal agencies issue their own agency NEPA procedures, consistent with CEQ regs.
- CEQ Regulations – largely unchanged until recent times:
  - July 16, 2020: the “2020 rule.”
  - April 20, 2022: Phase I Revisions
  - July 31, 2023: Proposed Phase II Revisions
    - Comments closed Sept. 29, 2023

# Proposed NEPA Regulations & EJ

- The proposed regulations:
  - Propose to codify consideration of environmental justice for first time;
  - Provide an expansive definition of EJ;
  - Incorporate EJ public engagement;
  - Incorporate climate change considerations; and
  - Explain how EJ effects should be considered.

# Proposed NEPA Regulations & Definition of EJ

## Proposed Regulation Definition and EO 14096

the just treatment and meaningful involvement of all people, regardless of income, race, color, national origin, **Tribal affiliation**, or **disability**, in agency decision making and other Federal activities that affect human health and the environment so that people:

- 1) Are **fully protected from disproportionate and adverse human health and environmental effects** (including risks) and hazards, including those related to **climate change**, the **cumulative impacts** of environmental and other burdens, and the legacy of racism or other structural or systemic barriers; and
- 2) Have equitable access to a healthy, sustainable, and resilient environment in which to live, play, work, learn, grow, worship, and engage in cultural and subsistence practices.”

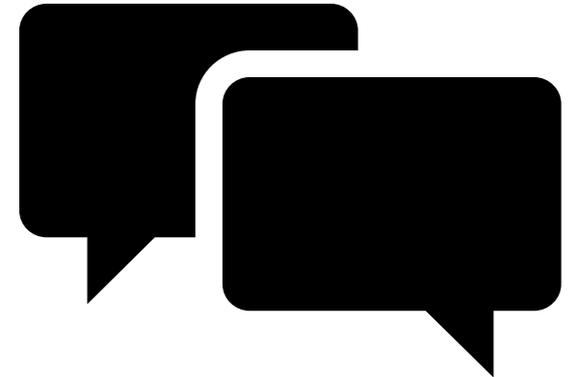
## EPA Working Definition

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.

# Proposed NEPA Regulations & Public Engagement

- Proposed Policy:

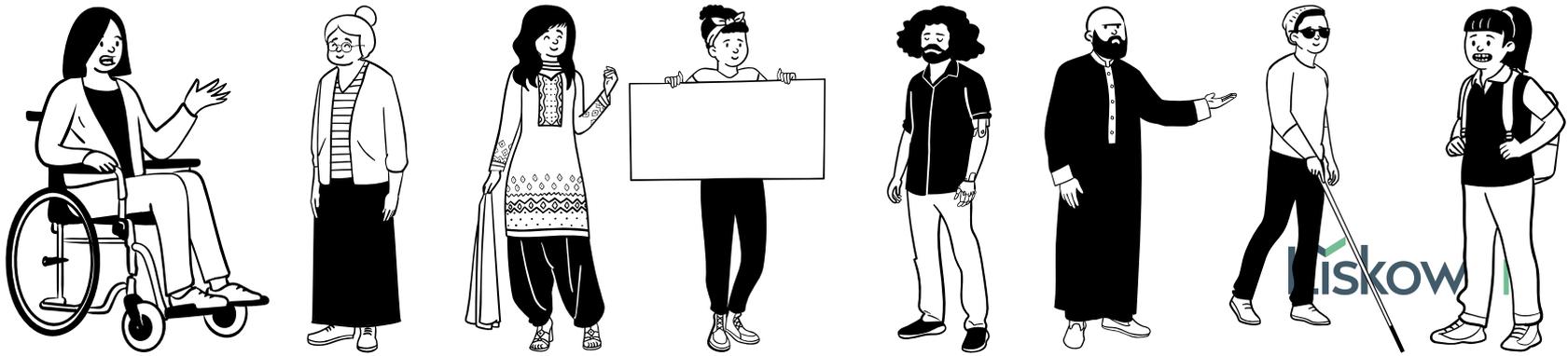
“Federal agencies shall to the fullest extent possible. . . . (d) Encourage and facilitate public engagement in decisions that affect the quality of the human environment, **including meaningful engagement with communities with environmental justice concerns**, which often include communities of color, low-income communities, indigenous communities, and Tribal communities.” (§1500.2).



- Emphasizes increased and earlier public engagement, and uses mandatory language for the scoping of issues for EIS analysis. (§§ 1501.9 and 1502.4).

# Proposed NEPA Regulations & Public Engagement (cont.)

- Agencies are to consider the needs of affected communities and persons when determining outreach and notification methods, including considering:
  - The primary language of affected persons; and
  - The appropriate format for public hearings or meetings given the needs of affected communities. (§ 1501.9).
- Requires agencies to designate a Chief Public Engagement Officer responsible for facilitating community engagement. (§ 1507.2).
- Removes “exhaustion” language, which only allowed litigation only based on comments raised during public comment.



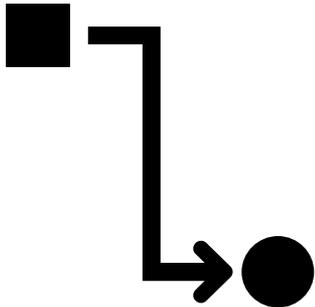
# Proposed NEPA Regulations & Climate Change

- Policy on reasonable alternatives:

“Federal agencies shall to the fullest extent possible. . . . (e) Use the NEPA process to identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions upon the quality of the human environment, such as **alternatives that will reduce climate change-related effects** or address adverse health and environmental effects that disproportionately affect communities with environmental justice concerns.” (§1500.2).

# Proposed NEPA Regulations & Climate Change

- Proposed Climate Change provisions:
  - When considering the significance of effects, encourage agencies to consider whether a proposed action has short-term adverse effects but long-term beneficial effects, including climate effects. (§ 1501.3).
  - Require the EIS to discuss reasonably foreseeable climate change-related effects of the proposed action and its alternatives, including the effects of climate change on the proposed action and alternatives. (§ 1502.16).
  - Modernize definitions, such as “effects” and “extraordinary circumstances,” to include climate change. (§ 1508.1).



# Proposed NEPA Regulations & EJ Outcomes

- Policy on reasonable alternatives:

“Federal agencies shall to the fullest extent possible. . . .

(e) Use the NEPA process to identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions upon the quality of the human environment, such as alternatives that will reduce climate change-related effects or **address adverse health and environmental effects that disproportionately affect communities with environmental justice concerns.**” (§1500.2).



# Proposed NEPA Regulations & EJ Outcomes

- Proposed EJ Outcome provisions:
  - Note that when agencies assess the significance of potential effects, they should consider disproportionate and adverse effects on communities with environmental justice concerns and adverse effects on rights of Tribal Nations that have been reserved through treaties, statutes, or Executive Orders. (§ 1501.3).
  - Promote adoption of mitigation measures that address or ameliorate significant adverse human health and environmental effects that disproportionately and adversely affect communities with environmental justice concerns. (§ 1505.3).
  - Modernize definitions, such as “effects” and “extraordinary circumstances,” to include climate change. (§ 1508.1).

# How would the CEQ regulations impact government agencies?

- Generally, agencies must comply with the CEQ regulations when administering NEPA. They can develop their own procedures but they must be consistent.
- For example, EPA implements NEPA through its own regulations, but explains that its regulations are to be used in conjunction with the CEQ regulations. 40 CFR 6.100(b).
- In proposed § 1500.6, CEQ proposes to remove the qualification that agencies must ensure full compliance with the Act “as interpreted by” these regulations. Instead, CEQ proposes that agencies must review and revise their procedures to ensure compliance with NEPA and the CEQ regulations. CEQ’s proposed revisions to § 1500.6 would clarify that agencies have an independent responsibility to ensure compliance with NEPA and a duty to harmonize NEPA with their other statutory requirements and authorities to the maximum extent possible.

# Policy and Regulation- Louisiana

- **Public Trust Doctrine**: Agencies must consider
  - whether adverse environmental effects have been avoided to the maximum extent possible;
  - the cost-benefit analysis of the environmental impacts and social/economic benefits; and
  - whether there are alternatives that would offer more protection to the environment.
- **RISE St. James v. LDEQ**:
  - In August 2022, the district court vacated air permits because (among other things):
    - EJ analysis is required under Louisiana’s public trust doctrine, and LDEQ dismissed EJ concerns in its decision-making.
    - The community in which the facility was located was “disproportionately” affected by air pollution.
    - LDEQ’s decision to not rely on EJSCREEN because it did not consider some emission decreases failed to consider the individualized health concerns of the immediate community.

# Policy and Regulation- Louisiana

- **Impact of RISE St. James v. LDEQ on the Public Trust Doctrine:**
  - On appeal (1<sup>st</sup> Cir) – issues include:
    - Whether EJ analysis is mandatory under public trust duty.
    - Requirements of public trust doctrine – EJ Screen / Cumulative Impacts?
  - Potential avenue for Louisiana case law to insert or remove EJ from pure state actions.
- **LA and EPA MOA re: Class VI Well Primacy**
  - LA agrees to “examine the potential risks of a proposed Class VI well within its jurisdiction to identify and address any particular impacts on minority and low-income populations.”
  - Use a variety of approaches, including:
    - **Implement an Inclusive Public Participation Process** - robust and ongoing opportunities
    - **EJ & Civil Rights Impacts on Communities**
      - Will project create new risks or exacerbate existing impacts on EJ community
      - Consider cumulative impacts and potential exposure pathways + benefits; use EJScreen
    - **Enforce Class VI Regulatory Protections** – public posting of enforcement activities
    - **Incorporate Other Mitigation Measures** – could include CO2 monitoring, release notification networks, impact offset via improving other environmental

# Policy and Regulation—Texas

- TCEQ's Public Participation Plan:
  - Permits applicants must complete a "Public Involvement Plan" if
    - the permits require public notice;
    - the activity is located within certain geographical areas; or
      - Locations include Austin, San Antonio, Dallas, West Texas, Fort Worth, Texas Panhandle, Houston, and along the Texas/Mexico border
    - there is significant public interest.
- The Public Involvement Plan form was updated in February 2023
  - The Public Involvement Plan Form requests information about the surrounding community, including percent minority population, commonly spoken languages in the area, per capita income, and local public interest groups. The form also requires a description planned public outreach activities.

# EJ Legal Challenges



- **Citizens:**

- **Title V petition:** Under the CAA, citizens can petition the EPA to object to a Title V permit which has been proposed by the state.
  - *In re Valero Refining-Texas, L.P.* (Houston Ship Channel): EPA granted petition in part and acknowledging the presence of EJ communities warrants “[f]ocused attention to the adequacy of monitoring and other compliance assurance provisions.”
- **Administrative Procedure Act:** aggrieved citizens can also file suit in court challenging an agency’s decision as “arbitrary and capricious” or “unreasonable.”
  - Challenge to the Formosa Facility USACE CWA Permit, including failure to consider EJ. USACE suspended the permit and issued memo that it would reexamine EJ.

# EJ Legal Challenges



- **The Government:**
  - **Enforcement decisions:** agencies can use discretion when deciding where to focus enforcement actions.
    - United States v. Denka Performance Elastomer, LLC (Case No. 23-cv-735, E.D. La.): While EJ is not a claim in the case, the DOJ and EPA both explained in news releases that this enforcement matter was driven by the agencies' determination to address EJ concerns.
  - **Title VI Investigations and Enforcement:** under Title VI, persons (including states) which receive federal funds cannot engage in discrimination.
    - Texas and Louisiana

# Title VI of the Civil Rights Act

- **Title VI** prohibits discrimination on the basis of race, color, and national origin in federally-assisted programs.
  - Sec. 601: “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.”
  - Sec. 602 directs each administering agency to take action pursuant to rule, regulation, or order to effectuate the principle of Sec. 601.
- Persons may file administrative complaints with the federal agency.
- EPA has opened investigations in a few states, including Louisiana and Texas for possible Title VI violations.
  - Investigating whether permitting decisions have created disparate adverse impacts on minority residents in violation of Title VI.

# Texas—Title VI Investigations



- There are currently four pending Title VI Investigations against TCEQ regarding its permitting practices.
- August 2021 Complaint—TCEQ lacks proper nondiscrimination policies and the air permits for Oxbow’s calcined coke facility in Port Arthur.
  - Pending: In Informal Resolution Agreement Negotiation
- April and May 2022 Complaints—regarding the standard permit for concrete batch plants, focusing on the Houston area.
  - Pending: In Informal Resolution Agreement Negotiation
- Nov. 2022 Complaint—regarding public notice for a TPDES permit, which was not issued in Spanish.
  - Pending: Under jurisdictional review
- As part of the information resolution negotiations, TCEQ has issued the Public Participation Plan (discussed previously).

# EPA Title VI Investigations – Louisiana

- **No current open Title VI Investigations in Louisiana**

## **History of Louisiana v. EPA:**

- **January 2022 and February 2022** – Two complaints filed by NGOs regarding the Denka Facility, Formosa Facility, and the Industrial Corridor alleging that LDEQ’s method of administering the air permitting program and LDH’s actions related to its duty to inform have an adverse disparate impact on the basis of race.
- **April 2022** – EPA opened Title VI investigations and LDEQ and LDH agreed to engage in the informal resolution process. The state agencies provided responses to the complaints and engaged in the Informal Resolution Agreement negotiation process.

# EPA Title VI Investigations – Louisiana (cont.)

- **October 2022** – EPA sent its initial findings to Louisiana, indicating that some the LDEQ and LDH practices were potentially in violation of Title VI.
  - No Title VI or EJ policies on how to review air permits
  - No policy on evaluating cumulative impacts and insufficient community engagement
  - Disparate impacts-cancer rates and exposure
  - “[T]he failure to seek out, consider or analyze available information and data about health risks appears to have formed the basis for actions and/or inactions by both LDEQ and LDH that may be subjecting Black residents of Louisiana to adverse disparate impacts.”
- **May 2023** – Louisiana filed suit challenging how EPA (and DOJ) have handled the Title VI investigations, arguing among other things that Title VI violations cannot be based on disparate impact analyses.
- **June 21, 2023** – Louisiana moved for a preliminary injunction to, inter alia, prevent the EPA from imposing or enforcing disparate-impact-based requirements.

# EPA Title VI Investigations – Louisiana (cont.)

- **June 27, 2023** – EPA administratively closed its Title VI investigations in Louisiana, based on other actions that address potential disparate impacts from the facilities.
- **August 16, 2023** – EPA filed motion to dismiss or, in alternative, motion for summary judgment, arguing the claims are now moot.
- **Sept. 29, 2023** – State of Louisiana filed opposition arguing still has standing as regulated party who will have to comply with disparate impact policies.
  - **October 10, 2023** – State of Louisiana filed request for judicial notice of EPA’s acceptance of Title VI complaint out of Alabama, which alleged disparate impact.
- **January 9, 2024** – Hearing set to be held.

# Key Takeaways

- The government is focusing on EJ communities, scrutinizing those permits and facility actions.
- The infrastructure is being established within the federal government to do this.
- Spending and grants are focusing on EJ communities and supporting their involvement in permitting decisions.
- NEPA requirements for EJ are likely to become more comprehensive and predictable.
- EPA's Title VI Investigations could result in state agencies agreeing to undertake more thorough EJ reviews.
- More EJ permit challenges seem likely, and they may be successful.
- Changing administrations may alter priorities, but not regulatory or constitutional requirements.

# THANK YOU

FOR YOUR TIME AND CONSIDERATION

**Emily von Qualen**

evonqualen@liskow.com

504.556.4129

**Clare Bienvenu**

cbienvenu@liskow.com

504.556.4129