



Environmental Justice and Environmental Law

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Environmental Law
Fall 2013

November 25, 2013



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Environmental Justice - History



- Deep Roots
 - United Church of Christ *Toxic Wastes and Race in the United States* (1987); GAO studies
 - *National Law Journal* series
 - 1992 Environmental Justice Act
 - E.O. 12,898
- Initial strong legal efforts to identify enforceable EJ rights for both permitting and enforcement
- Roadblocks
 - Equal Protection and Due Process challenges: intent
 - Title VI: private right of action
 - Difficulties of proof

Environmental Justice Act of 1992



HR 5326 IH1S
102d CONGRESS

2d Session

H. R. 5326

To establish a program to assure nondiscriminatory compliance with all environmental, health and safety laws and to assure equal protection of the public health.

IN THE HOUSE OF REPRESENTATIVES

June 4, 1992

Mr. LEWIS of Georgia (for himself, Mr. MILLER of California, Mr. TOWNS, Mr. OWENS of New York, Ms. NORTON, Mr. DELLUMS, Mr. DIXON, Mrs. COLLINS of Michigan, Mr. HAYES of Illinois, Ms. WATERS, Mr. PAYNE of New Jersey, and Mr. BLACKWELL) introduced the following bill; which was referred jointly to the Committees on Energy and Commerce, Education and Labor, Public Works and Transportation, and Agriculture

A BILL

To establish a program to assure nondiscriminatory compliance with all environmental, health and safety laws and to assure equal protection of the public health.

USEPA 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. 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.

<http://www.epa.gov/compliance/ej/>

Key EJ Issues for Environmental Law



How will environmental justice concerns affect:

- Development of rules and public notice procedures?
- Permits for facilities?
- The decision to pursue enforcement, both civil and criminal?
- Sentencing and punishment?

EJ and Rule Development and Permitting



- Environmental justice factors in development of environmental rules that might disproportionately affect EJ communities
 - Low sulfur gasoline rule
 - Definition of solid waste
- New EPA guidance on rule development – focus on process

Title VI of Civil Rights Act of 1964:

Nondiscrimination In Federally Assisted Programs



- Section 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.
- To establish a prima facie case of discrimination, complainants challenging environmental permitting decisions pursuant to § 601 **must demonstrate that the decision was motivated by intentional discrimination**
- **Very few cases in which intentional discrimination has been found**

Attacking agency decisions on EJ

Grounds: Title VI of Civil Rights Act

Nondiscrimination In Federally Assisted Programs



- Section 602
 - Directs each Federal agency administering a program of Federal financial assistance by way of grant, contract, or loan to **take action pursuant to rule, regulation, or order of general applicability** to effectuate section 601
 - Allows a **violation to be established by proof of unintentional discrimination, discriminatory effect, or disparate impact, arguably a less stringent burden of proof (not intentional)**
 - Can bring administrative complaint for discriminatory effect/impact

EPA's Title VI Implementing Regs



- 40 C.F.R. Part 7
- Prohibits **EPA-funded agencies** taking acts, including permitting actions, that are
 - **intentionally discriminatory** or
 - have a **discriminatory effect**
 - based on race, color, or national origin

Administrative Complaints Under Title VI



- Complainant has no formal right to participate in the administrative process
- No time limits
- No damages to complainant
- Funding revoked from entity
- No ability to challenge decision through judicial review



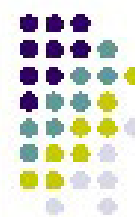
Title VI Administrative Petitions at EPA – Where Are They Today?

- Obama Administration is more aggressive on EJ policy
- EPA has yet to make an affirmative finding of discrimination on any administrative petition
- Settlements, however, have yielded change in state procedures
- Some cases have been in the docket for 16 years
- Uptick of petitions
- Latest activity – getting DOJ involved

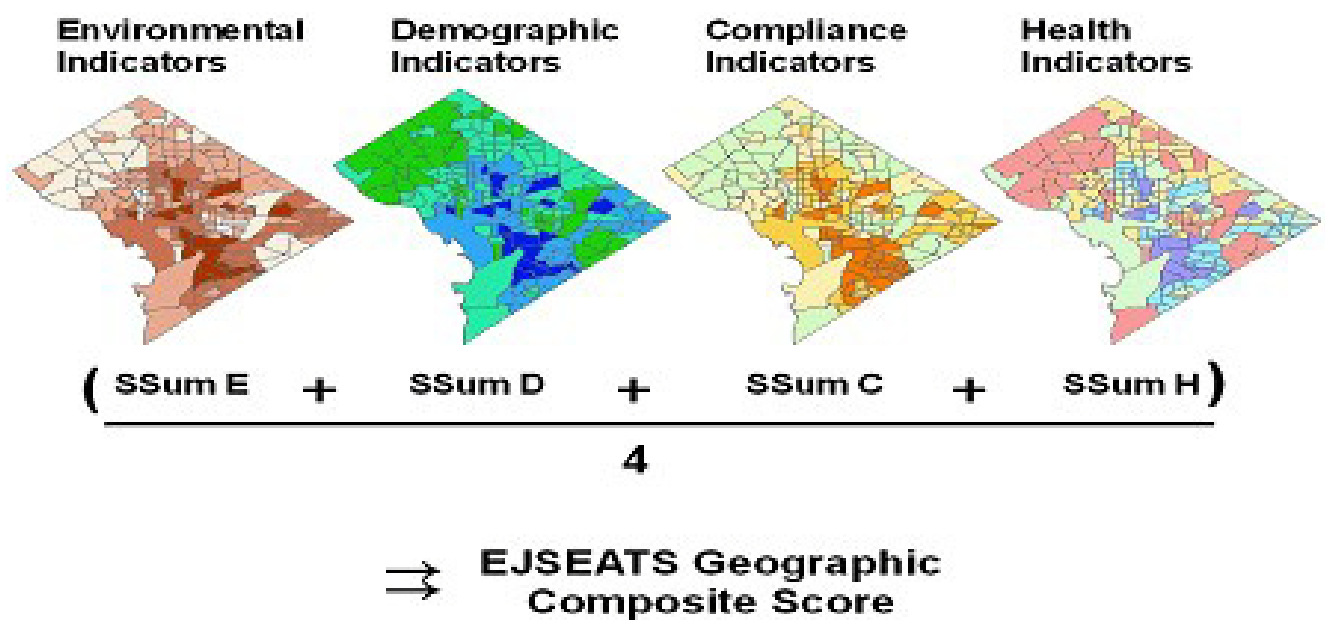


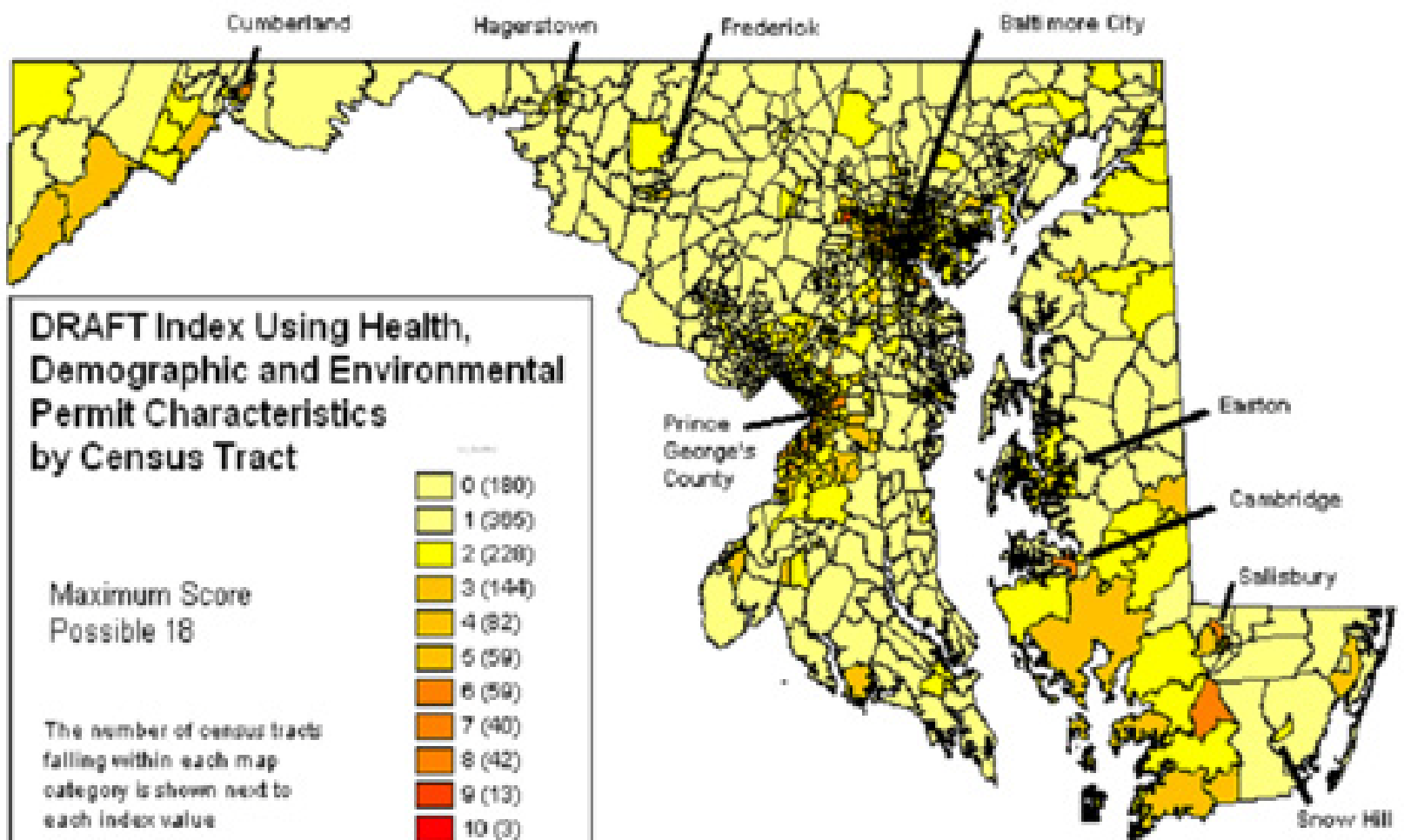
EJ and Environmental Enforcement

- History: need to process complex data to identify highest priority sites and issues
- EPA has worked hard to develop EJ Geographic Information Systems
 - Region 6 Multimedia Targeting List (1994)
 - Environmental Justice Index
 - Early stage implementation issues
 - EJSEAT

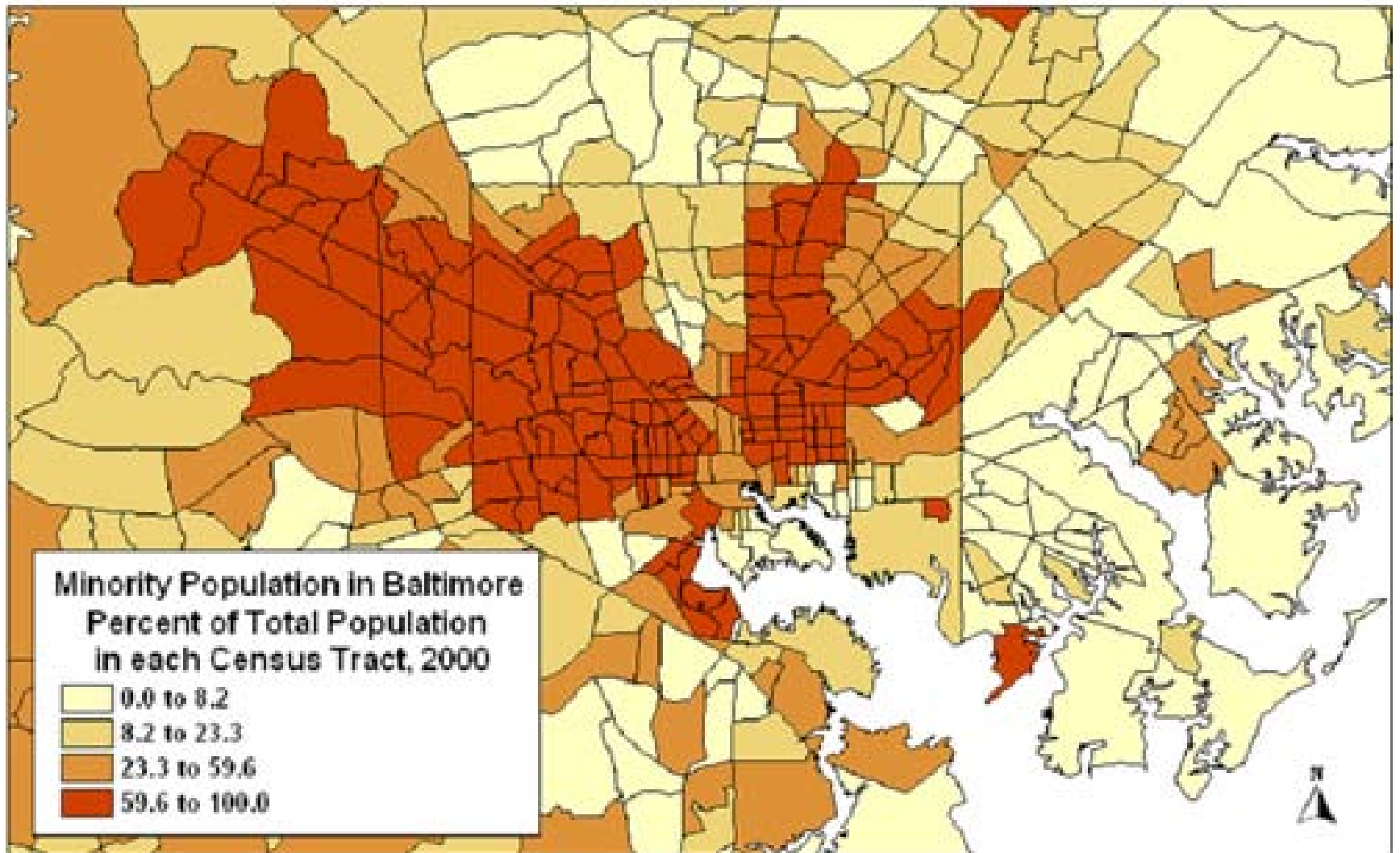


EJSEAT Scoring Methodology





Example of Socio-demographic Data





Environmental Justice and the Decision to Enforce

- EPA's Plan EJ 2014: EJ used to select national priorities, target specific enforcement actions that affect “overburdened communities”, and seek remedies that benefit such communities
- Agency EJ action plans
 - Region 6: inspections and enforcement in EJ areas for benzene in Houston, Texas
 - Oil and gas industry (subject to MACT HH/HHH) inspections and enforcement in EJ areas in New Mexico

Environmental Justice in Penalties and Sentencing



- Criminal sentencing: "vulnerable victims"
 - Jackson and Peters
- Criminal sentencing: Crime Victim Rights Act
 - CITGO
 - BP plea agreement



Potential Future Developments



- EPA Environmental Justice guidance on permitting – Dec. 2010
- Accelerated review and enforcement of Title VI administrative petitions
 - *Rosemere*
- Challenges to legal boundaries for remedies
 - Equal Protection limits?
 - Minimized by careful crafting of goals and targets
- State activity
 - EJ challenge to implementation of AB32

EJ – the Legal Bottom Line



- EJ has not yielded a bright legal test for either intentional discrimination or disparate impact
- It has had strong influence on EPA's (and other agencies') priorities and choices
- As a result, while not a typical legal obligation enforceable in court, you must account for it in environmental legal strategy and litigation



Questions?

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