Environmental justice and Title VI of the Civil Rights Act: A critical crossroads

Environmental justice (EJ) is a grassroots, community-based movement that addresses the disproportionate burden of toxic pollution and lack of environment benefits/amenities borne by low-income communities and communities of color. From a litigation perspective, the movement has mostly relied on traditional environmental laws to address environmental disparities. But beginning in the early 1990s, EJ communities turned to Title VI of the Civil Rights Act of 1964 (Title VI), 42 U.S.C. § 2000d et seq., as a means to address racial discrimination in the permitting and siting of facilities that release hazardous pollutants and cause environmental health risks.

Title VI is one of the nation's landmark federal civil rights laws and its passage was widely viewed as one of the major achievements of the civil rights movement. Section 601 of

Title VI generally prohibits discrimination based on race, color, or national origin by any entity or program that receives federal funds. Section 602 of Title VI allows for federal departments and agencies to issue their own rules, regulations, or orders to effectuate section 601's discriminatory prohibition. A number of federal agencies, including the U.S. Environmental Protection Agency (EPA), have promulgated implementing regulations that prohibit the agencies from engaging in practices or distributing federal funds in a way that causes disparate impacts or discriminatory effects—as is widely experienced by EJ communities.

Lawsuits and administrative Title VI environmental complaints

EJ communities have utilized Title VI in two major ways: by directly suing recipients of federal funds in federal and state courts under Title VI and by filing Title VI administrative complaints with EPA and other agencies. To date, both avenues have yielded limited success in the courts and at the agency level. Courts have set a high evidentiary bar where communities must prove discriminatory intent; and EPA has failed to take meaningful action on Title VI complaints, leaving a long list of unresolved complaints reaching back to 1993.

The primary barriers preventing EJ communities from

prosecuting Title VI cases in federal courts are the U.S. Supreme Court's decisions in *Guardians Ass'n v. Civil Service Commission*, 463 U.S. 582 (1983) and *Alexander v. Sandoval*, 532 U.S. 275 (2001). In *Guardians*, the Court found that section 601 of Title VI requires proof of intentional discrimination—an extremely high evidentiary bar that is difficult to demonstrate in any type of case. In *Sandoval*, the Court held that agency section 602 regulations prohibiting disparate impact do not create a private right of action because Congress did not intend to create a private remedy to enforce regulations promulgated under section 602. As a side note, courts have also been unwilling to permit disparate impact Title VI claims under section 1983. 42 U.S.C. § 1983 (civil actions for deprivation of rights, privileges, or immunities secured by the constitution and laws). As a result of *Sandoval*, EJ communities moved away from bringing Title VI claims in courts and focused instead on filing administrative complaints with federal agencies, such as EPA.

Unfortunately, EPA has failed to act on the vast majority of Title VI complaints filed within the timeframes set forth in the agency's Title VI implementing regulations codified at 40 C.F.R. Part 7. EPA's Office of Civil Rights (OCR) is the division charged with processing Title VI complaints. Once a complaint has been filed in a timely manner, the regulations require OCR to acknowledge receipt of the complaint within

five days. OCR must then immediately initiate complaint processing procedures and within twenty days review the complaint for acceptance, rejection, or referral to the appropriate federal agency. If the complaint is accepted, within 180 days of the start of the complaint investigation process OCR must notify the complainant and recipient agency of the agency's findings and recommendations for voluntary compliance.

The administrative complaint process

A March 2011 report commissioned by EPA that evaluated OCR's handling of Title VI complaints deemed OCR's Title VI track record as inadequate, unresponsive to EJ communities, and in some cases, damaging to EPA's reputation. *See* *Evaluation of the EPA Office of Civil Rights*, Deloitte Consulting LLP, Environmental Protection Agency, Order # EP10H002058 (Mar. 21, 2011). The report stated that only 6 percent of the 247 Title VI complaints received by OCR were accepted or dismissed within the agency's own twenty-day regulatory time limit. Moreover, the report found that OCR's backlog of unresponsive Title VI complaints stretches back to 2001, despite EPA's 180-day regulatory deadline for completing investigation of Title VI complaints accepted for investigation. At the time of the report's publication, statistics demonstrated the following: there were numerous cases that had been awaiting action for up to four years, two

cases had been in the queue for more than eight years, half of the complaints took one year or more to be accepted or dismissed, one case was accepted after nine years, and another case was accepted ten years after it was received. The report came on the heels of litigation bought by a Title VI complainant that compelled OCR to process complaints within EPA's 20- and 180-day time limits, as set forth in EPA's Title VI implementing regulations.

In *Rosemere Neighborhood Association v. U.S. EPA*, 581 F.3d 1169 (9th Cir. 2009), the court held that EPA's failure to process a Title VI complaint in accordance with the 180-day timeline set forth in 40 C.F.R. § 7.115(c)(1) constituted "agency action unlawfully withheld pursuant to the Administrative Procedures Act (APA), 5 U.S.C. § 706(1)." EPA settled the *Rosemere* case by agreeing to respond to all future Title VI complaints from the plaintiffs within the regulatory time frames and to produce on a quarterly basis an inventory of all Title VI complaints submitted to the agency and a report on each complaint's status. The inventory revealed that between 2006 and 2007, EPA failed to process a single Title VI complaint and there is currently a backlog of thirty-two complaints filed since President Obama entered the White House.

As demonstrated by *Rosemere* and a nearly identical lawsuit recently filed by the Center on Race, Poverty & the

Environment (CRPE) on behalf of Latino community advocacy groups in the Central Valley of California in *Padres Hacia Una Vida Mejor v. Jackson*, 1:11-cv-01094 (E.D. Cal. 2011), these types of APA challenges may assist community groups seeking to compel EPA to a timely process and investigate Title VI complaints. By forcing EPA to investigate and issue decisions on these complaints, community, environmental, and civil rights organizations can put pressure on the agency to utilize its Title VI authorities as a tool to address disproportionate environmental burdens facing EJ communities around the country.

However, getting EPA to accept and investigate Title VI complaints is merely the first step in the long road to justice for EJ communities that resort to the agency's Title VI program. A recent case is EPA's ill-advised resolution of a Title VI complaint known as *Angelita C., et al. v. California Department of Pesticide Regulation* (EPA File No. 16R-99-R9). On April 22, 2011, EPA finally completed its investigation of a Title VI complaint (filed by CRPE in 1994) and, for the first time in EPA's history, made a preliminary finding that the evidence in the complaint demonstrated a *prima facie* violation of Title VI. The complaint alleged that California state agency implementing pesticide registrations discriminated against Latino children by renewing the registration for methyl bromide—a highly toxic pesticide—in January 1999, without taking into consideration the health

impacts that it would have on children attending schools that were within a 1.5-mile radius of the areas in which methyl bromide was applied. The complaint also alleged that greater amounts of methyl bromide were applied in areas surrounding schools with high percentages of Latino schoolchildren (in comparison to areas surrounding schools with lower percentages of Latino schoolchildren) in violation of Title VI. On August 25, 2011, EPA announced that it had reached a settlement agreement with the State of California where the California Department of Pesticide Regulation would install one new air monitor, maintain a handful of existing air monitors for a period of two years, and conduct outreach to the Latino community. Unfortunately, the settlement was reached without any consultation with the complainants or their attorneys and provided no substantive remedy for the long-standing Title VI discrimination faced by the affected community.

The current status of agency EJ efforts

The *Angelita C.* decision and its subsequent settlement is a stark reminder that the Title VI program has a long way to go before becoming an effective tool for EJ communities to remedy long-standing discrimination. In response, EJ advocates from around the country have initiated a full-court-press campaign pushing EPA to fix the Title VI program once and for all. Their demands, as laid out at EPA's

One Community, One Environment EJ conference in Detroit in August 2011 are that EPA Administrator Jackson do the following: (i) rescind the agency's decision in the *Select Steel* case (EPA File No. 5R-98-R5) (a Title VI complaint against the Michigan Department of Environmental Quality alleging discrimination in how the agency issues Clean Air Act permits that was dismissed by EPA because the recipient agency issued permits to facilities that complied with the National Ambient Air Quality Standards) and the *Angelita C.* settlement to ensure proper and robust enforcement of Title VI, (ii) request the oversight and guidance of the Department of Justice's Federal Compliance and Coordination Section to help EPA institutionalize complaint investigation procedures, enforcement measures, and compliance assurance tools pursuant to Title VI, (iii) respond to the hundreds of public comments submitted by EJ communities on the 2000 *EPA Revised Draft Guidance for Investigating Title VI Administrative Complaints Challenging Permits*, and (iv) establish a date by which EPA will complete investigations and resolve all pending Title VI administrative complaints with the involvement of complainants and their attorneys.

On January 18, 2012, EJ advocates met with Administrator Jackson to discuss their demands. On the same day, EPA released its draft response to the March 2011 Deloitte report, which provides recommendations for developing a model

civil rights program at EPA. With the ball squarely in EPA's court, the opportunity now exists to fix the agency's Title VI program and restore integrity and faith to one of the nation's storied civil rights laws.