



CURRENT ENVIRONMENTAL ISSUES AFFECTING MISSOURI

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Current Environmental Issues Affecting Missouri

1. “Waters of the United States” Rule

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1. “Waters of the United States” Rule
2. Environmental Justice Initiatives

1. “Waters of the United States” Rule

The 1972 amendments to the Clean Water Act established federal jurisdiction over “navigable waters,” defined in the Act as the “waters of the United States” (CWA Section 502(7))

“Waters of the United States” Rule

The Clean Water Act does not define “waters of the United States”; rather, it provides discretion for EPA and the U.S. Department of the Army to define “waters of the United States” in regulations.

“Waters of the United States” Rule

The Supreme Court has issued three major opinions concerning the definition of “waters of the United States”

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1985 - *United States v. Riverside Bayview Homes, Inc.*,

- deferred to the Corps' assertion of jurisdiction over wetlands adjacent to a traditional navigable water.

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Adjacent wetlands may be regulated as waters of the United States because they are “inseparably bound up” with navigable waters and “in the majority of cases” have “significant effects on water quality and the aquatic ecosystem” in those waters.

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2001 - Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)

- rejected a claim of federal jurisdiction over non-navigable, isolated, intrastate ponds that lack a sufficient connection to traditional navigable waters.

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“Navigable” must be given meaning within the context and application of the statute.

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The use of “isolated” non-navigable intrastate ponds by migratory birds was not by itself a sufficient basis for the exercise of federal regulatory authority under the Clean Water Act.

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2006 - *Rapanos v. United States*

Four Justices stated that “waters of the United States” includes only:

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-- relatively permanent, standing or continuously flowing bodies of water

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- relatively permanent, standing or continuously flowing bodies of water
- ‘forming geographic features’ that are described in ordinary parlance as ‘streams[,] . . . oceans, rivers, [and] lakes,’” and “wetlands

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- relatively permanent, standing or continuously flowing bodies of water
- ‘forming geographic features’ that are described in ordinary parlance as ‘streams[,] . . . oceans, rivers, [and] lakes,’” and “wetlands
- with a continuous surface connection” to a “relatively permanent body of water connected to traditional interstate navigable waters.”

Justice Kennedy's concurring opinion

-- “to constitute ‘navigable waters’ under the Act, a water or wetland must possess a ‘significant nexus’ to waters that are or were navigable in fact or that could reasonably be so made.”

Justice Kennedy's concurring opinion

- adjacent waters have a significant nexus if:
 - “either alone or in combination with similarly situated lands in the region

Justice Kennedy's concurring opinion

-- adjacent waters have a significant nexus if:

-- “either alone or in combination with similarly situated lands in the region

-- significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as ‘navigable.’”

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Joint EPA-Corps Memo dated June 6, 2007

The agencies will assert jurisdiction over the following waters :

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- Traditional navigable waters

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- Traditional navigable waters
- Wetlands adjacent to traditional navigable waters

Current Environmental Issues Affecting Missouri

- Traditional navigable waters
- Wetlands adjacent to traditional navigable waters
- Non-navigable tributaries of traditional navigable waters that are relatively permanent where the tributaries typically flow year-round or have continuous flow at least seasonally (e.g ., typically three months)

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- Traditional navigable waters
- Wetlands adjacent to traditional navigable waters
- Non-navigable tributaries of traditional navigable waters that are relatively permanent where the tributaries typically flow year-round or have continuous flow at least seasonally (e.g ., typically three months)
- Wetlands that directly abut such tributaries

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The agencies will decide jurisdiction over the following waters based on a fact-specific analysis to determine whether they have a significant nexus with a traditional navigable water:

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- Non-navigable tributaries that are not relatively permanent

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- Non-navigable tributaries that are not relatively permanent
- Wetlands adjacent to non-navigable tributaries that are not relatively permanent

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- Non-navigable tributaries that are not relatively permanent
- Wetlands adjacent to non-navigable tributaries that are not relatively permanent
- Wetlands adjacent to but that do not directly abut a relatively permanent nonnavigable tributary

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2015 – 33 CFR Part 328 – Definition of Water of the United States

- Created a system to determine which waters were “jurisdictional waters” of the U.S.

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- Traditional navigable waters, interstate waters, and the territorial seas

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- Traditional navigable waters, interstate waters, and the territorial seas
- Impoundments of jurisdictional waters

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- Tributaries and adjacent waters (are jurisdictional because science confirms that they have a significant nexus to traditional navigable waters, interstate waters, or territorial seas)

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- Tributaries and adjacent waters (are jurisdictional because science confirms that they have a significant nexus to traditional navigable waters, interstate waters, or territorial seas)
- Those waters found after a case-specific analysis to have a significant nexus to traditional navigable waters, interstate waters, or the territorial seas, either alone or in combination with similarly situated waters in the region.

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Multiple lawsuits filed in Federal courts across the United States challenging the “Waters of the U.S.” Rule

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2016 Presidential Election

February 28, 2017 - Executive Order on Restoring the Rule of Law, Federalism, and Economic Growth

- Directs EPA and the Corps to review the 2015 WOTUS Rule.
- Directs agencies to “consider interpreting the term ‘navigable waters’ . . . in a manner consistent with” Justice Scalia’s plurality opinion in *Rapanos v. United States*, 547 U.S. 715 (2006)

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March 6, 2017 - EPA and U.S. Army Corps of Engineers publish intent to review and rescind or revise the 2015 Clean Water Rule

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March 30, 2018 – EPA Administrator Pruitt declares EPA Administrator is the sole authority over WOTUS designations, revoking the authority of regional administrators and the Army Corps of Engineers.

April 21, 2020 – Navigable Waters Protection Rule

“At this time, the regulations defining the scope of federal CWA jurisdiction are those portions of the CFR as they existed before the amendments promulgated in the 2015 Rule.”

April 21, 2020 – Navigable Waters Protection Rule

“The agencies concluded that it was appropriate as an interim matter to restore the pre-existing regulations to provide regulatory certainty as the agencies considered the proposed revised definition of ‘waters of the United States’ and because, as implemented, those prior regulations adhere more closely than the 2015 Rule to the jurisdictional limits reflected in the statute and case law.”

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2020 Presidential Election

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January 20, 2021 – Executive Order 13990

“It is, therefore, the policy of my Administration to listen to the science; to improve public health and protect our environment; to ensure access to clean air and water;
”
. . . .

January 20, 2021 – Executive Order 13990

“The heads of all agencies shall immediately review all existing regulations, orders, guidance documents, policies, and any other similar agency actions (agency actions) promulgated, issued, or adopted between January 20, 2017, and January 20, 2021, that are or may be inconsistent with, or present obstacles to, the policy set forth in section 1 of this order.”

June 2021 - EPA, Army Announce Intent to Revise Definition of WOTUS

“Today, the U.S. Environmental Protection Agency (EPA) and Department of the Army (the agencies) are announcing their intent to revise the definition of “waters of the United States” (WOTUS) to better protect our nation’s vital water resources that support public health, environmental protection, agricultural activity, and economic growth.”

June 2021 - EPA, Army Announce Intent to Revise Definition of WOTUS

“After reviewing the Navigable Waters Protection Rule as directed by President Biden, the EPA and Department of the Army have determined that this rule is leading to significant environmental degradation,” said EPA Administrator Michael S. Regan.”

June 2021 - EPA, Army Announce Intent to Revise Definition of WOTUS

“Communities deserve to have our nation’s waters protected. However, the Navigable Waters Protection Rule has resulted in a 25 percentage point reduction in determinations of waters that would otherwise be afforded protection,” said Acting Assistant Secretary of the Army for Civil Works Jaime A. Pinkham.”

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Litigation goes on.

Environmental Justice Initiatives

January 2021 – Executive Order 13990

“It is, therefore, the policy of my Administration to listen to the science; to improve public health and protect our environment; to ensure access to clean air and water; to limit exposure to dangerous chemicals and pesticides; to hold polluters accountable, including those who disproportionately harm communities of color and low-income communities; . . . and to prioritize both environmental justice and the creation of the well-paying union jobs necessary to deliver on these goals.”

January 2021 – Executive Order 14008

Sec. 219. *Policy.* To secure an equitable economic future, the United States must ensure that environmental and economic justice are key considerations in how we govern. . . .

January 2021 – Executive Order 14008

“Agencies shall make achieving environmental justice part of their missions by developing programs, policies, and activities to address the disproportionately high and adverse human health, environmental, climate-related and other cumulative impacts on disadvantaged communities, as well as the accompanying economic challenges of such impacts. . . .

January 2021 – Executive Order 14008

Sec. 222. Agency Responsibilities. In furtherance of the policy set forth in section 219:

(a) The Chair of the Council on Environmental Quality shall, within 6 months of the date of this order, create a geospatial Climate and Economic Justice Screening Tool and shall annually publish interactive maps highlighting disadvantaged communities.

April 7, 2021 - EPA Administrator Announces Agency Actions to Advance Environmental Justice

“In his message, Administrator Regan, while acknowledging the agency’s past environmental justice efforts, called on all EPA offices to take the following steps:”

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April 7, 2021 - EPA Administrator Announces Agency Actions to Advance Environmental Justice

“Strengthen enforcement of violations of cornerstone environmental statutes and civil rights laws in communities overburdened by pollution.”

April 7, 2021 - EPA Administrator Announces Agency Actions to Advance Environmental Justice

“Take immediate and affirmative steps to incorporate environmental justice considerations into their work, including assessing impacts to pollution-burdened, underserved, and Tribal communities in regulatory development processes and to consider regulatory options to maximize benefits to these communities.”

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Friends of Buckingham v. Virginia Air Pollution Control Board, 947 F. 3d 68 (4th Circuit 2020)

Friends of Buckingham and the Chesapeake Bay Foundation, Inc. challenge the Virginia Air Pollution Control Board's award of a permit for construction of a compressor station on behalf of Intervenor Atlantic Coast Pipeline, LLC ("ACP") in Union Hill, Virginia.

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Friends of Buckingham v. Virginia Air Pollution Control Board, 947 F. 3d 68 (4th Circuit 2020)

The Compressor Station is one of three such stations planned to support the transmission of natural gas through the ACP's 600-mile pipeline, which is projected to stretch from West Virginia to North Carolina.

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Friends of Buckingham v. Virginia Air Pollution Control Board, 947 F. 3d 68 (4th Circuit 2020)

"The purpose of an environmental justice analysis is to determine whether a project will have a disproportionately adverse effect on minority and low income populations." *Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 541 (8th Cir. 2003).

"Although the term 'environmental justice' is of fairly recent vintage, the concept is not." *Jersey Heights*, 174 F.3d at 195 (King, J., concurring).

Friends of Buckingham v. Virginia Air Pollution Control Board, 947 F. 3d 68 (4th Circuit 2020)

The Board's reliance on air quality standards led it to dismiss EJ concerns. Even if all pollutants within the county remain below state and national air quality standards, the Board failed to grapple with the likelihood that those living closest to the Compressor Station — an overwhelmingly minority population according to the Friends of Buckingham Survey — will be affected more than those living in other parts of the same county.

Friends of Buckingham v. Virginia Air Pollution Control Board, 947 F. 3d 68 (4th Circuit 2020)

The Board rejected the idea of disproportionate impact on the basis that air quality standards were met. But environmental justice is not merely a box to be checked, and the Board's failure to consider the disproportionate impact on those closest to the Compressor Station resulted in a flawed analysis.

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Baptiste v. Bethlehem Landfill Co., 965 F. 3d 214 (3rd Circuit 2020)

Action against the Bethlehem Landfill Company on behalf of a class of homeowner-occupants and renters claiming interference with the use and enjoyment of their homes and loss in property value caused by noxious odors and other air contaminants emanating from the Bethlehem landfill.

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Baptiste v. Bethlehem Landfill Co., 965 F. 3d 214 (3rd Circuit 2020), fn 9.

PADEP has identified Freemansburg, where the Baptistes reside, as an "environmental justice area," meaning an area "where 20 percent or more individuals live in poverty, and/or 30 percent or more of the population is minority."

Baptiste v. Bethlehem Landfill Co., 965 F. 3d 214, 226-227 (3rd Circuit 2020)

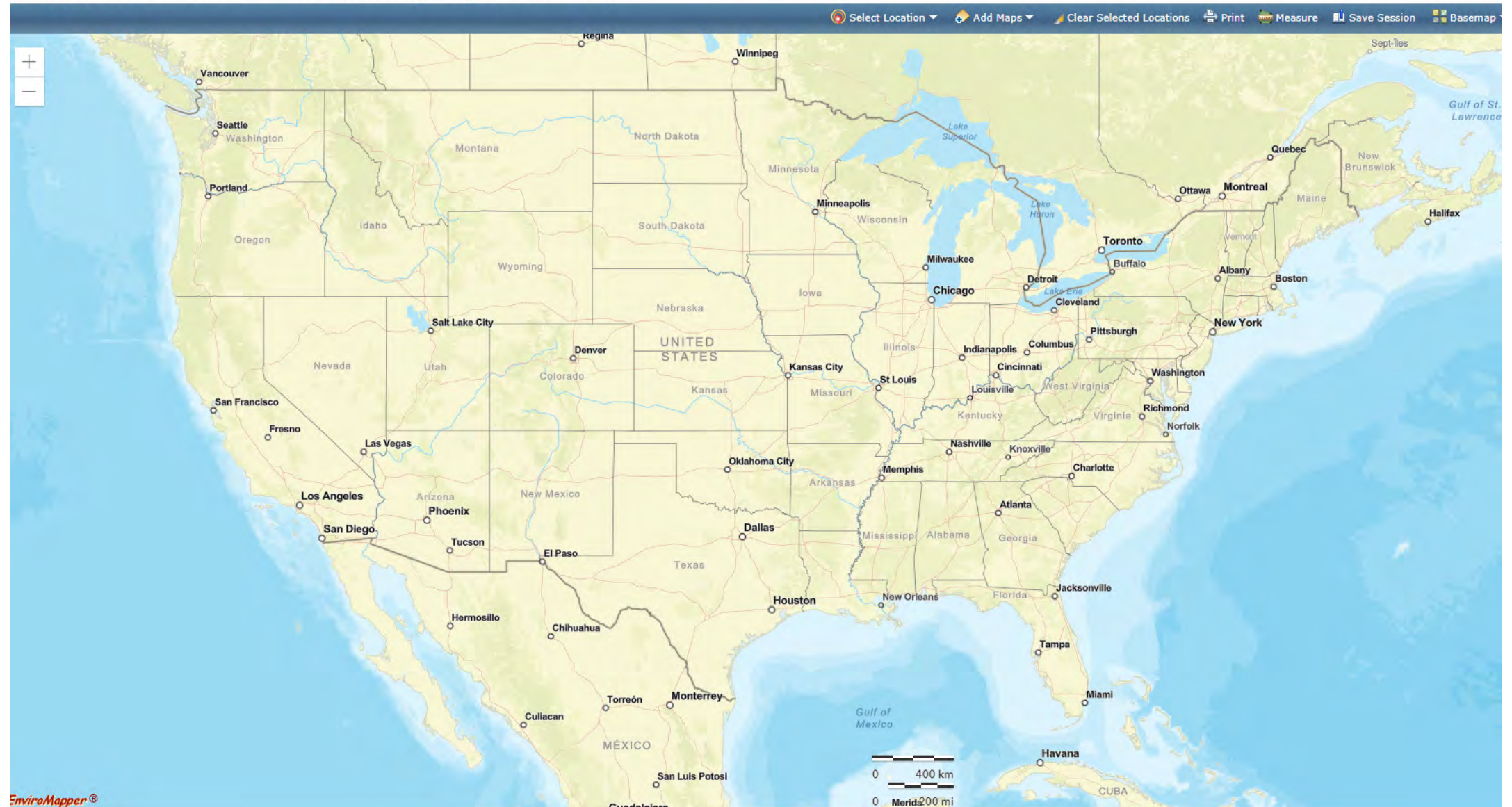
Yet environmental laws remain underenforced in those communities. See, e.g., R. Shea Diaz, GETTING TO THE ROOT OF ENVIRONMENTAL INJUSTICE: EVALUATING CLAIMS, CAUSES, AND SOLUTIONS, 29 GEO. ENVTL. L. REV. 767, 779 (2017) (reviewing empirical research suggesting that environmental "enforcement is less vigilant in minority and low-income communities").

EPA - *EJSCREEN*

“EJSCREEN is the environmental justice screening tool used by EPA to provide a nationally consistent dataset and methodology for calculating ‘EJ indexes,’ which highlight places that may be candidates for further review.”

EPA - *EJSCREEN*

“The tool offers a variety of powerful data and mapping capabilities that enable users to access environmental and demographic information, at high geographic resolution, across the entire country.”



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Bridgeton Landfill Site, St. Louis, MO

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EJSCREEN Report (Version 2020)

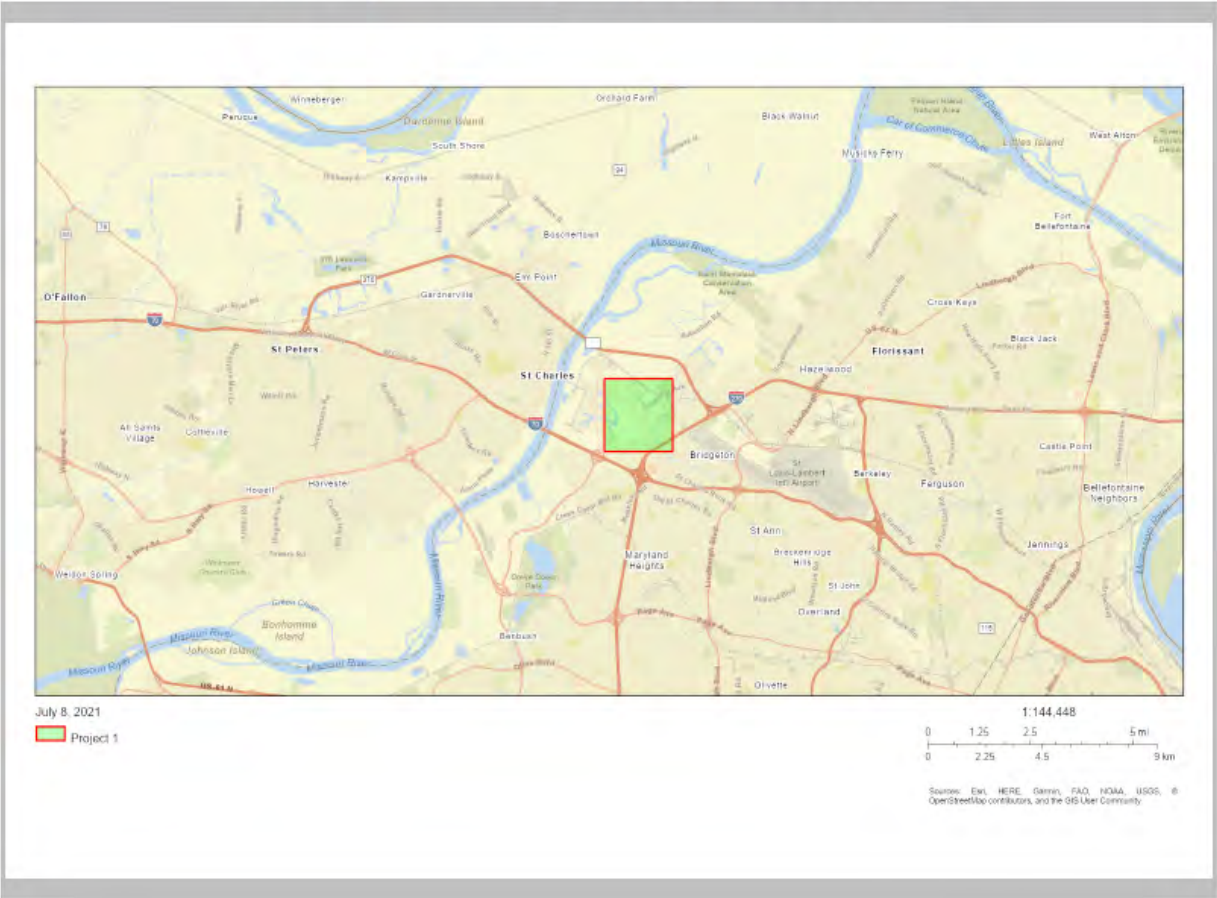


the User Specified Area, MISSOURI, EPA Region 7

Approximate Population: 234

Input Area (sq. miles): 2.89

(The study area contains 1 blockgroup(s) with zero population.)



Current Environmental Issues Affecting Missouri



EJSCREEN Report (Version 2020)



the User Specified Area, MISSOURI, EPA Region 7

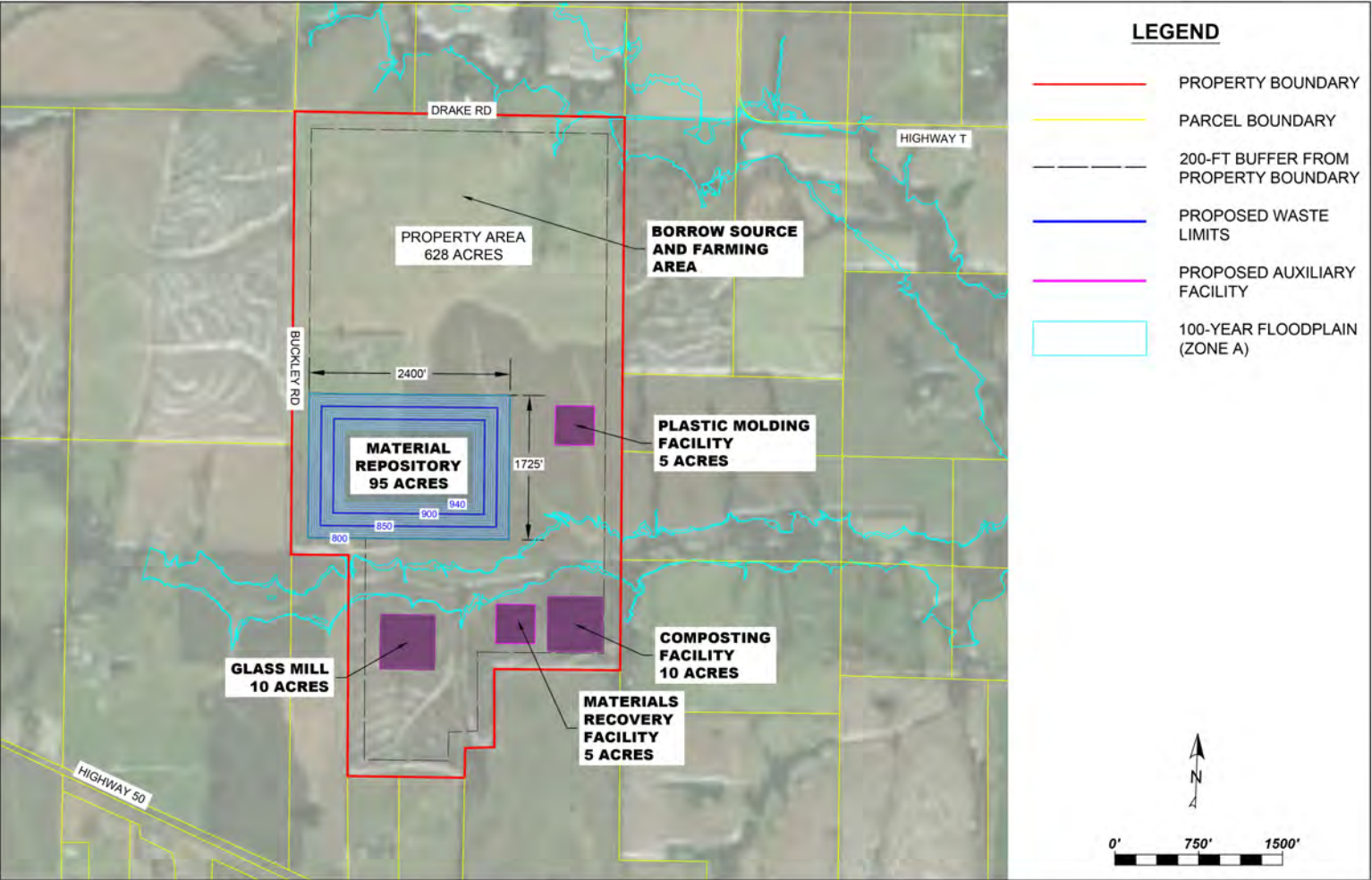
Approximate Population: 234

Input Area (sq. miles): 2.89

(The study area contains 1 blockgroup(s) with zero population.)

Selected Variables	Value	State Avg.	%ile in State	EPA Region Avg.	%ile in EPA Region	USA Avg.	%ile in USA
Environmental Indicators							
Particulate Matter (PM 2.5 in $\mu\text{g}/\text{m}^3$)	9.47	8.56	97	8.17	99	8.55	80
Ozone (ppb)	48.5	45.6	93	44.4	97	42.9	86
NATA* Diesel PM ($\mu\text{g}/\text{m}^3$)	0.914	0.447	94	0.367	95-100th	0.478	90-95th
NATA* Cancer Risk (lifetime risk per million)	39	32	96	27	95-100th	32	80-90th
NATA* Respiratory Hazard Index	0.56	0.42	98	0.36	95-100th	0.44	80-90th
Traffic Proximity and Volume (daily traffic count/distance to road)	2600	370	97	330	98	750	93
Lead Paint Indicator (% Pre-1960 Housing)	0.11	0.29	36	0.34	32	0.28	40
Superfund Proximity (site count/km distance)	0.57	0.099	98	0.098	97	0.13	95
RMP Proximity (facility count/km distance)	0.88	0.64	76	0.95	64	0.74	73
Hazardous Waste Proximity (facility count/km distance)	6.5	1.6	95	1.3	97	5	88
Wastewater Discharge Indicator (toxicity-weighted concentration/m distance)	0.8	8	92	4	95	9.4	94
Demographic Indicators							
Demographic Index	45%	27%	85	25%	86	36%	69
People of Color Population	33%	20%	81	20%	82	39%	53
Low Income Population	55%	33%	84	31%	86	33%	84
Linguistically Isolated Population	0%	1%	72	2%	66	4%	45
Population With Less Than High School Education	24%	10%	93	9%	93	13%	85
Population Under 5 years of age	3%	6%	21	6%	18	6%	21
Population over 64 years of age	34%	16%	97	16%	97	15%	96

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Proposed Pettis County, MO Environmental Material Management Park

Current Environmental Issues Affecting Missouri



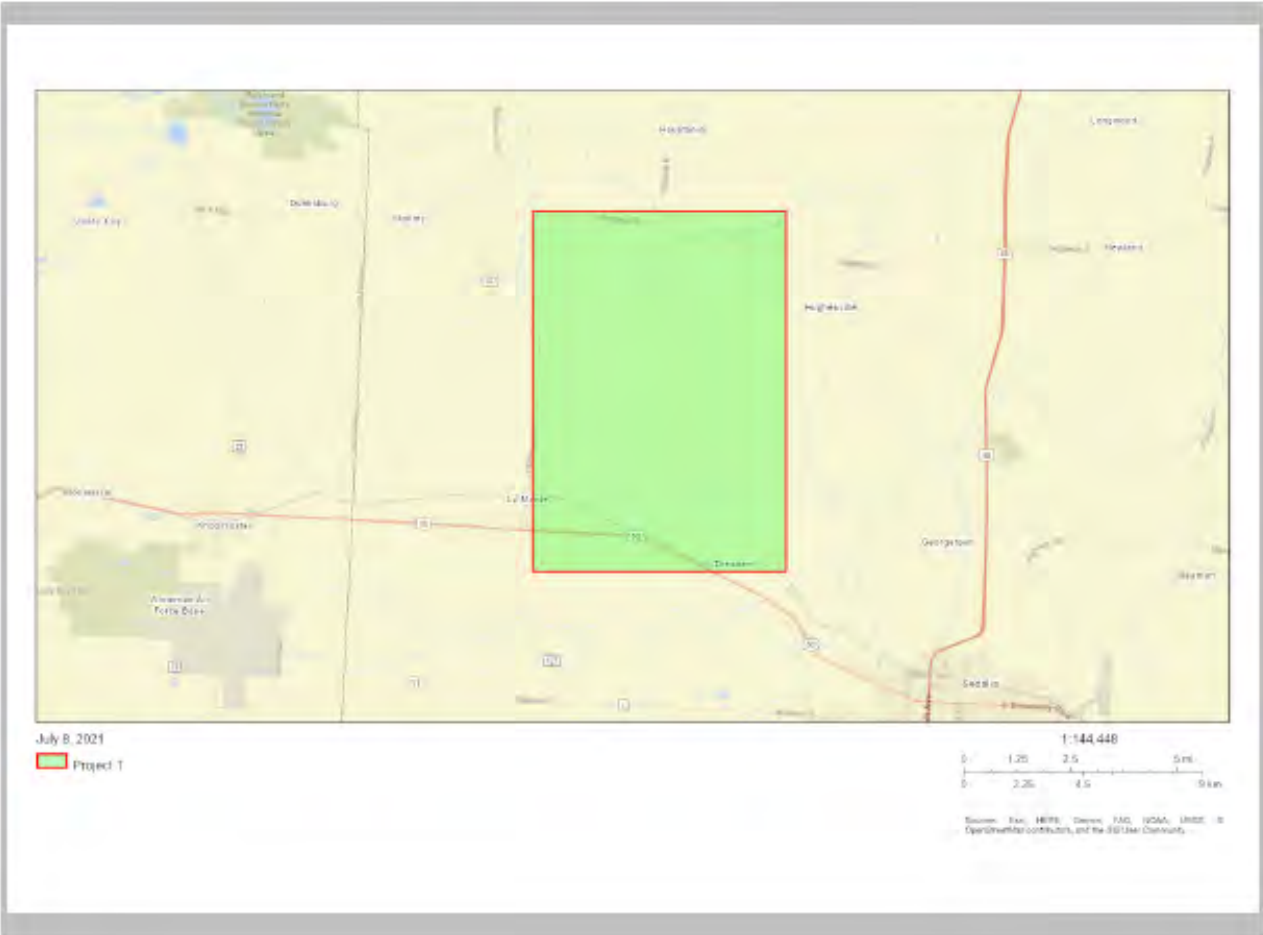
EJSCREEN Report (Version 2020)



the User Specified Area, MISSOURI, EPA Region 7

Approximate Population: 952

Input Area (sq. miles): 49.74



Current Environmental Issues Affecting Missouri



EJSCREEN Report (Version 2020)



the User Specified Area, MISSOURI, EPA Region 7

Approximate Population: 952

Input Area (sq. miles): 49.74

Selected Variables	Value	State Avg.	%ile in State	EPA Region Avg.	%ile in EPA Region	USA Avg.	%ile in USA
Environmental Indicators							
Particulate Matter (PM 2.5 in $\mu\text{g}/\text{m}^3$)	7.46	8.56	3	8.17	12	8.55	19
Ozone (ppb)	43.8	45.6	19	44.4	44	42.9	59
NATA* Diesel PM ($\mu\text{g}/\text{m}^3$)	0.158	0.447	11	0.367	<50th	0.478	<50th
NATA* Cancer Risk (lifetime risk per million)	26	32	10	27	<50th	32	<50th
NATA* Respiratory Hazard Index	0.35	0.42	10	0.36	<50th	0.44	<50th
Traffic Proximity and Volume (daily traffic count/distance to road)	70	370	39	330	39	750	29
Lead Paint Indicator (% Pre-1960 Housing)	0.27	0.29	61	0.34	50	0.28	60
Superfund Proximity (site count/km distance)	0.012	0.099	9	0.098	8	0.13	6
RMP Proximity (facility count/km distance)	2.3	0.64	94	0.95	88	0.74	92
Hazardous Waste Proximity (facility count/km distance)	0.083	1.6	20	1.3	23	5	11
Wastewater Discharge Indicator (toxicity-weighted concentration/m distance)	0.007	8	67	4	73	9.4	77
Demographic Indicators							
Demographic Index	40%	27%	81	25%	82	36%	63
People of Color Population	37%	20%	83	20%	84	39%	56
Low Income Population	43%	33%	70	31%	75	33%	72
Linguistically Isolated Population	7%	1%	95	2%	91	4%	76
Population With Less Than High School Education	28%	10%	95	9%	95	13%	88
Population Under 5 years of age	12%	8%	92	6%	91	8%	92
Population over 64 years of age	12%	16%	32	16%	34	15%	41

Current Environmental Issues Affecting Missouri

What happens in Missouri when
Environmental Justice concerns are raised with DNR?

Current Environmental Issues Affecting Missouri



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

EXTERNAL CIVIL RIGHT COMPLIANCE OFFICE
OFFICE OF GENERAL COUNSEL

March 30, 2021

In Reply Refer to:

EPA Complaint No. 01RNO-20-R7

Carol S. Comer, Director
Missouri Department of Natural Resources
P.O. Box 176
Jefferson City, MO 65102
Carol.Comer@dnr.mo.gov

Re: Partial Preliminary Findings for EPA Complaint No. 01RNO-20-R7: Non-Compliance

Dear Director Comer:

This letter conveys partial preliminary findings of the U.S. Environmental Protection Agency's (EPA) External Civil Rights Compliance Office (ECRCO) in the administrative complaint (Complaint) filed with EPA on September 4, 2020, by the Great Rivers Environmental Law Center on behalf of the National Association for the Advancement of Colored People, Missouri State Conference ("Missouri NAACP"), the NAACP St. Louis City Branch ("St. Louis City NAACP"), and the Dutchtown South Community Corporation (DSCC) against the Missouri Department of Natural Resources (MoDNR). The Complaint alleges that MoDNR discriminated on the basis of race, color and/or national origin in violation of Title VI of the Civil Rights Act of 1964, and EPA's nondiscrimination regulation, 40 C.F.R. Part 7, when on March 10, 2020, MoDNR issued Part 70 Intermediate Operating Permit OP2020-008 to Kinder Morgan Transmix Company, LLC ("Kinder Morgan").

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III. Summary of Preliminary Findings

As discussed above, ECRCO has concluded its investigation of the second issue.⁴⁴ The first issue remains under investigation. With respect to the second issue, ECRCO has determined that the preponderance of the evidence supports a conclusion that MoDNR failed to comply with federal nondiscrimination laws and EPA's nondiscrimination regulation with respect to MoDNR not having in place nor implementing a nondiscrimination program, including: procedural safeguards required under 40 C.F.R. Parts 5 and 7; policies and procedures for ensuring meaningful access to MoDNR's services, programs, and activities for individuals with LEP and individuals with disabilities; and a public participation program that ensures meaningful access to those proceedings to persons with limited-English proficiency.⁴⁵ Further, based on ECRCO's review of available evidence, it appears that MoDNR ignored concerns raised over the years about its failure to have in place a nondiscrimination program consistent with its longstanding legal obligations.⁴⁶

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Prediction:

Future Federal Court legal challenges involving permit holders when DNR issues permits in areas having identifiable Environmental Justice criteria.

Questions