

How The **New Administration** Could Bring A New Day to The **EPA's Title VI** Enforcement



Dayna Bowen Matthew, Health Research and Policy Fellow

Congressional Black Caucus Foundation, Inc.

January 23, 2017

How The New Administration Could Bring A New Day to The EPA's Title VI Enforcement

The last weeks have been busy ones as the current administration scurries to rectify decades of civil rights inaction at the Environmental Protection Agency (EPA). The EPA issued a strategic plan, an enforcement manual, and the first chapter of an enforcement Toolkit, withdrew an ill-advised set of proposed rules, and finally gave direct legal oversight to its Title VI External Compliance team, moving it into the Office of General Counsel. The most telling sign that this work signals a new era in Title VI enforcement, however, is a Letter of Concern issued in the Genesee Power Plant Title VI case that has been pending for over two decades on the EPA's docket. Title VI is the Federal civil rights law that prohibits discrimination based on race, color, or natural origin. Historically, the EPA has had a disastrous record of enforcing Title VI. However, these significant, substantial and promising changes, though long overdue, just could work to turn the agency's failing record around.

In fact, the tone of the incoming administration's confirmation hearings have focused on improving quality in health and health care through innovation. Thus the time may indeed be ripe for the new EPA leadership to reduce government waste, substantially increase administrative efficiency correct the EPA's repeated missteps in enforcing Title VI, and even eliminate its decades-old backlog of unresolved Title VI cases. The result could not only save money, time, and resources, but lives.¹

The Environmental Protection Agency's (EPA's) mission² and statutory duty³ is to protect human health and the environment. The U.S. Constitution⁴ and federal anti-discrimination laws⁵ obligate the EPA to carry out this mission equitably. Thus, in 1973, the EPA promulgated Title VI regulations⁶ to ensure that minority communities are not subjected to discrimination based on race, color, or national origin under any environmental program or activity that receives Federal financial assistance. But throughout its nearly 50-year history, the Agency has struggled unsuccessfully to enforce Title VI.

A Record of Inefficient Title VI Enforcement that Spans Decades

Last month, the U.S. Commission on Civil Rights released its 2016 Statutory Enforcement Report⁷ evaluating the EPA's performance enforcing Title VI and the Executive Order 12,898.⁸ The report can only be described as scathing. The Commission found, as many other EPA observers before it have found, that the Agency does not effectively enforce Title VI, the civil rights law that prohibits discrimination by federal financial assistance recipients. The Civil Rights Commission found the EPA has:

¹ U.S. Government Accountability Office, "Environmental Justice: EPA Needs to Take Additional Actions to Help

² <https://www.epa.gov/aboutepa/our-mission-and-what-we-do>

³ National Environmental Policy Act, 40 CFR Parts 1500-1508

⁴ The Constitution of the United States, Amendment 14.

⁵ Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d-2000d-7 prohibits discrimination based on race, color or national origin.

⁶ 42 CFR Part 7

⁷ U.S. Commission on Civil Rights, *Environmental Justice: Examining the Environmental Protection Agency's Compliance and Enforcement of Title VI and Executive Order 12,898* (September 2016). Available here: http://www.usccr.gov/pubs/Statutory_Enforcement_Report2016.pdf.

⁸ Executive Order 12898 – Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, 59 FR 7629 (February 16, 1994).

- A history of extreme delays in its Title VI program;
- A current backlog of nearly 250 Title VI complaints of discrimination it has not decided;
- Not protected the human health or civil rights of low-income and minority communities disproportionately affected by coal ash disposal;
- Placed the burden on these communities to collect complex data, fund litigation and navigate the federal court system;
- Never made a formal finding of discrimination, has never denied or withdrawn financial assistance from a recipient in its entire history; and
- No mandate or accountability to obey anti-discrimination law internally within its own Agency.

Sadly, none of this is new news. The U.S. Civil Rights Commission Report joins a long line of administrative reports, judicial opinions, consultants' evaluations and think-tank studies that have all similarly criticized the EPA's ineffective Title VI case management:⁹

- 2003 – U.S. Commission on Civil Rights report titled, “Not In My Backyard, Executive Order 12,898 and Title VI as Tools for Achieving Environmental Justice” concluded the EPA “had not fully committed to environmental justice.”
- 2009 – In *Rosemere Neighborhood Association v. EPA*, the 9th Circuit Court of Appeals found the Agency's Title VI case management “has since bloomed into a consistent pattern of delay by the EPA” and reversed lower court decision dismissing discrimination claim.¹⁰
- 2011 – Deloitte Consulting firm issued a Final Report evaluating the EPA Office of Civil Rights (OCR). It concluded the agency had not “adequately adjudicated Title VI complaints” and found that “50% of Title VI cases took over 1 year to be accepted...[the EPA has] no tracking system to monitor investigations and lengthy case management timeliness . . . [and] the EPA does not provide Title VI compliance guidance to recipients.”¹¹
- 2015 - The Center for Public Integrity reported a series of articles titled, “Environmental Justice, Denied,” based on its analysis of 265 Title VI complaints from 1996 to 2013. It found the EPA denies Title VI claims of discrimination 95% of the time and has never made a formal finding of a violation in its 22-year history.¹²
- 2016 - The Center on Race, Poverty and the Environment released a report analyzing the single case in which the EPA made a preliminary finding of discrimination.¹³ The report concluded, “the

⁹ Michael Gerrard, *EPA Dismissal of civil Rights Complaints*, N.Y.L.J. Nov 28 2003

¹⁰ *Rosemere Neighborhood Association v. EPA*, 581 F.3d 1169 (9th Cir. 2009)

¹¹ Deloitte Consulting LLP, *Final Report: Evaluation of the EPA Office of Civil Rights*, (March 21, 2011) at 25. Available here: <https://assets.documentcloud.org/documents/723416/epa-ocr-audit.pdf>

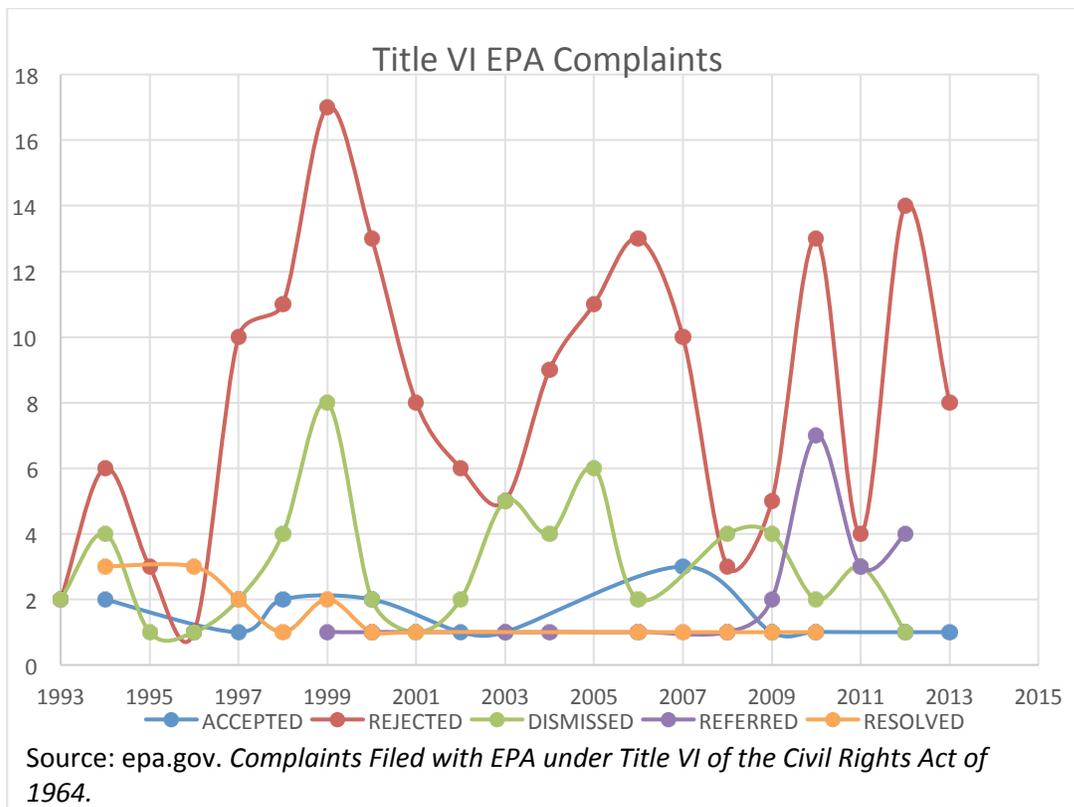
¹² Center for Public Integrity, “Environmental Justice, Denied,” available at <https://www.publicintegrity.org/environment/environmental-justice-denied>.

¹³ In 2011, the EPA made a *preliminary* finding of discrimination in case called “Angelita C.” That case alleged Title VI discrimination against Latino neighborhood where the California Department of Pesticide Regulation permitted

EPA has for decades abdicated its responsibility to protect [suffering communities], effectively eliminating the rights guaranteed by Title VI of the Civil Rights Act. EPA has institutionally failed to prevent environmental injustices despite having broad authority under this law to prevent racial discrimination.”¹⁴

Notably, the EPA’s reaction to each of these reports has been identical. After each report publicly criticizing the EPA’s Title VI backlog and delays, the Agency scurries to speed its procedural decision-making. However, it does virtually nothing to enforce the substantive terms of the law. The chart below makes this pattern plain.

The EPA reacts to critical reports by rejecting or dismissing a spate of cases before settling back into a familiar pattern of substantive inaction on Title VI complaints. The relatively flat orange and blue lines at the bottom of the graph show the small number of cases the EPA accepts for investigation annually, and the even smaller number that it resolves. In contrast, the roller-coaster-like spikes of red and green lines show the number of cases the EPA dismisses or rejects. The peaks in these lines predictably follow immediately after the dates of each critical reports listed above.



pesticide spraying on strawberry fields near a California school. However the preliminary finding, made after a 10-year long investigation, resulted in a negotiated settlement that did not involve the Latino parents who filed the claim.

¹⁴ The Center on Race, Poverty & The Environment, *A Right Without a Remedy: How the EPA Failed to Protect the Civil Rights of Latino Schoolchildren*, (April 2016) at 2. Available at http://earthjustice.org/sites/default/files/Right%20without%20a%20Remedy%20FINAL_optimized.pdf.

This chart visually depicts what each assessment has concluded: The EPA does not enforce the law of Title VI but instead takes action under the law only as a last resort, after extended delay, achieving only procedural results without substantively addressing disparate health impact claims.¹⁵

The EPA's reactive case management approach shows no sign of improving. Available evidence confirms these trend lines will continue in response to the sharply critical 2016 reports. So far this year, the EPA has stepped up its dismissals and rejections, but released no substantive Title VI decisions resolving a case on the merits.¹⁶ This pattern continues to build the EPA's Title VI case backlog, a frustrating outcome for complainants and EPA staff alike; it costs time, personnel, and money to maintain a backlog, while yielding few discernable results that align with the EPA's mission and statutory mandate.

Consequences of the EPA's Procedural Inefficiency

A common theme in the small library of critical reports is the failure of the EPA to meet its procedural deadlines for resolving Title VI complaints. The consequences of delay are concrete. Health problems develop quickly and persist indefinitely while the EPA's Office of Civil Rights moves slowly. Two cases are exemplary:

An advocacy group representing Latino communities filed a complaint in 1994 alleging that EPA permits for toxic waste disposal sites violated Title VI. The EPA dismissed the complaint in 2011, though the allegedly discriminatory sites remain. Legal attempts to challenge the EPA on the grounds that it had taken too long to act were dismissed by a Federal Court on the grounds that the EPA had met its regulatory obligation to dispose of the complaint, albeit 17 years after it was filed.¹⁷

In another case filed in 1999, the EPA actually made a preliminary finding of regulatory discrimination where its state partner permitted harmful pesticide spraying on strawberry fields near a school in a predominately Latino neighborhood. This suggested the EPA might make its first *ever* finding of a Title VI violation based on the merits of the legal case. However, when the EPA settled and dismissed the case twelve years after it was filed, the Agency cited among its reasons, "the resources that would be required to conduct an alternative analysis."¹⁸ When the parents who originally filed the complaint sought to re-open and challenge settlement of the case, a Federal Court refused because the EPA had satisfied its *procedural* regulations leaving the Federal Court without jurisdiction to hear the

¹⁵ Executive Summary, U.S. Commission on Civil Rights 2016 Statutory Enforcement Report, available here: http://www.usccr.gov/pubs/Statutory_Enforcement_Report2016.pdf.

¹⁶ According to the U.S. Civil Rights Commission Report, between December 2015 and July 2016, the EPA received 25 Title VI complaints, and rejected 11 of those received during the year, and rejected 3 additional complaints that were part of its existing backlog. The EPA also closed two other cases because the Agency found "insufficient evidence to support a conclusion of noncompliance" and the complainants withdrew two.

¹⁷ *Padres Hacia Una Vida Mejor v. Jackson*, 922 F.Supp2d 1057, 1060 (E.D. Cal 2013), *aff'd sub nom. Padres Hacia Una Vida Major v. McCarthy*, 614 F.App'x 895 (9th Cir 2015).

¹⁸ Agreement Between the California Department of Pesticide Regulation and the United States Environmental Protection Agency, (August 24, 2011). Available here: <https://www.epa.gov/sites/production/files/2016-04/documents/title6-settlement-agreement-signed.pdf>.

case.¹⁹ Despite nearly a decade of procedural wrangling, these cases demonstrate that a consequence of procedural delay is that the EPA seldom reaches or resolves the substantive question of whether health or the environment had been disproportionately harmed.

However focusing solely on the EPA's record of procedural delays is misplaced. This focus prompts the EPA to respond rationally, but unproductively to the objections about its Title VI processes. For example, in December 2015, the EPA met repeated complaints about its failure to meet statutory Title VI deadlines with a notice of proposed rulemaking that will eliminate those deadlines from its regulations.²⁰ Also in December 2015, the EPA published a Strategic Plan and an Interim Case Resolution Manual outlining details of the resolution process it intends to follow for Title VI Civil Rights cases. Both these efforts meet complaints about the EPAs procedural delays with attempts to repair the process. Neither of these procedural fixes addresses the EPA's lack of substantive Title VI enforcement.

Indeed, the EPA's most determined environmental justice efforts turn attention and resources away from Title VI and instead direct Agency resources toward implementing the non-legally binding Executive Order 12,898. While these efforts are positive, they are not legally potent. In October 2016, for example, the EPA released its "EJ 2020 Action Agenda"²¹ – an ambitious strategic plan to advance environmental justice. In it, Administrator, Gina McCarthy announced that the EPA has worked for more than 20 years "to ensure that overburdened communities receive the same environmental protections as everyone else" and proclaimed, "we have made tremendous progress during the past eight years."²² But none of the EJ 2020 Report contained action steps to improve Title VI enforcement or address the problems raised in the U.S. Civil Rights Commission report.

The Real Reason the Agency's Procedure Is Slow: The EPA Has Fundamentally Misunderstood the Law

While criticism of the EPA has focused on procedural failures, there is a deeper problem in the substantive approach the EPA's Office of Civil Rights takes to Title VI cases. Since 1998, the EPA has labored under an erroneous ruling that compliance with the health-based National Ambient Air Quality Standards ("NAAQS") creates a rebuttable presumption that pollution impacts cannot be adverse from a public health standpoint, and therefore cannot violate Title VI prohibitions against disparate impact.²³ This holding, commonly called "Select Steel" after the respondent named in the complaint, stands in stark contrast to the civil rights rule of law applied throughout the rest of the Federal agencies,²⁴ and by

¹⁹ *Maria Garcia et al. v. Gina McCarthy*, No 14-15494 D.C. No. 3:13-cv-03939-WHO (9th Cir. May 11, 2016) (Dismissing challenge to "Angelita C" settlement for lack of subject matter jurisdiction).

²⁰ 80 FR 77284-7789 (December 14, 2015). Environmental Protection Agency, A Proposed Rule: Nondiscrimination in Programs or Activities Receiving Federal Assistance from the Environmental Protection Agency

²¹ <https://www.epa.gov/environmentaljustice/about-ej-2020#about>

²² https://www.epa.gov/sites/production/files/2016-05/documents/052216_ej_2020_strategic_plan_final_0.pdf

²³ *St. Francis Prayer Ctr. V. Michigan Department of Environmental Quality*, EPA File No. 5R-98-R5 (October 3, 1998)[*hereinafter* "Select Steel"]

²⁴ Compare, for example, the Department of Justice Title VI Manual (available here: <https://www.justice.gov/crt/department-justice-manuals-concerning-title-vi-civil-rights-act-1964>) and other agencies' Title VI enforcement such as in the Department of Transportation's City of Corpus Christi Title VI Voluntary Resolution Agreement (12/17/2015) (available here:

courts generally.²⁵ All other agencies and courts enforce disparate impact claims under Title VI by identifying and addressing disparity. The EPA, in contrast, analyzes Title VI disparate impact claims by focusing on adversity. “Disparate impact” goes to the issue of equality, while “adversity” refers to physically measurable standards of pollution, without regard to the extent of the harm communities bear in relation to one another. The difference is that the EPA misunderstands that equality is the fundamental motivation that underlies Title VI and all civil rights law..

The *Select Steel* rule arises out of a case beginning in December 1997 when Select Steel, Inc. applied for a permit from the Michigan Department of Environmental Quality to build a \$175 million steel mini-mill in Flint, Michigan. The proposed mill would have melted and recast scrap metal, producing about 100 tons of lead per year. Minority community members filed a Title VI complaint alleging the decision to grant Select Steel’s permit discriminated against them based on race. They alleged the proposed mini-mill would produce pollutants²⁶ that would disproportionately harm African-American residents in Flint, Michigan, when compared to the population that impacted white communities in Michigan.

However, the EPA analysis did not compare pollution in Flint, Michigan with pollution in predominately white communities. Instead, the EPA analyzed the Title VI claim by asking whether the pollution the mill would generate complied with the National Ambient Air Quality Standards (NAAQS) for ozone and lead. When the EPA saw the NAAQS health standards were met, the Agency decided the permit set pollution “at a level presumptively sufficient to protect public health and allows for an adequate margin of safety for the population within the area” and never reached the question of disparate impact. Instead, based on an environmental rather than a civil rights standard, the EPA concluded, “no affected population could suffer adverse impacts within the meaning of Title VI.” Although the Select Steel mill was never built, the EPA still follows the Title VI rule from this case.

The *Select Steel* rule creates a “rebuttable presumption” that compliance with environmental regulations means compliance with civil rights law. Moreover, the *Select Steel* rule measures each individual pollutant against its relevant health standard to determine whether it presents an adversity. Both these presumptions are inconsistent with the purpose and practice of Title VI law. In the EPA’s analysis, the focus is on the level of a single source of pollution rather than on the cumulative harm that

http://www.fhwa.dot.gov/civilrights/programs/docs/VoluntaryResolution_Agreement.pdf); The Department of Education’s Resolution Agreement with Oklahoma City Public Schools District (4/7/2016)(available here: <http://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/07141149-b.pdf>); the Department of Housing and Urban Development’s Voluntary Compliance Agreement with the Medina Metropolitan Housing Authority (May 13, 2015)(available here: <http://portal.hud.gov/hudportal/documents/huddoc?id=14-0658-6MedinaVCAExe.pdf>); and the Department of Health and Human Services’ Voluntary Resolution Agreement with the Shiawassee County Medical Care Facility (02/01/2015)(available here: http://www.hhs.gov/sites/default/files/ocr/civilrights/activities/agreements/Shiawassee/shiawassee-countymcf_vra.pdf)

²⁵ Compare, e.g. *United States v. Maricopa County*, 151 F.Supp.3d 998 (D. Arizona 2015).

²⁶ Such as particulate matter, ozone, and nitrogen oxide, adding to existing sources of pollution such as the wood-burning Genesee County Power Station.

pollution may impose on a community. In short, if the EPA finds no environmental adversity for each allegedly harmful pollutant, the EPA concludes there could be no civil rights disparity. Since the *Select Steel* decision in 1998, the EPA's anomalous approach to civil rights law has produced unwieldy delays and inefficiencies.

How To Streamline the EPA's Title VI Case Management

The EPA could reduce its backlog, save the costs of lengthy investigations, and better protect health and the environment by correcting its Title VI disparate impact analysis to apply civil rights law as it is written and applied by Courts and throughout the Federal government. The newly released Toolkit hints the Agency is ready to make this change. In the past, when faced with a Title VI complaint alleging that a federally funded entity's program or activity subjects minority communities to environmental discrimination, the EPA engaged in a disparate impact analysis unlike any other approach to civil rights jurisprudence in the nation. The Agency first compared the allegedly discriminatory pollution in a minority community to the environmental health standards rather than rather than to pollution in non-minority communities. Moreover, the EPA made this comparison *before* analyzing whether the pollution imposed a weightier (or disparate) burden on racial minority communities than would be permitted in white communities. It then presumed there was no need to make the disparity comparison with other communities if the health standards were met. The correct approach to Title VI disparate impact analysis would first compare the health effects of pollution borne by one community compared to another, and then determine whether the extent of the inequality was adverse. The EPA prioritized an inquiry about the extent of adversity over considering the degree of inequality. In doing so, the EPA recast disparate impact civil rights claims, as merely a review of the environmental impact of pollution in the minority community.

This approach should be permanently abandoned because it is wrong jurisprudentially, and inefficient in practice. The rebuttable presumption analysis required the EPA to conduct a lengthy and tedious re-determination of whether the environmental standards are met. A corrected approach would focus on the comparison among populations that is at the core of the civil rights inquiry. Moreover, the EPA consumed the time of its scientists to duplicate the scientific inquiry under the guise of a Title VI analysis,²⁷ while sidestepping the straightforward question of whether one community is burdened more by pollution than another. The *Select Steel* rule means that in practice, the EPA turned every Title VI complaint into a repeat of the broad scientific inquiry that consumes time, personnel, and Agency resources, but almost never resolved the substantive complaints of discrimination.

The EPA can easily and quickly fix this costly and time consuming problem by taking two steps:

- Adopt an analytical approach to Title VI cases that aligns with the *substantive* law by first and foremost comparing the pollution impacting an affected population with a comparison population to determine to what degree a disparate pollution burden exists

²⁷ See EPA Order Identification Number 4700 establishing position of "Deputy Civil Rights Officials" within each regional office to support Title VI analyses.

- In the comparison analysis, adopt a method for evaluating the combined exposures to multiple pollutants through different pathways in affected communities that allege disparate impact violations under Title VI

The most recently released compliance manual and Toolkit chapters give the new administration all that it needs to immediately go to work reducing the Title VI backlog. With these tools, the Agency can go to work now, negotiating voluntary resolutions, issuing Letters of Concern, and, where needed making preliminary findings of discrimination that may incentivize settlements that will relieve long over-burdened communities.

Ultimately, the EPA should make these changes in a corrected²⁸ and finalized Guidance. The unfinished Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits (2000 Draft Guidance),²⁹ which was first published in 2000, offers an ideal vehicle for the EPA to publicly correct its approach to Title VI law. The EPA could finalize the 2000 Draft Guidance to align its aberrational approach to civil rights law, at least with respect to the EPA's permitting program, with Title VI law as applied throughout the Federal government and courts. In the bargain, the EPA would also save time, money, and improve human health and the environment.

²⁸ The required correction would change the section that describes "Potential Steps for Conducting Adverse Disparate Impact Analyses" to begin with the requirement to "characterize populations and conduct comparisons (currently step 4) as step 1 of the civil rights analysis.

²⁹ 65 FR 124 (June 27, 2000)



COPYRIGHT © 2016 CONGRESSIONAL BLACK CAUCUS FOUNDATION, INC.
ALL RIGHTS RESERVED.