

## A Risk-Based Approach to Protect Communities

by Kenneth J. Warren\*

Last month, the U.S. Environmental Protection Agency (EPA) released for public comment its Interim Framework for Advancing Consideration of Cumulative Impacts. The Framework encourages EPA programs to consider the totality of exposures to chemical and nonchemical stressors affecting human health and the environment, together with vulnerabilities and susceptibilities that may increase the likelihood that exposures will result in illness or other injuries. By engaging with communities and considering the cumulative effects of an action on the exposed population, the EPA can best protect citizens from environmental injuries.

The Framework does not identify the legal basis for requiring cumulative impact analysis. As I discussed in my January 2022 column for *The Legal Intelligencer*, few environmental statutes expressly authorize agencies to consider cumulative impacts. Hence disadvantaged communities and administrative agencies at times rely upon civil rights laws for support. On the federal level, this ground has become more tenuous.

Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color or national origin. In *Louisiana v. U.S. Environmental Protection Agency*, 712 F. Supp. 3d 820 (W.D. La. 2024), Louisiana challenged regulations adopted by the Department of Justice and the EPA, respectively, pursuant to Title VI that prohibit recipients of federal funds from taking actions that produce a discriminatory effect on a protected class. *Louisiana* contended that DOJ and EPA regulations contravene the U.S. Supreme Court holding in *Alexander v. Sandoval*, 532 U.S. 275 (2001), limiting the prohibition in Section 601 of Title VI to intentional discrimination. The DOJ and EPA responded that their authority under Section 602 to effectuate Section 601 afforded them discretion to require recipients of federal funds to examine an action's cumulative, disparate impacts on the affected population.

The *Louisiana* court issued a permanent injunction prohibiting the EPA from enforcing its Title VI disparate-impact regulations against any entity in the State of Louisiana. The court cited the spending clause of the Constitution, finding Title VI does not contain the requisite unambiguous language authorizing an agency to withhold a state's funding. The court also found interpreting Title VI to allow agencies to require disparate impact analyses violated the "major questions" doctrine absent clear Congressional intent to extend federal agency authority to activities otherwise within the state's domain.

Most fundamentally, the court viewed disparate impact analysis to create an unlawful race-based decision. The court noted: "The public interest here is that government agencies abide by its laws, and treat all of its citizens equally, without considering race. To be sure, if a decision maker has to consider race, to decide, it has indeed participated in racism. Pollution does not discriminate. Surely, that is why Title VI so plainly does not mention disparate impact."

The *Louisiana* court failed to acknowledge that communities overburdened with multiple sources of pollution and suffering from poor health conditions and other stressors are disproportionately comprised of minority members. Yet on the question of whether Title VI

authorizes disparate impact regulations, the Louisiana court's outcome is consistent with *Alexander* and what today's Supreme Court majority would likely rule. Given the current political divisiveness of disparate impact prohibitions, the views of the incoming conservative administration and Congress, and the recent efforts of the Supreme Court to limit agency authority, relying on Title VI as a legal foundation for cumulative impact analysis is not a practical path forward.

A different result may be attained under certain state laws. In 2020, the New Jersey legislature enacted an Environmental Justice Law, N.J.S.A. 13:1D-157 (EJ Law). Under the EJ Law, when evaluating an application for a permit to construct or operate certain types of facilities in a minority or low-income ("overburdened") community, disproportionate effects must be mitigated or a compelling public interest demonstrated and control measures implemented. Initially under an Administrative Order No. 2021-25 issued by the New Jersey Department of Environmental Protection (NJDEP) and now by regulation, permit applicants must undertake enhanced community engagement, assess impacts from environmental and public health stressors more severe than in appropriate comparison geographic areas, and implement mitigation or control measures to avoid or minimize adverse impacts. This is similar to the process the EPA proposes in the Framework and, to date, has worked well.

*In re Passaic Valley Sewerage Commission*, (NJDEP July 18, 2024) (Passaic), involved an application by the Passaic Valley Sewerage Commission (PVSC) to amend its Title V Air Operating Permit to construct and operate an on-site emergency standby generating facility in an overburdened community. By providing the sewage treatment facility with power in the event of an electric outage, the generators would serve the public interest in avoiding the discharge of raw sewage to surrounding waterbodies.

NJDEP concluded that PVSC would minimize potential adverse environmental and public health stressors. Employing state of the art air pollution control equipment, restricting use of the standby generators to emergency operations, using on-site battery storage, and reducing emissions from existing air sources would result in net overall emission reductions. NJDEP memorialized these and related measures in special conditions in the permit. NJDEP concluded that this process and outcome satisfied the EJ Law and Title VI, and reduced risk to the host community.

Title VI disputes have unnecessarily overshadowed the usefulness of cumulative impact analysis in minimizing risk. The Endangered Species Act presents a poignant example of applying cumulative impacts analysis independent of civil rights considerations. Section 7 of the ESA requires federal agencies to ensure that actions they perform or fund are "not likely to jeopardize the continued existence" of a listed species. An action jeopardizes the continued existence of the species if it would reasonably be expected to reduce the species' survival and recovery. When jeopardy may occur, the action agency must consult with a federal resource agency such as the Fish and Wildlife Service. The service issues a biological opinion (BiOp) along with "reasonable and prudent" mitigation measures.

The ESA requires the service to take a snapshot of the species' health to use as an environmental baseline. The service must add the effects of future state and private actions (cumulative effects) to the baseline to determine whether the action is likely to jeopardize the species' continued existence. The likely effects of climate change must be considered as part of the baseline or as a cumulative effect.

The ESA's consideration of cumulative impacts has teeth. In *Appalachian Voices v. United States Department of Interior*, 25 F.4th 259 (4th Cir. 2022), environmental organizations challenged the BiOp and incidental take statement that the service prepared for a proposed natural gas pipeline. The plaintiffs contended that the service insufficiently protected two species of endangered fish, the Roanoke logperch and the candy darter.

The court found to the service's evaluation of the environmental baseline inadequate because it failed to examine all of the existing activities and stressors already impacting the species. The service's cumulative effects analysis was likewise deficient because it failed to identify anticipated impacts from numerous non-federal activities, focus narrowly on the action area, and account for increasing impacts from climate change. Because the evaluation of the environmental baseline and the cumulative effects of the proposed action were deficient, the court vacated the BiOp and incidental take statement.

As the Endangered Species Act illustrates, cumulative impact analysis is a tool to minimize risk and injury from pollution, one of the principal goals of environmental law. Although administrative efficiency weighs in favor of setting uniform national or statewide environmental standards, protecting human health and the environment may require a more place-based approach.

To enhance environmental protection consistent with statutory goals and mandates, agencies setting standards or reviewing permit applications could first define the population potentially affected by a proposed action and, with community input, the community's baseline conditions. Anticipated cumulative changes to those conditions caused by the proposed action and other factors such as climate change could be assessed. Mitigation or control measures could be designed to minimize adverse impacts identified. Viewing cumulative effects analysis as one of several tools to achieve risk reduction goals may shed some of the baggage preventing its use.

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