

ENVIRONMENTAL JUSTICE AND LANDFILLS

SWANA PALMETTO CHAPTER
SPRING CONFERENCE
MYRTLE BEACH, SC
MAY 2022

Jessie J. O. King, Esquire

WILLIAMS MULLEN



> Environmental Justice

- Definition
- History

> Recent Developments

- Biden White House
- EPA
- USDOJ
- States

> Future

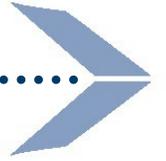
WHAT IS ENVIRONMENTAL JUSTICE?



DEFINITION



“**Environmental Justice** is 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.”



> **Fair treatment** means:

- no group of people should bear a disproportionate share of the negative environmental consequences resulting from industrial, governmental and commercial operations or policies.

> **Meaningful involvement** means:

- Opportunity to participate in decisions about activities that may affect their environment and/or health;
- The public's contribution can influence the regulatory agency's decision;
- Community concerns will be considered in the decision-making process; and
- Decision makers will seek out and facilitate the involvement of those potentially affected.



“The concept of environmental justice centers on the idea that minority groups as well as the poor have over the years been disproportionately harmed by pollution since they often live in neighborhoods next to heavy industry areas or other sources of pollution, like rail yards, landfills or incinerators.”



1968

– Memphis Sanitation Strike

- Strike advocated for fair pay and better working conditions for Memphis garbage workers

1979

– *Bean v Southwestern Waste Management Corp.*: Houston, Texas

- Group of African American homeowners fought to keep Whispering Pines Sanitary Landfill from being placed within 1500 feet of a local public school

1982

– Sit-in Against Warren County, NC PCB Landfill

- Over 500 environmentalists and civil rights activists were arrested



1983

- Publication of “Solid Waste Sites and the Houston Black Community” by Dr. Robert Bullard
 - first-of-its-kind study documenting the location of municipal waste disposal facilities in Houston. EPA says it is “the first comprehensive account of environmental racism in the United States.”
- General Accounting Office conducts study: ‘*Siting of Hazardous Waste Landfills and Their Correlation with Racial and Economic Status of Surrounding Communities*’

1987

- The United Church of Christ Commission on Racial Justice (UCC) released “*Toxic Waste in the United States*”
 - Examined the statistical relationship between the location of a hazardous waste site and the racial/socioeconomic composition of host communities nationwide.
 - According to EPA website, “The study found that over 15 million African Americans, 8 million Hispanics, and half of all Asian/Pacific Islanders and Native Americans resided in communities with at least one abandoned or uncontrolled toxic waste site.”

1988

- West Harlem Environmental Action(WE ACT) founded.
 - Addressed community struggles around the poor management of the North River Sewage Treatment Plant, the construction of the sixth bus depot across from an intermediate school and a large housing development



1990

- EPA Administrator creates the Environmental Equity Workgroup
 - to address the allegation that ‘racial, minority, and low-income populations bear a higher environmental risk burden than the general population.’

1993

- EPA Administrator Creates the National Environmental Justice Advisory Council

“Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations”

- Established an Interagency Working Group on Environmental Justice
- Directed federal agencies to develop strategies on how to identify and address the disproportionately adverse human health and environmental effects of programs, policies, and activities on minority and low-income populations.



HISTORY OF EJ: 2000 - 2010



2002

- EPA Offices Begin Implementing EJ Action Plans

2004

- EPA Issues Toolkit to assist staff in conducting Environmental Justice Assessments

2010

- Environmental Justice is Established as an EPA Agency-Wide Priority

2011

- Plan EJ 2014: roadmap to assist EPA in integrating EJ into all Agency programs, policies, and activities

2013

- EPA issues notice describing the actions that EPA regional offices should take when issuing EPA permits to ensure EJ

2015

- EPA releases initial version of EJSCREEN

2016

- Final Framework for EJ 2020 Action Agenda
 - Strategic plan for advancing environmental justice for the years 2016-2020

HISTORY OF EJ 2017-2022



- > Growing movement to increase protections for underserved communities
- > Infrastructure Law meant to benefit poor communities
 - Drinking water
 - Roads
 - Access
 - Sewer
 - Clean Air / Climate Change
- > 2021: EPA Administrator Michael S. Regan embarks on Journey to Justice tour in Mississippi, Louisiana, and Texas

- > Renews commitment to EPA's three principles— follow the science, follow the law, and be transparent
- > Adds fourth principle: **advance justice and equity**
- > Includes strategic goals focused exclusively on addressing climate change and advancement of environmental justice and civil rights.
 - September 30, 2023, EPA will develop and implement a **cumulative impacts framework**, issue guidance on external civil rights compliance, establish at least 10 indicators to assess EPA's performance in reducing disparities in environmental and public health conditions, and train staff and partners on how to use these resources.



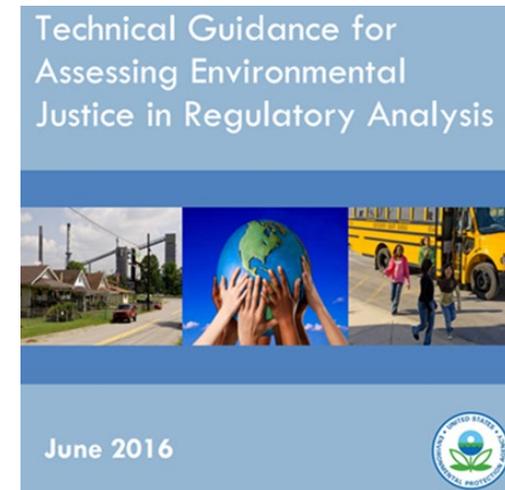
1. Biden Executive Order 14008 (Jan. 2021):
 - White House Environmental Justice Advisory Council (WHEJAC) established to advise newly established White House Environmental Justice Interagency Council (IAC)
 - Goal: to increase the Federal Government's efforts to address environmental injustice
2. Use of EJ Screen in Permitting and Enforcement Processes
3. EPA Enforcement of Complaints under Title VI of Civil Rights Act
4. Lawsuits claiming violations by State Agencies under Title VI
 - DOJ launches Comprehensive EJ Strategy (May 5, 2022)
5. Use of Cumulative Impacts in Permitting & Enforcement Processes
6. Federal Environmental Justice for All Act: Proposed



1. WHEJAC GOALS



- > **Climate change** mitigation, resilience, and disaster management
- > Toxics, pesticides, and pollution reduction **in overburdened communities**
- > Equitable conservation and public lands use
- > Tribal and Indigenous issues
- > Clean energy transition
- > Sustainable infrastructure, including clean water, transportation, and the built environment
- > NEPA, enforcement **and civil rights**
- > Increasing Federal Government's efforts to address current and historic environmental injustice



2. EJ SCREEN 2.0 – EPA WEBSITE



How used by EPA:

- > Informing outreach and engagement practices
- > Implementing aspects of the following programs:
 - permitting
 - enforcement
 - compliance
- > Developing retrospective reports of EPA work

Not used by EPA staff for:

- > To identify or label an area as an "EJ community"
- > To quantify specific risk values for a selected area
- > To measure cumulative impacts of multiple environmental factors
- > As the sole basis for agency decision-making or making a determination regarding the existence or absence of EJ concerns



3. CIVIL RIGHTS ACT OF 1964: TITLE VI



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 USC 2000d]

3. TITLE VI OF CIVIL RIGHTS ACT



> “Program or activity” – All operations of — “the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended.”

And...

> “Each Federal department and agency... is authorized and directed to effectuate the provisions of section 2000d of this title.”

> NOTE: This includes EPA and State Environmental Agencies issuing permits to Agricultural Facilities

CIVIL RIGHTS ACT TITLE VI COMPLAINTS

FOR ECRCO WEBSITE POSTING 04-27-2022
Complaints Received and Compliance Reviews Initiated by EPA between Calendar Year 2014 (January 1, 2014) through the present Fiscal Year, as of April 26, 2022.
Fiscal Year 2022 to Date (October 1, 2021, through April 26, 2022)

EPA Complaint #	Named Entity	Date Received	Alleged Discrimination Basis	Current Status
01R-22-R4	City of Conyers, GA	10/14/2021	Title VI: Race	Pending: Under Jurisdictional Review
02R-22-R4	Rockdale County, GA	10/14/2021	Title VI: Race	Pending: Under Jurisdictional Review
01RNO-22-R5	Michigan EGLE (Flint I)	11/8/2021	Title VI: Race, National Origin	Pending: Under Investigation
02RNO-22-R5	Michigan EGLE (Detroit)	11/8/2021	Title VI: Race, National Origin	Pending: Under Investigation
01D-22-R2	Puerto Rico ASA	11/18/2021	Section 504: Disability	Rejected/Referred to EEOC 3/31/2022: Lack of Jurisdiction
01RNO-22-R9	Pima County (AZ) DEQ	12/19/2021	Title VI: Race, National Origin	Pending: Under Jurisdictional Review
01DAr-22-R3	PA DOH (Wyoming County)	12/20/2021	Section 504: Disability Age Act: Age Title VI: Retaliation	Pending: Under Jurisdictional Review
02DAr-22-R3	PA DEP (Wyoming County)	12/20/2021	Section 504: Disability Age Act: Age Title VI: Retaliation	Pending: Under Jurisdictional Review
03Dr-22-R3	PA DOH (Susquehanna County)	12/20/2021	Section 504: Disability Title VI: Retaliation	Pending: Under Jurisdictional Review
04Dr-22-R3	PA DEP (Susquehanna County)	12/20/2021	Section 504: Disability Title VI: Retaliation	Pending: Under Jurisdictional Review
03DRr-22-R5	Michigan EGLE – (Flint II)	12/31/2021	Title VI: Race, Retaliation Section 504: Disability	Pending: Under Investigation

FOR ECRCO WEBSITE POSTING 04-27-2022

01RNO-22-R1	Providence Water Supply Board (RI)	1/5/2022	Title VI: Race, National Origin	Pending: Under Investigation
04RNO-22-R5	City of Chicago (Dept. of Health)	1/11/2022	Title VI: Race, National Origin	Rejected w/o Prejudice in Light of Pending HUD Investigation: 4/26/2022
01NO-22-R10	Puget Sound Clean Air Agency (WA)	1/11/2022	Title VI: National Origin	Pending: Under Jurisdictional Review
01R-22-R6	Louisiana DEQ (St. John the Baptist Parish)	1/20/2022	Title VI: Race	Pending: Under Investigation
02R-22-R6	Louisiana DOH	1/20/2022	Title VI: Race	Pending: Under Investigation
03R-22-R4	Georgia DNR	1/24/2022	Title VI: Race	Pending: Under Jurisdictional Review
03RNO-22-R6	City of Houston	1/28/2022	Title VI: Race, National Origin	Pending: Under Jurisdictional Review
04R-22-R6	Louisiana DEQ (St. James Parish)	2/2/2022	Title VI: Race	Pending: Under Investigation
02R-22-R1	MA DEP	2/17/2022	Title VI: Race	Pending: Under Jurisdictional Review
04RDA-22-R4	NC DEQ (Burlington North Facility)	3/17/2022	Title VI: Race, Section 504/Age Act: Disability, Age Disability	Pending: Under Jurisdictional Review
01CR-22-R8	Colorado Department of Public Health and Environment (CDPHE)	3/18/2022	Title VI: Race, National Origin	Pending: Compliance Review Investigation Initiated
05R-22-R5	Wisconsin DNR	3/23/2022	Title VI: Race	Pending: Under Jurisdictional Review
06R-22-R5	Madison Metro Sewerage District (WI)	3/23/2022	Title VI: Race	Pending: Under Jurisdictional Review
05RNO-22-R4	Florida Dept. of Envir. Protection	3/31/2022	Title VI: Race, National Origin	Pending: Under Jurisdictional Review
05RNO-22-R6	Texas Comm. on Envir. Quality (Harris County)	4/5/2022	Title VI: Race, National Origin	Pending: Under Jurisdictional Review

Grist

Donate [Menu icon]

The EPA just accused Missouri's environmental agency of violating the Civil Rights Act

The findings are the latest example of how the Biden administration is prioritizing environmental justice.



The Kinder Morgan fuel transport facility in St. Louis, Missouri, *Linden Mueller / Great Rivers Environmental Law Center*

Jena Brooker



The U.S. Environmental Protection Agency has preliminarily ruled that the Missouri Department of Natural Resources is in violation of Title VI under the 1964 Civil Rights Act. Federal investigators found that the state agency failed to comply with several nondiscrimination requirements, such as ensuring that everyone - including those who aren't proficient in English - can participate in public comment periods, not having a staff person for handling Title VI complaints, and lacking an official notice of nondiscrimination.

The ruling marks one of just a few times in the EPA's 50-year history that the agency has made a finding of noncompliance in a Title VI complaint. In fact, 90 percent of civil rights complaints brought to the EPA aren't even investigated, according to reporting from the Center for Public Integrity. But experts say the decision in Missouri, along with the EPA's recent comments voicing civil rights concern over a metal scrapyards in Chicago, are indicative of the possible shift under the Biden administration toward prioritizing environmental justice.



The case stems from a Title VI complaint filed by the Great Rivers Environmental Law Center, based in St. Louis, after the state agency issued an extension of an operating permit for a fuel transport site run by the energy infrastructure company Kinder Morgan. Environmental and civil rights groups argue that the DNR's permit didn't take into account how emissions from the facility would disproportionately expose low-income communities of color in St. Louis to high levels of air pollution.

Some 74 percent of residents in the community identify as people of color, and almost 20 percent speak a language other than English at home. The median household income in the area is \$26,000, just half the Missouri state average of \$54,000.

- > Earthjustice, Sierra Club, Concerned Citizens of St John, Lawyer's Committee for Civil Rights Under Law
- > Alleging violations of Title VI by the Louisiana DEQ and Louisiana Department of Health
 - failing to review the permit renewal applications submitted by the neoprene production facility (Denka Performance Elastomer LLC) and to determine whether to renew and strengthen those permits;
 - failing to conduct the public notice and comment process required by Louisiana and federal law for permit renewal applications; and
 - failing to control hazardous air pollution from Denka and other air toxics sources as needed to protect St. John residents from disproportionate, adverse impacts from this pollution.



> Arrowhead Landfill

- Uniontown, Alabama:
- Population of about 2,234
 - 88% black
 - Median household income - \$14,094
- Uniontown residents opposed the permitting and development of the Arrowhead landfill
- 2008: Facility began accepting coal ash
- Residents allege foul odors, upset appetite, respiratory issues, headaches, dizziness, nausea, vomiting, and excessive dust

ARROWHEAD LANDFILL



- > 2013 - 35 residents filed a Title VI Civil Rights complaint with EPA against ADEM
- > Alleged ADEM's authorization of construction of landfill had disparate impact on the African-Americans in community
- > Alleged health-related and non-health related harms:
 - Health effects from coal ash
 - Odors
 - Degradation of nearby cemetery,
 - Increased roaming of wild-life, and
 - Decreased property values



- > 2016: Defamation lawsuit by landfill against community group
- > 2016: Amendment to Civil Rights Complaint
 - alleging that ADEM engaged in and failed to protect them from a continuing practice of retaliation and intimidation
- > 2018: EPA finds insufficient evidence to support a Civil Rights Act Complaint
 - unable to find a causal connection between the permitted actions and the alleged harms
- > 2019: 3 Residents file sue in Alabama State Court argued that the use of tarps as alternative cover violated state law
 - Court finds in favor of residents and found ADEM violated state law

> CLAIMS:

- Common law nuisance and negligence class action brought by Freemansburg, PA residents against neighboring landfill
- Claims: noxious odors reducing ability to use and enjoy properties
- 3rd Circuit Ct Appeals:
 - Nuisance: nuisance class actions viable on behalf of large, geographically-defined classes relating to discharges (air, land, water);
 - Negligence: Industrial polluters have a common-law duty to operate in a manner that avoids unreasonable risk to their neighbors

Recognized EJ Concerns and Landfills:

“Recent studies have shown that environmental pollution, including from landfills, has a disparate impact on racial-ethnic minorities and low-income communities,” that “environmental laws remained underenforced in those communities,” and therefore that private rights of action to challenge pollution are of “greater importance to historically underrepresented communities whose interests are not always fully addressed by public agencies or through political process.”



- NY: Environment Justice Zone Map
- Neighborhood abutting the S.A. Dunn C&D debris landfill labeled in the zone
 - 2 weeks after the city of Rensselaer Common Council approved a resolution asking the DEC and Gov. Andrew M. Cuomo to close the landfill
 - Designation complicates facility's efforts to renew state operating permit (expires July 2022)
 - Based on new census data
- Increased public outreach
- Jan 2022: Landfill applied for renewal
- Still under review/full website and lots of monitoring going on

BROOKHAVEN LANDFILL (LONG ISLAND NY)



- > 1974: Opened municipal solid waste landfill
- > 1991: Switched to accepting ash from garbage collected and incinerated on Long Island and C&D Debris.
- > Black and Latino residents live close to landfill
- > Garbage: Census says residents close to landfill have 20% lower life expectancy
- > Pressure on NYDEC to close landfill for EJ Concerns



5. CUMULATIVE IMPACTS



- > Refers to the total burden – positive, neutral, or negative – from chemical and non-chemical stressors and their interactions that affect the health, well-being, and quality of life of an individual, community, or population at a given point in time or over a period of time.
- > Cumulative Impact Assessment is the process of accounting for cumulative impacts in the context of problem identification and decision-making. It requires consideration and characterization of total exposures to both chemical and non-chemical stressors, as well as the interactions of those stressors, over time across the affected population.

METHODS FOR CUMULATIVE IMPACT ASSESSMENTS (EPA DRAFT PUBLICATION)



- > Combine quantitative and qualitative data on stressors
- > Characterize the cumulative impacts of multiple decisions at once (e.g., permitting multiple facilities in an area).
- > Develop and combine stressors/indicators for one or more health and well-being outcomes
- > Standardize (in absolute and relative ways) identification and characterization of disproportionately impacted and overburdened communities.
- > Use biomarker identification for exposures to multiple chemical or non-chemical stressors.
- > Integrate multiple streams of data, including data from community and citizen science and traditional ecological knowledge.
- > Characterize health inequities within and across communities
- > Characterize health-benefiting assets of a community, such as measuring the benefits of green space.
- > i. Identify and account for historical stressor exposures in cumulative impact assessments.
- > j. Evaluate the cumulative impacts/benefits of various types of interventions.



- > Greenhouse Gas Emissions impacts on neighborhoods
- > Cumulative Impacts?
- > “Site specific impact scorecards”
- > Factors
 - emissions from construction activity
 - off-site leachate disposal,
 - on-site vehicle fuel usage,
 - waste emissions and soil oxidation data
 - Offsets: landfill gas collection, onsite recycling, carbon sequestration efforts, and “emissions avoided” through renewable energy projects

6. ENVIRONMENTAL JUSTICE FOR ALL ACT



SECTION 2

- Policy of Congress that each Agency will enforce EJ
- Identify and Address
 - Disproportionately adverse human health or environmental effects
- Provide direct guidance and technical assistance to affected communities



Sec 2

Creates a Civil Right to . . .

- Clean Air
- Safe and Affordable Drinking Water
- Protection from Climate Hazards
- Sustainable Natural Environment





Sec 4

Prohibited Discriminations . . .

- Intentional Discrimination – Pollution targeting person based on race, color, or national origin.
- Disparate Impact of Operations – If the activity 1) has a disparate impact, and 2) Company can't show it is “necessary to achieve the nondiscriminatory goal” or company refuses to adopt “a less discriminatory alternative,” then the activity is prohibited.



Sec 4

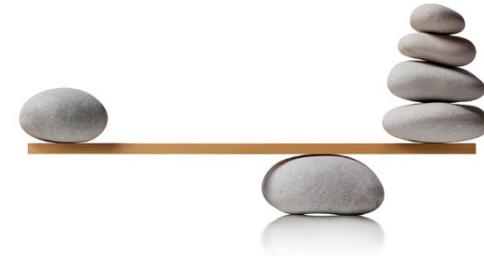
- “Has a disparate impact” and is “necessary to achieve the nondiscriminatory goal”
 - Who has the Burden of Proof?

- “Less discriminatory alternative”
 - Who says what is less discriminatory?



> Private Right of Action

- “Aggrieved by....”
- May File Suit
- Without Regard to Citizenship



> Remedy

- Intentional - Equitable Relief, Attorneys Fees, and Punitive Damages
- Disparate Impact – Attorneys Fees and Costs



> Agency Actions

- “Ensure each Program does not...deny any individual the benefits of, or subjecting any individual to discrimination or disparate impact...”
- Must consider “cumulative impacts” and find “**reasonable certainty of no harm**” to
 - General population, and
 - “Potentially exposed or susceptible subpopulation.”



- > Pressure from Headquarters/Washington
- > Pushing down to States
- > Title VI Complaints increasing
- > EPA putting pressure on State Agencies
 - Increase EJ tools in permitting and enforcement or lose funding
 - Make EJ Program Stronger

> EJ Zones being formed in States

- NY, NJ, NC, MD, WA, CA, CO

> EJ Laws

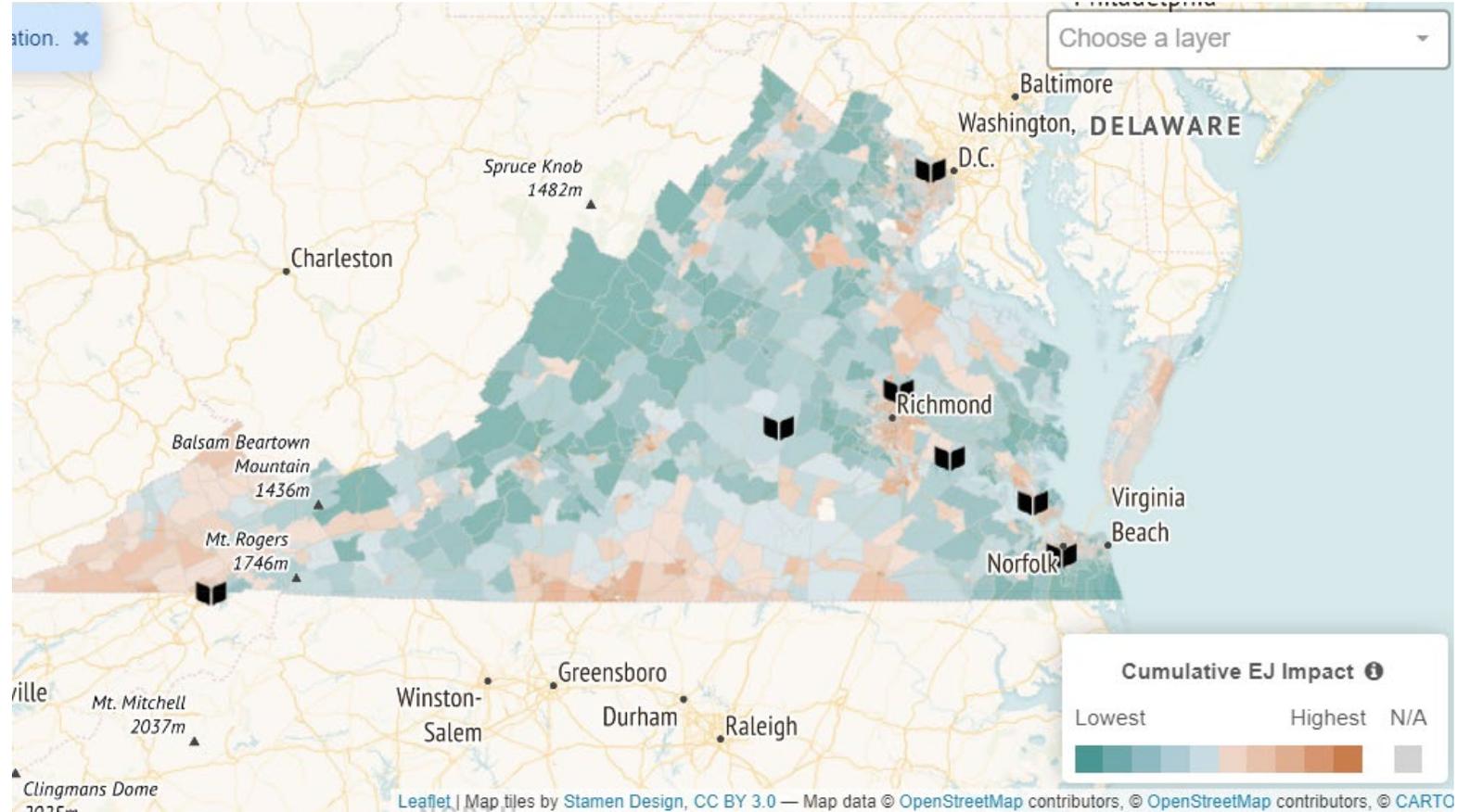
– New Jersey’s Environmental Justice Law (Sept. 18, 2020)

- Requires NJDEP to evaluate the environmental and public health impacts of certain facilities on overburdened communities when reviewing certain permit applications
- Census locates overburdened communities:
 - at least 35% of the households qualify as low-income households (at or below twice the poverty threshold)
 - at least 40% of the residents identify as minority or as members of a State recognized tribal community; or,
 - at least 40 % of the households have limited English proficiency (without an adult that speaks English “very well” according to the United States Census Bureau).

MAPPING FOR ENVIRONMENTAL JUSTICE (MEJ)



- > Virginia
- > Colorado (2020)



State Environmental Justice Mapping Tools

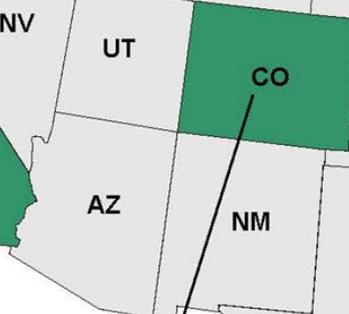
[Washington Environmental Health Disparities Map](#)



[CalEnviroScreen](#)



[Colorado Demo EJ Map](#)



[Maryland Environmental Justice Screen Tool](#)



[DEQ North Carolina Community Mapping System](#)

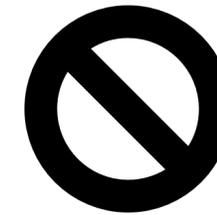
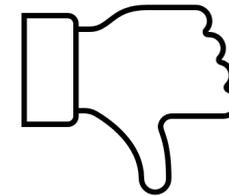
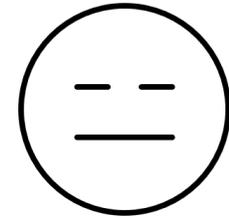


Source: <https://www.epa.gov/ejscreen/additional-resources-and-tools-related-ejscreen>

GLOSSARY: EVOLUTION OF WORD 'NIMBY'



- > **NIABY:** Not in anyone's backyard
- > **NIMD:** Not in my district
- > **NIMEY:** Not in my election year
- > **NIMFOS:** Not in my field of sight
- > **NIMFYE:** Not in my front yard either
- > **NIMTOO:** Not in my term of office
- > **NITL:** Not in this lifetime
- > **NOPE:** Not on planet earth
- > **NOT:** None of that
- > **NOTE:** Not over there either
- > **NUMBY:** Not under my backyard
- > **PIITBY:** Put it in their backyard
- > **WIIFM** What's in it for me?





Jessica J.O. King
Partner
Columbia, SC
P: 803.567.4602
F: 803.567.4601
jking@williamsmullen.com



Jessie King focuses her practice on environmental legal issues. A former chief attorney for the Environmental Quality Control Division of the South Carolina Department of Health and Environmental Control (SCDHEC), she has substantial experience helping companies and individuals obtain environmental permits, respond to notices of violation and environmental lawsuits, understand regulatory requirements, perform due diligence and negotiate business transactions.

Please note: This presentation contains general, condensed summaries of actual legal matters, statutes and opinions for information purposes. It is not meant to be and should not be construed as legal advice. Individuals with particular needs on specific issues should retain the services of competent counsel.