



AIR & WASTE MANAGEMENT  
ASSOCIATION

# Back to the Future: Environmental Justice - Coming Soon to an Industrial Facility Near You!



# URS

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# Agenda

- Definitions
- Background on Environmental Justice (EJ)
- USEPA's Five New Policy and Guidance Statements
- Other Recent EJ Developments
- Wrap-up



# Key Definitions

- **Environmental Justice:** A social movement that believes that minorities and low-income populations are disproportionately impacted by industrial pollution.
- **EPA's definition of Environmental Justice:** 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.
  - Other similar terms, often used interchangeably: Environmental Equity, Environmental Injustice, Environmental Inequity, and Environmental Racism.
- **Fair treatment** means that no group of people should bear a disproportionate share of the negative environmental consequences resulting from industrial, governmental and commercial operations or policies.



# Key Definitions (cont'd)

- **Disparate or Disproportionate Impact:** A higher burden placed upon poor or minorities lacking economic or political strength, compared to the level of exposure faced by the rest of the population.
- **Overburdened:** describes minority, low-income, tribal and indigenous populations or communities that potentially experience disproportionate environmental harms and risks due to exposures or cumulative impacts or greater vulnerability to environmental hazards. This increased vulnerability may be attributable to an accumulation of negative and lack of positive environmental, health, economic, or social conditions within these populations or communities.
- **Title VI:** Title VI of the Civil Rights Act of 1964

# Out of the “Turbulent 60s” came Two Major Social Movements...

The *Civil Rights*  
*Movement*, and...

The *Environmental*  
*Movement*.

*Environmental Justice* is  
the melding of those  
two movements.\*



\* Nat'l Conf of Legislatures, *EJ, A Matter of Perspective*



# Climate Justice

- **Climate justice** is viewing climate change as an ethical issue and considering how its causes and effects relate to concepts of social and environmental justice. Recognizing and addressing the fact that those least responsible for climate change experience its greatest impacts is seen by many as being central to climate justice.



# Environmental Justice...A Complex Issue

- A body of evidence suggests that, in certain instances around the country, minority and lower income citizens/ neighborhoods/ communities bear an inequitable share of the risks associated with environmental releases.
- Since 1992, when EPA first acknowledged the issue, they have been developing policies and programs to correct the situation.
- Countless perspectives and a lack of conclusive evidence hinder solutions and create a complicated public policy issue.
- Heart of the issue: Quality of life, fairness, and empowerment, *not emissions*.
- The issue is often hijacked by NGOs for their own purposes, leaving the community out of the picture.





# What is EPA's "Agenda"??

EPA's agenda is clear...

- They do not believe that state agencies are adequately representing the views of the community, especially those of low-income and minority populations, two groups who have not had much opportunity historically to voice their opinion in permitting actions.
- They want the communities to be empowered; i.e., have a bigger voice and more power in the process.
- EPA believes that the threat of EJ concerns/publicity will be so abhorrent and onerous that affected parties will be forced to negotiate with the local communities to make sure their permit or other action is approved.
- Ultimately, EPA achieves their objective: empowered communities.

# What is EPA's Agenda?

## EPA's Agenda is pretty clear...



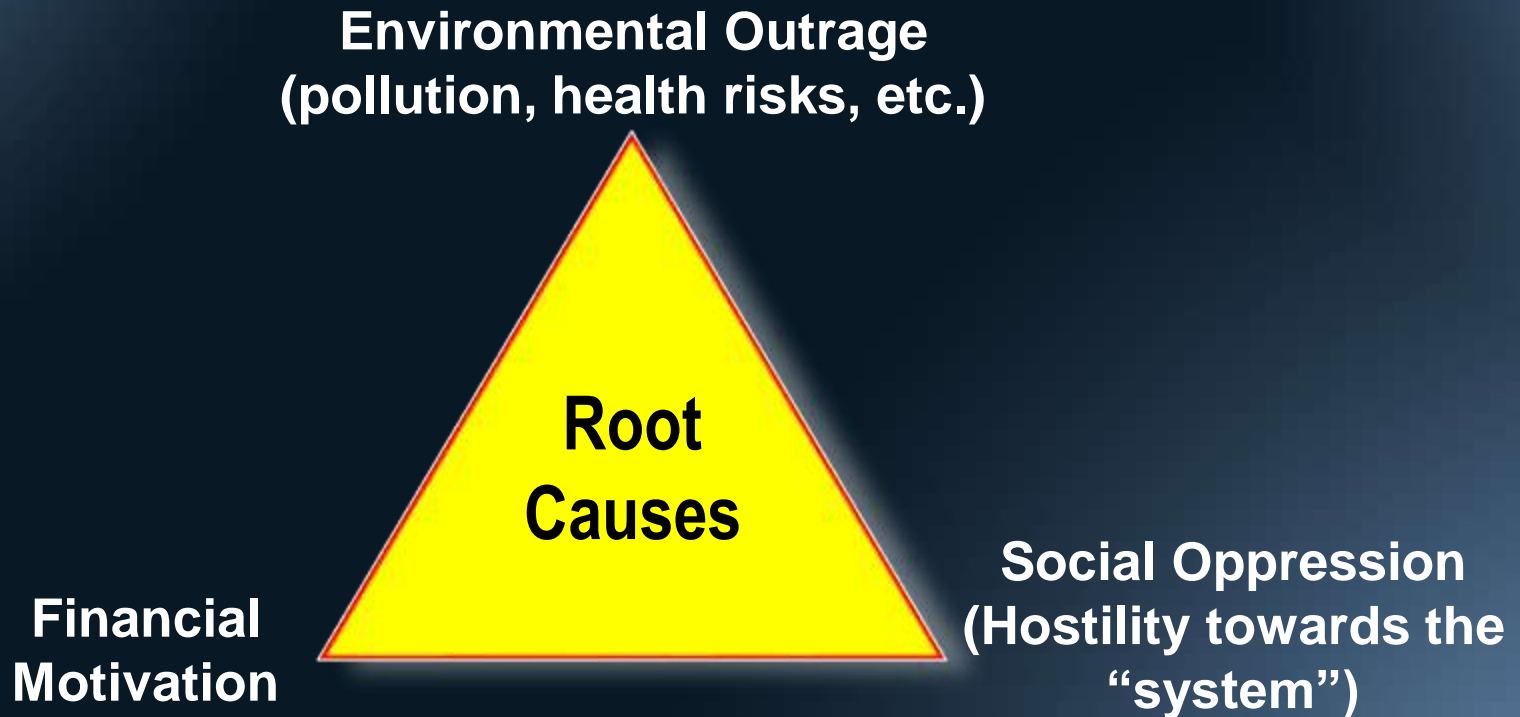
# Are Industrial Emissions The “Real” Issue?

Offering to make emission reductions will not address the real sources of local residents’ frustrations.

An industrial facility may simply be the “straw that broke the camel’s back!”

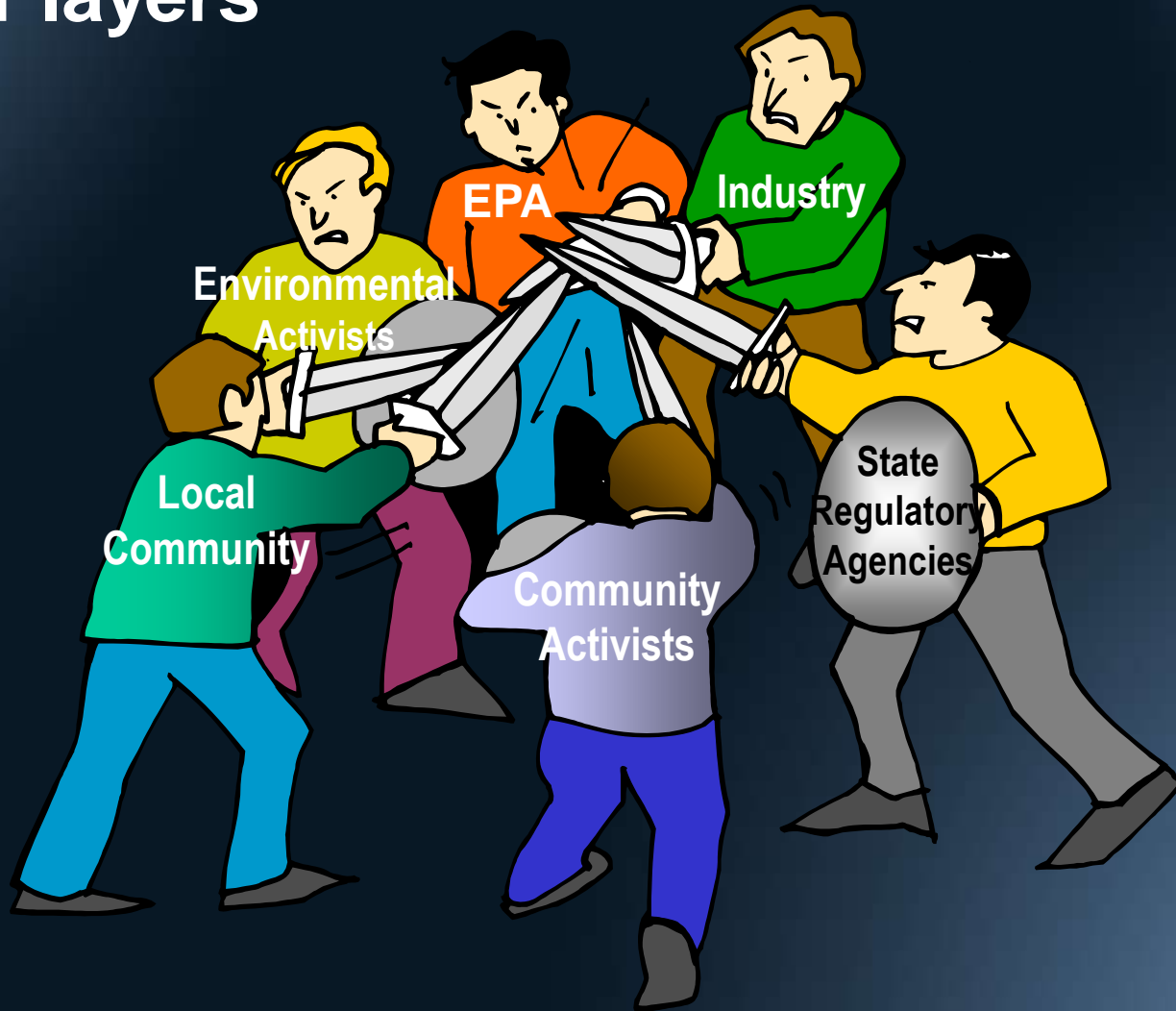


# What are the “Root Causes” of an EJ issue?

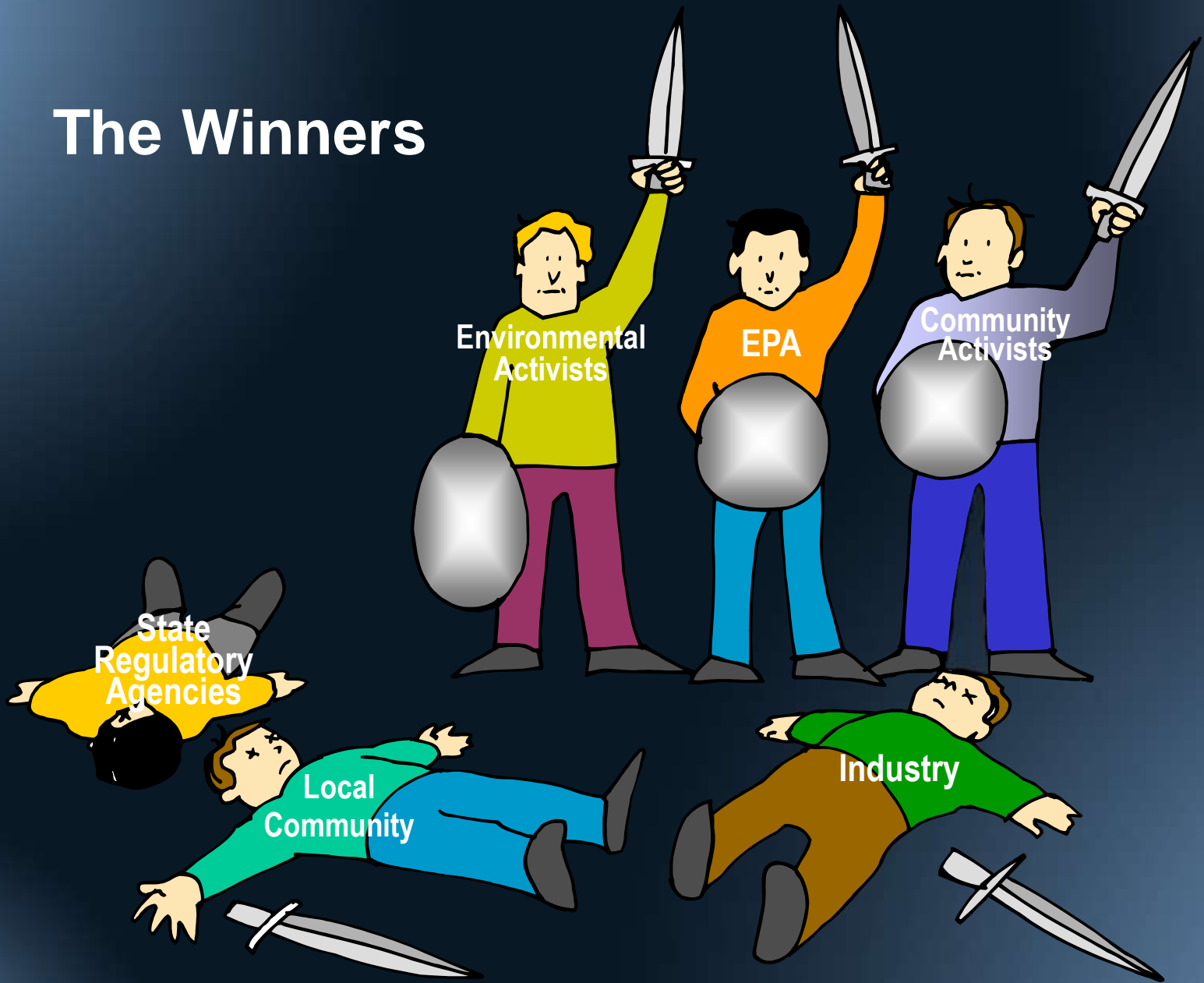


*It is possible to work with all three of these groups...it becomes a business decision and requires compromise on all parts.*

# The Players



# The Winners





# Recent Historical Context. . .

- Since the Shintech case in 1998, we have not heard much about environmental justice (EJ).
  - Shintech planned to construct an \$800 million fully-integrated PVC plant in St. James Parish, LA.
  - Initially granted all permits. Later, their permits were revoked when an EJ complaint was filed.
    - 80% of the local population within 1-2 miles was minority.
  - USEPA had no comments on Shintech's permit when it was initially reviewed. After the complaint was filed, the permit was re-reviewed and USEPA found 48 pages of issues with the permit.
  - Shintech was opposed by the Tulane Environmental Law Clinic, Oil Chemical and Atomic Workers Union (Shintech was non-union), Greenpeace, Rev. Jesse Jackson, trial lawyers and others.
  - Supported by St. James NAACP, state NAACP, and 75% of local citizenry.

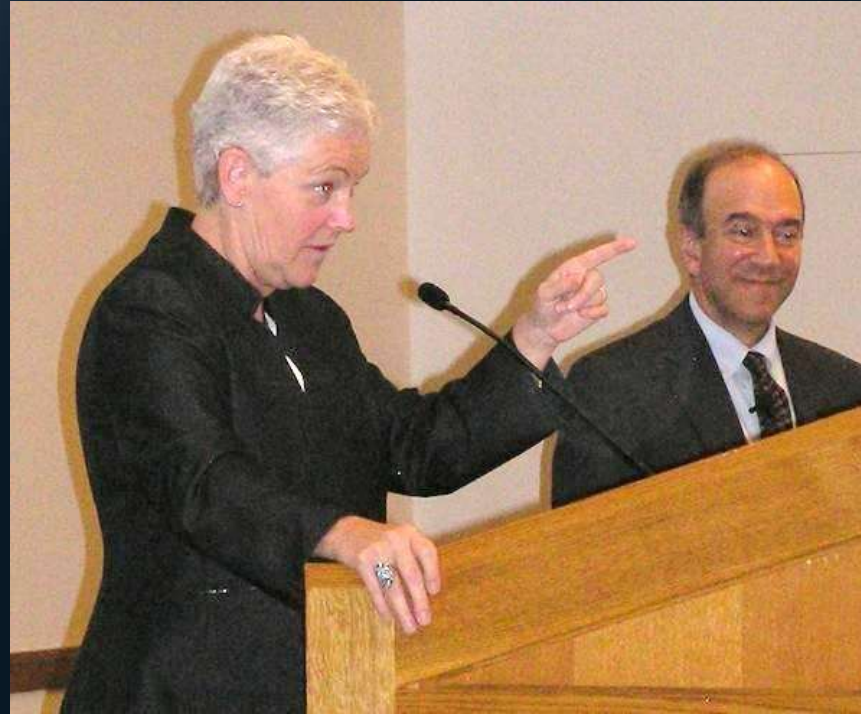
# Recent Historical Context. . . (cont'd)

- Although Shintech received their Permit to Construct, Shintech chose to move upriver to another site *with very similar demographics* where they were welcomed.
  - Shintech has now invested ~\$2 billion at their new site.
  - Nucor has since built a iron processing plant at the former Shintech site with no significant opposition.
- After Shintech, the EJ issue was hijacked again and again by multiple activist groups to attack industrial permits across the U.S.
- Within a couple of years, two Supreme Court rulings thwarted activist efforts:
  - Alexander v Sandoval (2001) - no private right of action to enforce disparate impact regulations promulgated under Title VI. Supreme Court ruling eliminated a major judicial tool for private civil rights and environmental justice plaintiffs to enforce their claims of discrimination in violation of Title VI.

# Recent Historical Context. . . (cont'd)

- South Camden Citizens in Action v. New Jersey Department of Environmental Protection – Third Circuit Court of Appeals in South Camden held that in addition to the lack of standing for private individuals to bring claims of discrimination in violation of regulations promulgated under Title VI, these regulations do not create free standing rights to be enforced by private individuals.
- EJ has been a back-burner issue for almost 12 years.
- May no longer be the case as USEPA seems to be making it a front-burner issue again.
- Administrator Lisa Jackson made EJ one of USEPA's top seven priorities in early 2010.
- Recently, USEPA's OECA announced that EJ would be one of their top 5 enforcement priorities in 2014 – 2016.

# EJ Did Not Go Away with the Departure of Administrator Lisa Jackson. . .



“I have no intention of leaving behind the environmental justice communities,” newly minted EPA Administrator Gina McCarthy told a 300-plus audience at Harvard Law School on July 30 in her first public address since being confirmed by the Senate two weeks earlier.



# Recent USEPA Announcements, Policy and Guidance Statements



# Recent Developments (cont'd)

- USEPA had a series of national conference calls in May ('13) and issued several FedReg notices where they rolled out their new policies.
- USEPA issued all of these new documents as policy statements or guidance. None are regulations.
- As a result:
  - Developed behind closed doors
  - Not subject to the Federal rulemaking process or peer review
  - No Federal cost-benefit analysis or compliance cost study is required
  - Evades judicial review
- The burden of proof will once again be placed on industry to prove a negative: prove that you are not causing an undue burden on the local community.



# Five Recent Developments

- USEPA has recently begun to modify their environmental justice policies and procedures and these new policy statements could have a significant impact upon refinery permits in the future.
- On April 26<sup>th</sup>, USEPA noticed two policy statements in the Federal Register:
  - “Title VI of the Civil Rights Act of 1964: Adversity and Compliance With Environmental Health-Based Thresholds,” and
  - “Role of Complainants and Recipients in the Title VI Complaints and Resolution Process.”
- On May 9<sup>th</sup>, USEPA released:
  - “Draft Technical Guidance for Assessing Environmental Justice in Regulatory Analysis. “
  - “EPA Activities To Promote Environmental Justice in the Permit Application Process” and
  - “Promising Practices for Permit Applicants Seeking EPA-Issued Permits: Ways to Engage Neighboring Communities.:



# Policy Document#1 “Title VI of the Civil Rights Act of 1964: Adversity and Compliance With Environmental Health- Based Thresholds (cont’d)

- In the first of the two new policy statements discusses, in detail, the USEPA’s intent to eliminate the “rebuttable presumption” defense.
- Historically, since the Select Steel decision in 1998 (shortly after Shintech), the USEPA agreed that if the NAAQS are not being violated near a facility, there cannot be any adverse effect on local residents.
  - The NAAQS are set based on detailed human health studies and have an ample margin of safety built into them.
  - Since 1998, USEPA agreed that if an area is in full attainment with all NAAQS, there are, presumably, no adverse impacts on the local community.
  - This rebuttable presumption is now being eliminated.
  - USEPA is reversing that position and indicating that even if the NAAQS are in attainment, there may still be adverse impacts on the local community due to “cumulative exposure, hot spots,” etc. upon “particularly sensitive populations.”

# Policy Document#1 “Title VI of the Civil Rights Act of 1964: Adversity and Compliance With Environmental Health- Based Thresholds (cont’d)

- Of course, “cumulative exposure,” “hot spots,” “sensitive populations” and “overburdened communities” are terms that remain undefined or ambiguously defined and, with respect to “cumulative burden”, something that is impossible to measure.
- USEPA will almost always be able to find an issue with “cumulative exposure,” “hot spots,” and/or “sensitive populations” since these terms are either undefined or defy measurement.
- Eliminates a clear, easy-to-understand, bright-line rule that has been followed by EPA for 13 years.
- And replaces it with a as-yet-to-be-defined “compliance with an environmental health-based threshold” and an unlimited and undefined list of other factors in order to determine “adversity.”

# Policy Document#1 “Title VI of the Civil Rights Act of 1964: Adversity and Compliance With Environmental Health- Based Thresholds (cont’d)

- Without a bright-line, “adversity” in the future seems to be whatever USEPA wants it to be and may define it on a case-by-case basis.
- Compliance with the terms of the permit will no longer be considered to have no adverse impact.
- EPA has eliminated the words “significant” and “substantial” preceding the word “adversity.” Now, you just have to show any level of “adversity.”
- USEPA states that in the future the agency may rely on “other readily available information” to determine if there is an adverse impact.
  - The agency did not spell out what other data might be used.

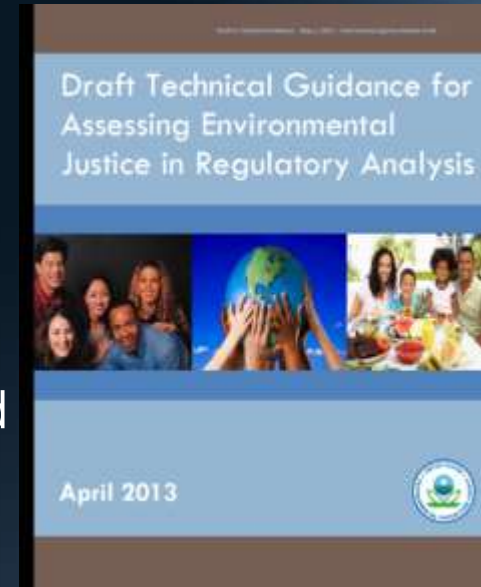
## Policy Document #2: “Role of Complainants and Recipients in the Title VI Complaints and Resolution Process.”

- The Agency also issued a new policy related to the ability of citizens to file a Title VI complaint about a permit issuance but, it is interesting that the permittee is not given a seat at the table.
  - The new policy NEVER mentions the permittee.
  - The permittee is the entity at the “tip of the spear” but does not have a voice when the outcome of the permit is being decided.
  - In fact, although the permittee has no seat at the table, “EPA may seek and consider complainant’s input on potential terms of a settlement agreement.”
  - The policy discusses a myriad of ways to give the complainant a higher profile in the complaint process including EPA-financed arbitration.
  - Only the entity/agency issuing the permit and the complainant are at the table.



# Policy Document #3: “Draft Technical Guidance for Assessing Environmental Justice in Regulatory Analysis”

- Purports that it “does not impose any legally binding requirements.”
- The “guidance” will be used in developing new EPA regulations that will have subsequent effects on permit applications, NAAQS development, BACT requirements, etc.
- Lays out a detailed framework for assessing the demographic and racial impact of regulations, such as how to identify minority populations at higher health risk.
- “Minority, low-income, and indigenous populations experience greater exposure and disease burdens that can increase their risk of adverse health effects from environmental stressors,” the guidance states. It also mentions “Laotian subsistence fishers” as an example of how finely they expect analysts to look for disparities.
- While it does not expressly say so, it certainly appears that USEPA is encouraging future rule-makings to incorporate disparate impact assessments into the rule.





# Policy Document #5: “Promising Practices for Permit Applicants Seeking EPA-Issued Permits: Ways to Engage Neighboring Communities”

- “Promising Practices” is designed to encourage and assist permit applicants to reach out to neighboring communities when applying for permits that may affect communities’ quality of life, including their health and environment.
- “Promising Practices” are based on conversations with communities, permit applicants, and government stakeholders.
- The purpose of the “Promising Practices” document is to publicize the good neighbor practices already employed by permit applicants across the country and to encourage their greater use.



# New Developments: EJ Screen

- EPA is now beta-testing a nationally consistent screening tool, called EJSCREEN *“to help identify communities that are potentially overburdened.”*
- A geospatial tool that contains demographic and environmental data for the United States at the census block group level.
- The environmental factors include:
  - (1) PM 2.5 Level in Air;
  - (2) Ozone Level in Air;
  - (3) Diesel Particulate Matter Level in Air;
  - (4) Air Toxics Cancer Risk;
  - (5) Air Toxics Neurological Hazard Index;
  - (6) Air Toxics Respiratory Hazard Index;
  - (7) Traffic Proximity and Volume;
  - (8) Lead Paint Indicator (% pre-1960);
  - (9) Risk Management Plan Facility Proximity;
  - (10) Superfund Site Proximity;
  - (11) Treatment Storage Disposal Facility Proximity; and
  - (12) Major Direct Dischargers to Water Proximity.

# New Developments: EJScreen

- In addition to environmental factors, EJSCREEN also uses two primary demographic factors, specifically, percentage of the population that is minority and percentage of population that is low-income.
- EJSCREEN also includes information about linguistic isolation, population over age 64, population under age 5, and population with less than a high school education.
- EJSCREEN also creates indexes, which combine each environmental indicator with the two primary demographic factors, to provide a measure of how much each block group contributes to disparity between demographic groups nationwide.



# New Developments: EJScreen (cont'd)

● Not functioning at this time. Housed here:

<https://ndgishub.maps.arcgis.com/home/webmap/viewer.html?webmap=cb6ee8434c054e3bba37995f06e644d3>

HOME ▾ NEW MAP SIGN IN

Find address or place

EJSCREEN

EJSCREEN services combined for web map used in EJSCREEN Flex application.

Web Map by rosenbaum,barbara\_EPA  
Last Modified: June 28, 2013

★★★★☆ (1 rating, 0 comments, 2,728 views)

More Details...

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Is it a coincidence that the default map shown when the site is accessed is exactly centered on ExxonMobil's offices in Fairfax, VA?

# Wrap Up



# Insights and Implications : EPA's Recent Announcements

- Impact on the environment or human health is *not* a factor.
- Proximity to a facility is the *only* determining factor.
- Full compliance with all applicable rules and regulations offers no shield from Environmental Justice.
- Makes EPA the ultimate arbiter of what is best for a local community from a social and economic standpoint instead of the local residents, the state and local officials.
- Improperly extends EPA's arm *far beyond* their historical regulatory and permitting bounds.



# Thanks For Listening!

# Questions?

