Community Lawyering for Environmental Justice Part 8: Title VI as a Tool for Advancing Environmental Justice

1. Introduction to the Pro Bono Clearinghouse

The Environmental Law Institute's Pro Bono Clearinghouse works to connect communities who would otherwise be unable to access legal resources with pro bono attorneys and experts to support the resolution of their environmental legal issues.

Communities who require pro bono support may reach out to the Pro Bono Clearinghouse directly. In addition, law clinics and other non-profits may submit any viable environmental matters that they are unable to take on due to resource limitations or because they are outside of their scope of work. Clinics and non-profits can also post requests for Clearinghouse member attorneys to expand their capacity or provide expertise they lack in-house. The Clearinghouse does not post criminal matters. Clearinghouse member attorneys can offer their skills and take on new matters, whether as a long-term legal ally of a community or for a discrete legal task.

Community lawyering, also known as empowerment lawyering, is key to meaningful environmental justice-oriented pro bono work. Community lawyering involves collaboration with community members as facilitative partners. As a result, it differs from the more traditional representational lawyering.

Learn more about the Pro Bono Clearinghouse here: https://www.eli.org/probono.

2. Overview of Title VI of the Civil Rights Act of 1964

Title VI of the Civil Rights Act of 1964 is the federal law that prohibits recipients of federal financial assistance from discriminating based on race, color, or national origin.[1] This prohibition is useful for environmental justice claimants because virtually every local government body making environmental permitting decisions receives federal funding.[2] Therefore, practically every local government and their environmental policy decisions are subject to Title VI.

Section 601 of Title VI establishes the law's general prohibition against racial discrimination by federal funding recipients.[3] Section 602 mandates that federal agencies issue regulations to implement § 601's prohibition.[4] Section 602 also directs federal agencies to provide a process through which the agency may terminate a recipient's federal funding if the recipient is in violation of § 601.[5]

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[1] 42 U.S.C § 2000d.
[2] Stephen Lee, *States Brace for Flood of Environmental Permits as Funding Flows*, BLOOMBERG LAW (Apr 21, 2021) ("State environmental agencies rely largely on federal funding, permit fees, and state general funding to run their operations").
[3] 42 U.S.C § 2000d ("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").
[4] 42 U.S.C § 2000d-1.
[5] *Id.*

Pursuant to § 602, every major federal agency has promulgated regulations prohibiting recipients of federal funding from enacting racially discriminatory policies and programs.[6] Crucially, these regulations explicitly prohibit policies that create disparate racial *impacts*, regardless of the intent or motivations behind the policy. For example, the EPA's § 602 regulations dictate that "[a] recipient shall not use criteria or methods of administering its program or activity *which have the effect* of subjecting individuals to discrimination because of their race, color, national origin, or sex" (emphasis added).[7]

These § 602 regulations also create administrative complaint processes to aid federal agencies in enforcing their disparate impact regulations.[8] These administrative complaint processes allow members of the public to file complaints alleging violations of Title VI by a federal funding recipient directly with the federal agency, asking for further investigation and, if appropriate, enforcement actions such as denial of future federal funding.[9]

There are generally no standing requirements imposed on the complainant to file a Title VI administrative complaint. Instead, federal agencies evaluate Title VI administrative complaints under four jurisdictional requirements.[10] These are:

1) The complaint must be in writing, although it does not need to be in English.[11]
2) The federal agency must have jurisdiction over the *subject matter* of the complaint.[12] To satisfy this requirement, the complaint must allege discrimination based on race, color, national origin, sex, disability, or age.[13]
3) The federal agency must have jurisdiction over the *entity* that is allegedly engaged in discriminatory behavior.[14] This requirement means the complaint must show the federal agency receiving the complaint has funded the allegedly discriminatory party.[15]
4) The complaint must be timely filed.[16] The complainant has 180 days from the most recently alleged discriminatory act to file a complaint.[17]

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[6] *See* 40 C.F.R. § 7.10-7.180 (EPA); 44 C.F.R. § 7.1-7.16 (FEMA); 24 C.F.R. § 1.7-1.10 (HUD); 32 C.F.R. §195.1-195.14 (DOD); 7 C.F.R § 15.1-15.143 (USDA); 49 C.F.R. § 21 (DOT).
[7] 40 C.F.R. § 7.35 (b).
[8] *See e.g.*, 40 C.F.R. § 7.120 (detailing the EPA's Title VI administrative complaint process).
[9] *See e.g.*, 40 C.F.R § 7.130 ("If compliance with this part cannot be assured by informal means, EPA may terminate or refuse to award to continue assistance. EPA may also use any other means authorized by law to get compliance, including a referral of the matter to the Department of Justice").
[10] ENV'T PROT. AGENCY, CASE RESOLUTION MANUAL 5 (2021), *available at* https://www.epa.gov/sites/default/files/2021-01/documents/2021.1.5_final_case_resolution_manual_.pdf.
[11] *Id*. at 6.
[12] *Id*. at 6-7.
[13] *Id*. In addition to jurisdiction pursuant to Title VI, EPA also has authority to investigate complaints under Title IX of the Education Amendments of 1972 (20 U.S.C. §§ 1681 et seq.; 40 C.F.R. Part 5), Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794; 40 C.F.R. Part 7), and the Age Discrimination Act of 1975 (42 U.S.C. §§ 6101 et seq.; 40 C.F.R. Part 7, Subpart F).
[14] ENV'T PROT. AGENCY, CASE RESOLUTION MANUAL 7 (2021), *available at* https://www.epa.gov/sites/default/files/2021-01/documents/2021.1.5_final_case_resolution_manual_.pdf.
[15] *Id*.
[16] *Id*. at 7-9.
[17] There are exceptions provided for circumstances under which filing within 180 days was impossible or impracticable. *Id*. at 8-9.

A. Distinguishing Title VI and the Constitutional Standard for Illegal Racial Discrimination

Title VI's disparate impact standard distinguishes the law from the Fourteenth Amendment's prohibition on racial discrimination. These distinct standards are the product of a series of Supreme Court decisions from 1970s and 80s. In these decisions, the Supreme Court clarified that for a state or local law or policy to violate the Fourteenth Amendment, it "must ultimately be traced to a racially discriminatory *purpose*," (emphasis added) rather than merely produce a racially disparate impact.[18] While the Court caveated that disparate racial impacts are a factor in discerning discriminatory intent, it held that disparate impacts would not be dispositive.[19]

In practice, the discriminatory intent standard is a significant barrier for environmental justice advocates bringing constitutional claims. Environmental justice claimants can often make a persuasive case that a local government's environmental decisions disproportionately burden them. However, following the Supreme Court's precedents, courts look beyond disparate impacts for evidence of a discriminatory intent or motive behind the policy in question. This evidentiary bar has proven difficult to meet.[20]

For example, in 1979, the first lawsuit to allege environmental discrimination under constitutional civil rights law (*Bean v. Southwestern Waste Management Corporation*) was unsuccessful after failing to meet the intentional discrimination standard.[21] Throughout the 1980s and 1990s[22], environmental justice claimants continued to employ constitutional arguments on racial discrimination and were largely unsuccessful.[23]

The constitutional standard's higher evidentiary bar for prohibited racial discrimination has elevated the relevance of Title VI to environmental justice claimants.

B. Title VI Jurisprudence

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[18] *Washington v. Davis*, 426 U.S. 229, 240 (1976).

[19] *Washington v. Davis*, 426 U.S. 229, 242 (1976) ("we have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another. Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution").

[20] Carlton Waterhouse, *Abandon All Hope Ye That Enter? Equal Protection, Title VI, and the Divine Comedy of Environmental Justice*, 20 FORDHAM ENVTL. L. REV. 51, 65 (2009).

[21] Kyle W. La Londe, *Who Wants to Be an Environmental Justice Advocate?: Options for Bringing an Environmental Justice Complaint in the Wake of* Alexander v. Sandoval, 31 B.C. ENVTL. AFF. L. REV. 27, 29 (2004) (saying the Bean case is thought to be the first environmental justice case to use civil rights law); *see also Bean v. Southwestern Waste Management Corporation*, 482 F. Supp. 673 (S.D. Texas 1979), affirmed 780 F.2d 1038 (5th Cir. 1986).

[22] See e.g., *Bean v. Southwestern Waste Management Corporation*, 482 F. Supp. 673 (S.D. Texas 1979), affirmed 780 F.2d 1038 (5th Cir. 1986), *E. Bibb Twiggs Neighborhood Ass'n v. Macon-Bibb County Planning & Zoning Comm'n*, 706 F. Supp. 880 (M.D. Ga. 1989), aff'd., 896 F.2d 1264 (11th Cir. 1989), and *R.I.S.E. v. Kay, Inc.*, 786 F. Supp. 1144 (E.D. Va. 1991).

[23] See e.g., *Bean v Southwestern Waste Management Corporation*, 482 F. Supp. 673 (S.D. Texas 1979), affirmed 780 F.2d 1038 (5th Cir. 1986), *E. Bibb Twiggs Neighborhood Ass'n v. Macon-Bibb County Planning & Zoning Comm'n*, 706 F. Supp. 880 (M.D. Ga. 1989), aff'd., 896 F.2d 1264 (11th Cir. 1989), and *R.I.S.E. v. Kay, Inc.*, 786 F. Supp. 1144 (E.D. Va. 1991).

A crucial aspect of Title VI is that there is no private cause of action to enforce the disparate impact regulations in court. This feature of Title VI is the product of the Supreme Court's decision in *Alexander v. Sandoval*. In *Sandoval*, the Supreme Court issued two holdings that significantly altered Title VI's potential applicability to environmental justice claims. First, although it acknowledged that "private individuals may sue to enforce Section 601," it clarified that "Section 601 prohibits only intentional discrimination."[24] On this latter point, the Court cited its majority opinion in *Regents of the University of California v. Bakke*, which used the legislative history behind the Civil Rights Act to argue Title VI "must be held to proscribe only those racial classifications that would violate the Equal Protection Clause."[25] Second, the Court held "there is no private right of action to enforce disparate-impact regulations promulgated under [§ 602 of] Title VI."[26] In this way, the *Sandoval* decision was the culmination of the Court's shift toward no longer finding implied private rights of action in statutes. Before *Sandoval*, federal courts normally relied on the four factors laid out in *Cort v. Ash* to determine if a statute or regulation carried an implied private cause of action.[27] However, in *Sandoval*, the Court clarified that "statutory intent on this latter point is determinative. Without it, a cause of action does not exist, and courts may not create one."[28]

Beyond denying them a private cause of action, the *Sandoval* decision otherwise left the Title VI disparate impact regulations untouched. Therefore, alleging violations of disparate impact regulations through an agency's Title VI administrative complaint process remains a viable option for environmental justice advocates. However, there is pending litigation challenging constitutionality of disparate impact regulations (see Section D). Nonetheless, the Title VI approach to environmental justice has grown in prominence in recent years, with community groups filing Title VI administrative complaints in response to the Jackson, Mississippi water crisis and toxic air pollution in Cancer Alley, Louisiana and Port Arthur, Texas.[29]

C. Issues with Title VI Administrative Complaints

The administrative complaint strategy has limitations. Historically, these limitations have concerned federal agencies' lack of resources to process complaints, conduct investigations, and

[24] *Alexander v. Sandoval*, 532 U.S. 275, 280-281 (2001).
[25] *Regents of University of California v. Bakke*, 438 U.S. 265, 287 (1978).
[26] *Alexander v. Sandoval*, 532 U.S. 275, 275 (2001).
[27] *Cort v. Ash*, 422 U.S. 66 (1975).
[28] *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001).

[29] NAACP, *Complaint Under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, and 40 C.F.R. Part 7 Regarding Discrimination by the State of Mississippi Gravely Adversely Impacting the Drinking Water System for the City and the Health and Well Being of the People of Jackson, Mississippi* (2021), available at https://www.epa.gov/sites/default/files/2021-12/documents/jackson_complaint.pdf. Tulane Environmental Law Clinic, *Complaint Under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, and 40 C.F.R. Part 7 against the Louisiana Department of Environmental Quality for Lack of Environmental Justice Procedures in its Air Permitting Program and Resulting Discriminatory Decision on Formosa Air Permits* (2022), available at https://www.epa.gov/system/files/documents/2022-06/04R-22-R6%20Complaint%20Redacted.pdf. Lone Star Legal Aid, Complaint under Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, by Port Arthur Community Action Network regarding the Texas Commission on Environmental Quality's Issuance of Federal Operating Permit No. O1493 to Oxbow Calcining LLC (2021), available at https://environmentalintegrity.org/wp-content/uploads/2021/08/2021.08.18_Oxbow-Title-VI-Complaint-Final.pdf.

enforce remedies.[30] For example, some recent estimates suggest only half of the complaints filed with the EPA receive any acknowledgment within one year of their filing date.[31] There are also many notable anecdotes. For example, in *Californians for Renewable Energy et al. v. EPA*, a federal district court found EPA had failed to respond to five different complaints for more than a decade.[32] After communities of color in Flint, Michigan filed a complaint objecting to the siting of a power plant in their community, it took the EPA 25 years to respond.[33] In other cases, the EPA has taken decades to even begin its review process (which should only take twenty days).[34] For example, in *Padres Hacia Una Vida Mejor v. McCarthy*, the EPA failed to acknowledge receipt and begin reviewing a Title VI complaint for 17 years.[35]

The Biden Administration has attempted to revamp the Title VI process for environmental justice advocates. Executive Order 14096 directed federal agencies to "advance environmental justice for all by implementing an enforcing the National's environmental and civil rights laws."[36] Subsequently, the EPA has enacted several reforms to make its Title VI review process more efficient.

In late 2022, the EPA created the new Office of Environmental Justice and External Civil Rights (OEJECR), which has taken over review of Title VI administrative complaints. The OEJECR has 200 new staff and significant funding from the Inflation Reduction Act to carry out its mission.[37] In its FY 2022-2026 Strategic Plan, the EPA also expressed its commitment "to strengthen the EPA's External Civil Rights Office and its ability to enforce federal civil rights laws to their fullest extent, including by fully implementing its authority to conduct affirmative investigations in overburdened communities, issue policy guidance, and secure timely and effective resolutions to address discrimination."[38]

D. Louisiana Questions Constitutionality of Disparate Impact Regulations

While the Supreme Court has not yet squarely addressed whether disparate impact regulations are constitutional,[39] the question has now been raised directly by the State of Louisiana.[40] On May 24th, 2023, the State of Louisiana, through Attorney General Jeff Landry, filed suit against

[30] Clifford Villa et al., ENVIRONMENTAL JUSTICE: LAW, POLICY & REGULATION 154 (3rd ed. 2020).
[31] *Id.*
[32] *Californians for Renewable Energy et al. v. EPA*, No. 4:15-cv-03292, 2018 WL 1586211 (N.D. Cal. Mar. 30, 2018)
[33] Villa et al., *supra* note 32, at 148-155.
[34] 40 C.F.R. § 7.120(d)(1)(i) (EPA section 602 regulations stating that "[w]ithin twenty calendar days of acknowledgement of the complaint, the OCR will review the complaint for acceptance, rejection, or referral to the appropriate Federal agency").
[35] *Padres Hacia Una Vida Mejor v. McCarthy* , 614 F. App'x 895, 897 (9th Cir. 2015).
[36] Exec. Order No. 14,096, 88 Fed. Reg. 25,251 (2023).
[37] Marianne Engelman-Lado, *EPA's New Office of Environmental Justice and External Civil Rights: A Moment in History*, U.S. ENV'T PROT. AGENCY (Oct. 6, 2022), https://www.epa.gov/perspectives/epas-new-office-environmental-justice-and-external-civil-rights-moment-history.
[38] U.S. ENV'T PROT. AGENCY, FY 2022-2026 STRATEGIC PLAN (2022).
[39] The Court expressly avoided this question in *Alexander v Sandoval*. See *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001).
[40] *State of Louisiana v. EPA*, No. 2:23-cv-00692-JDC-KK (W.D. La. May 24, 2023).

the EPA, alleging that the agency's enforcement of Title VI regulations prohibiting discrimination under a disparate impact theory is unconstitutional.[41]

The State argues that because § 602 requires funding agencies to adopt and enforce regulations pursuant to § 601, and § 601 is limited to prohibiting only intentional discrimination (see above discussion of *Alexander v. Sandoval*), agencies are therefore only authorized to regulate intentional discrimination.[42]

There are debates over Title VI's legislative history. One interpretation is that Congress did not define discrimination as an act of deference to the agencies.[43] In addition, there is an argument that Congress has subsequently ratified disparate impact regulations in other contexts, by requiring their adoption when enforcing government assistance anti-discrimination statutes.[44] For example, statutes were in enacted in the 1970s prohibiting discrimination on the basis of sex for programs that received assistance from the Federal Highway Administration or under the Federal Energy Administration Act that required enforcement in accordance with the established Title VI regulations.[45]

In June, the EPA issued a finding of no discrimination, resolving the two complaints against Louisiana's Department of Environmental Quality and Department of Health that had provided the basis for Louisiana's suit against the agency.[46] The EPA filed notice of such resolution and the State has filed its response; the court has yet to decide whether the case will continue to move forward.[47]

3. Notes

Presentation #1: Amy Laura Cahn (Legal Director for Taproot Earth)

Presentation #2: Lisa Jordan (Director, Tulane Environmental Law Clinic)

[41] *Id.*
[42] *Id.*
[43] Bradford Mank, *Are Title VI's Disparate Impact Regulations Valid?*, 71 U. CINN. COLL. L. 517, 528-30 (2003) (primarily discussing Charles F. Abernathy, *Title VI and the Constitution: A Regulatory Model for Defining "Discrimination,"* 70 GEO. L.J. 1 (1981)).
[44] *Id.* at 532-34.
[45] *Id.*; *see* 49 U.S.C. § 47123; 43 U.S.C. § 1863.
[46] Defendants' Notice of Resolution of Title VI Complaints, *State of Louisiana v. EPA*, No. 2:23-cv-00692-JDC-KK (June 27, 2023).
[47] *Id.*

Presentation #3: Maryum Jordan (Director, Climate Justice Attorney, EarthRights International)

Presentation #4: Debbie Chizewer (Managing Attorney, Earthjustice)