The Disparate Impact Trap

A look at the concept of disparate impacts in the context of environmental permitting in an effort to help state regulators and facility owners avoid the disparate impact trap.

Advocates for environmental justice frequently invoke the nondiscrimination mandate of Title VI of the Civil Rights Act of 1964 to address perceived "disparate impacts" from state environmental programs. These Title VI claims often focus on the issuance, renewal, or modification of facility permits by state environmental regulators. State environmental agencies are subject to Title VI because they receive grants or other financial assistance from the U.S. Environmental Protection Agency (EPA).

On the one hand, such disparate impact claims face significant legal hurdles, and their overall record of accomplishment has been quite limited.
On the other hand, these claims pose a major challenge both to state environmental regulators, who may lack legal authority to consider demographics in the permitting process,9 and also to industrial facilities, which have no control over the demographics of their host communities and which focus primarily on compliance with environmental regulations. This is the disparate impact trap.

Under President Obama, EPA is heavily emphasizing Title VI enforcement as part of its overall environmental justice program.9 It is therefore timely to revisit the concept of disparate impacts in the context of environmental permitting. This article sketches two closely related ideas that may assist state regulators and facility owners in evaluating these disparate impact claims. First, alleged disparate impacts from environmental permitting are often based on arbitrary comparisons rather than on objective analysis. Second, even where disparate impacts do exist, they still may not reflect any impermissible “discrimination.”10

The Search for Disparate Impacts
A facility or activity is said to have a disparate impact if—without any intentional discrimination at all—its potential adverse effects fall disproportionately on members of a racial or ethnic minority group. Before we can evaluate proportionality, however, we first need to understand what is being compared to what.

Identifying disparate impacts can be straightforward where the relevant comparison to be made is relatively clear. Examples include the employment discrimination context (under Title VII of the Civil Rights Act of 196411) and other more traditional federally funded programs (under Title VI).

In regard to hiring practices, for example, we can compare the racial composition of an employer’s workforce to the racial composition of the qualified labor pool.12 This is reasonable because, over time, we would expect the workforce to be demographically similar to the qualified labor pool, assuming that no impermissible discrimination is in play.

Likewise, for many federally funded programs, we can compare the racial composition of the funding recipients to the racial composition of the qualified applicants. Again, we presume that absent impermissible discrimination, the pool of funding recipients would, over time, be demographically similar to the pool of qualified applicants.

When it comes to environmental justice and facility permitting, however, no such straightforward comparisons exist. It is difficult enough to identify the population potentially affected by the facility (the “target” group). It is even more difficult to identify the appropriate comparison group (the “reference” group) with any objectivity. Yet, these choices are literally outcome-determinative, because the nature and extent of any disparate impacts are purely a function of the demographics of these arbitrarily chosen groups.13

A basic problem in defining the target group is that proximity is often used as a proxy for actual exposure to the adverse impacts of concern. Lacking data on whether, and to what extent, proximity correlates with actual exposure, different proximities are selected arbitrarily to define the target population (and its demographic composition). These arbitrary choices can include measures based on geographic distances, on similar or different political or statistical jurisdictions, or on other geographical proxies for actual exposures. For example, a target group

Environmental Justice

The term “environmental justice” has no fixed or technical definition. The U.S. Environmental Protection Agency (EPA) describes it as follows:

“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. EPA has this goal for all communities and persons across this Nation. It 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.”

Source: www.epa.gov/environmentaljustice (last accessed November 19, 2012).

The U.S. Government Accountability Office recently recommended that EPA develop a clearer and more focused definition, but EPA disagreed that a better definition was necessary.1
could be selected based on a specified distance from a facility, a particular jurisdiction, or a specific direction or specific pattern of activity.

Even if a target group were selected on the basis of actual exposure, the choice of a reference group for comparison is still based on arbitrary judgments. There is no control group that precisely matches the demographic composition of the target group but lacks the presence of the facility of concern.

One can simply draw a circle with, say, a one-mile radius around the facility. Or one could consider only those residents within the circle who live downwind (or downgradient) from that facility. Or, instead of drawing circles, one could look to existing political or statistical jurisdictions, such as census tracts, zip codes, townships, cities, counties, or even states. Each of these potential reference groups has a different demographic composition, which, in turn, means that the results of a disparate impact analysis will also be different. Yet no one can say which choice is more accurate, or more “appropriate,” than another choice.

This analytical chaos reflects the fact that no benchmark or theoretical standard exists for selecting a demographic reference group as the “appropriate” basis for comparison. Neither EPA’s Title VI regulations nor EPA’s Draft Title VI Guidance for EPA Assistance Recipients offers any principled basis for selecting “appropriate” target populations or reference populations. Because there are no principled answers, most claims of disparate impact from environmental permitting ultimately rest on arbitrary line-drawing.

The Search for Discrimination

After the lines have been drawn, and a disparate impact identified, advocates for environmental justice tend to equate the existence of a disparate impact with impermissible discrimination. This equation rests on a faulty premise, however, and the reason why is closely related to the discussion above.

Again, in the employment discrimination context (under Title VII), and in other, more traditional, Title VI contexts, disparate impacts shift the burden of proof to the defendant because—absent impermissible discrimination—we would generally expect the target group (e.g., the workforce) to resemble the larger comparison group (e.g., the qualified labor pool). But when it comes to environmental justice, such expectations are unjustified. In fact, they are contrary to both common sense and real-world experience.

Fundamentally, there is no reason to expect that the demographics of the population affected by a particular facility would mirror the demographics of the zip code, the city, the county, or the state in which the facility is located. Americans of a particular race or national origin are not distributed uniformly across the land. So we have no basis for believing that the demographics of the target population would resemble those of a larger reference group, such as the city or the state.

In other words, even if (despite the problem identified above in Part I) there were some agreed-upon or theoretically sound basis for selecting the “appropriate” reference group, there is still no reason to expect that reference group to be demographically similar to the smaller target group. Absent a persuasive basis for the expectation of demographic similarity, any disparate impact that may be identified is simply a disparity (i.e., a difference). It raises no inference of discrimination.
Chief Judge Richard A. Posner of the U.S. Court of Appeals for the Seventh Circuit made a similar point in *Latimore vs. Citibank Federal Savings Bank*,17a case involving disparate impacts in mortgage lending. Writing for the three-judge appellate panel, Judge Posner explained:

The fact that a qualified black is passed over for promotion in favor of a white has been thought sufficiently suspicious to place on the defendant the minimum burden of presenting a noninvidious reason why the black lost out. . . . [But] we pointed out the unsuitability of the *McDonnell Douglas vs. Green*, 411 U.S. 792 (1973) framework when there is no basis for comparing the defendant’s treatment of the plaintiff with the defendant’s treatment of other, similarly situated persons. . . . No reasonable suspicion of racial discrimination can arise from the mere fact of a discrepancy . . . . At the heart of *McDonnell Douglas* is the idea that if the black is treated worse than the white in a situation in which there is no obvious reason for the different in treatment . . . there is something for the employer to explain.18

Similarly, in analyzing claims of disparate impacts from environmental permitting decisions, there is “no basis for comparing” the state agency’s treatment of the target group with its treatment of any larger reference group that is not affected by the same facility. Even if the demographic makeup of the two groups differs quite substantially, “no reasonable suspicion of . . . discrimination can arise from the mere fact of a discrepancy.”

**Conclusion**

At the end of the day, any given target group will resemble some reference groups fairly closely, other reference groups, not so much. Where disparities are identified, we should not be particularly surprised, as there was no reason to expect homogeneity of impacts in the first place. The disparities tell us more about the reference group chosen than about the attitudes of those involved in permitting and operating the facility. State regulators and facility owners alike should bear in mind that sometimes a difference is just a difference.

**Notes and References**

3. The term “disparate impacts” does not appear in Title VI or in EPA’s regulations implementing Title VI. However, EPA’s regulations provide, inter alia, that no recipient of EPA funding assistance may “use criteria or methods of administering its program or activity which have the effect of subjecting individuals to discrimination because of their race, color, national origin, or sex . . . .” 40 C.F.R. § 7.35(b) (2011) (emphasis supplied). This category of prohibited “criteria or methods” is commonly referred to as “disparate impact.” See generally Alexander vs. Sandoval, 532 U.S. 275 (2001).
7. See, e.g., Rosamere Neighborhood Ass’n vs. EPA, 581 F.3d 1169 (9th Cir. 2009).
8. State regulators typically have no legal authority to base permit decisions on social factors such as the demographic makeup of the population(s) potentially affected by a facility. Moreover, any permit decision based on demographics could be viewed as “reverse discrimination” that raises serious legal questions. See, e.g., Roci vs. DeSantiago, 129 S. Ct. 2658 (2009); Guetter vs. Bollinger, 539 U.S. 306 (2003).
10. The precise legal interpretation of the term “discrimination” under Title VI is beyond the scope of this article, as are other bases for environmental justice claims, such as Executive Order 12,898 (1994). See generally Michael W. Steinberg & Tim A. Pohle, “Environmental Justice and RCRA Permits: Nothing is Quite What It Seems,” 26/22 Environment Reporter (BNA) 1025 (Oct. 6, 1995).
12. See Ramona L. Paetzold & Steven L. Willborn, The Statistics of Discrimination: Using Statistical Evidence in Discrimination Cases § 5.04, at 5-7.5-9 (disparate impact analysis normally addresses qualified applicants or relevant labor markets, but may use for comparison the general population when applicant data “are not available, reliable, or are believed to be biased, and where statistical information regarding the labor market is difficult to ascertain.”)
13. Alice Kawas, Environmental Justice: Bridging the Gap Between Environmental Laws and ‘Justice,’ 47 Am. U.L. Rev. 221, 231 (1997) (“Much depends on how relevant communities are defined and upon what constitutes a ‘proportional’ distribution of desirable or undesirable land uses. There are no easy or absolute answers to either of these questions.”).
14. EPA does not have separate Title VI regulations, but rather consolidated nondiscrimination regulations that are now codified at 40 C.F.R. Part 7 (2011).
16. Leslie Kish, Survey Sampling 163 (1965) (“Generally, population variables are not ‘well-mixed’: they are not randomly distributed in groups and clusters . . . .”). Moreover, the factors that typically guide facility siting decisions, such access to water supplies, mineral resources, transportation corridors, etc., are also not randomly distributed.