

No. 08-35045

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

ROSEMERE NEIGHBORHOOD ASSOCIATION,

Plaintiff-Appellant,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, and
STEPHEN L. JOHNSON, in his official capacity as Administrator of the
Environmental Protection Agency,

Defendants-Appellees.

On Appeal from the United States District Court for the
Western District of Washington
Case No. C07-5080BHS
Hon. Benjamin H. Settle

**AMICUS CURIAE BRIEF OF
CENTER ON RACE, POVERTY & THE ENVIRONMENT IN SUPPORT
OF APPELLANT ROSEMERE NEIGHBORHOOD ASSOCIATION**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the Center on Race, Poverty & the Environment hereby states that it does not have any parent companies, subsidiaries, or affiliates that have issued shares to the public.

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I. STATEMENT OF INTEREST

Amicus Curiae Center on Race, Poverty & the Environment ("CRPE") submits this brief in support of Appellant Rosemere Neighborhood Association ("RNA"). CRPE believes that the actions of Appellee Environmental Protection Agency ("EPA") with respect to the two Title VI complaints filed by RNA are capable of repetition, yet evading review. *See Moore v. Ogilvie*, 394 U.S. 814, 816 (1969). CRPE supports the arguments made by RNA in its opening brief.

CRPE is a non-profit environmental justice law firm that represents communities facing environmental burdens. Since 1994, CRPE has filed 12 complaints with EPA under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, on behalf of individuals and communities alleging racial discrimination and has also worked with many other complainants. EPA did not meet its regulatory deadlines with respect to any of the Title VI complaints filed by CRPE or any of the other complainants CRPE has worked with. Five of CRPE's complaints are still pending before EPA, some more than a decade after they were filed. Despite EPA's repeated failure to resolve complaints within regulatory deadlines, and despite the fact that many of our complaints still remain outstanding, CRPE continues to file Title VI complaints, in hopes of fulfilling the promise of this nation's civil rights laws. CRPE has a strong interest in the

outcome of this case.

II. BACKGROUND ON CIVIL RIGHTS LAW

When Congress enacted the Civil Rights Act of 1964, it intended that citizen enforcement of civil rights law be a vital component of the statutory framework. As the Supreme Court recognized, "it was evident that enforcement [of the Civil Rights Act] would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law." *Newbury v. Piggie Park Enterprises*, 390 U.S. 400, 401 (1968) (per curiam). However, in *Alexander v. Sandoval*, 532 U.S. 275 (2001), the Supreme Court stripped victims of disparate impact discrimination of the right to bring action in federal court to redress that discrimination under Title VI implementing regulations. Under Title VI, after *Sandoval*, administrative complaints filed with responsible agencies are the only means for alleging and addressing disparate impact.

The disparate impact standard is important to civil rights law and environmental justice because it reaches discrimination that may exist under the guise of compliance with the law. See 110 Cong. Rec. 13504 (remarks of Sen. Case) (quoted in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971)). Because complainants who may bear disparate environmental burdens are prevented from

bringing disparate impact claims in federal court, the Title VI administrative complaint is vital to the continued enforcement of civil rights law and the struggle for environmental justice. If federal agencies such as EPA are allowed to abdicate their responsibility to adhere to the law, victims of discrimination will be precluded from any legal remedy for their harm.

III. CRPE HAS EXPERIENCED SIMILAR PROBLEMS OF ILLEGAL DELAY IN COMPLAINTS FILED WITH EPA.

CRPE believes that there is a high likelihood that EPA's wrongful conduct will recur with respect to a future complaint filed by RNA because EPA has demonstrated a pattern and practice over the last 18 years of failing to enforce civil rights laws, ignoring its regulatory deadlines, and completely abdicating its responsibility to take action to resolve the issues raised in Title VI complaints that CRPE and other have filed with the agency. In fact, all 12 of the Title VI complaints filed by CRPE have been similarly plagued by EPA's inability to resolve complaints within regulatory timelines.¹ Below are examples from 10 complaints filed by CRPE.

¹ EPA's Title VI implementing regulations are found at 40 C.F.R. Part 7. EPA has five days to acknowledge receipt of a complaint and 20 days to accept, reject or refer the complaint. 40 C.F.R. § 7.120(c); 40 C.F.R. § 7.120(d)(1)(i). After acceptance, EPA has 180 days to issue a preliminary decision. 40 C.F.R. § 7.120(c); 40 C.F.R. § 7.115(c)(1).

A. *Padres Hacia una Vida Mejor, et al. v. California Environmental Protection Agency, Department of Toxic Substances Control, et al. (01R-95-R9).*

CRPE filed this complaint with EPA on December 12, 1994. ER 134. The complaint alleged violations of Title VI by the state and local government agencies that permit and oversee toxic waste dumps, causing three low-income Latino communities in rural California to bear the brunt of toxic waste disposal for the entire state. ER 135. EPA failed to accept, reject or refer the complaint within 25 days of receipt. EPA accepted the complaint on July 18, 1995, 193 days after its deadline. ER 135.

EPA also failed to meet its regulatory deadline for reaching a preliminary decision on the complaint within 180 days. The complaint was filed on December 12, 1994, but EPA has not yet issued a decision although it is over 13 years after the complaint was filed. ER 135. EPA did conduct an investigation in at least one of the three communities that filed the complaint in the mid-1990s. ER 135. However, CRPE has not heard from EPA about the status of this complaint in at least five years. ER 135.

At the same time, EPA has been processing a PCB permit renewal for one of the facilities that was named in the complaint – Chemical Waste Management's Kettleman Hills facility. ER 135. It has been extremely frustrating for CRPE's

clients to have these allegations of civil rights violations pending for over 13 years now, while EPA is simultaneously processing new permits for the plant causing the discriminatory impact. ER 135. The grandchildren of the original complainants were newborns at the time the complaint was filed and are now in high school without a resolution of this civil rights complaint. ER 135. Those children, their parents and grandparents have lost all respect for, and faith in, EPA and its ability to protect public health, the environment and their civil rights. ER 135.

B. *Residents of Sanborn Court v. California Environmental Protection Agency, Department of Toxic Substances Control (02R-95-R9).*

CRPE filed this complaint with EPA on August 9, 1995. ER 135. The complaint alleged that California's Department of Toxic Substances Control ("DTSC") violated Title VI by issuing a Permit and "Negative Declaration" under the California Environmental Quality Act ("CEQA") for a major toxic waste treatment facility to be located just one block from the Residents' apartment complex. ER 135-36. EPA failed to accept, reject or refer the complaint within 25 days of receipt. EPA rejected several of the allegations in the complaint on April 6, 1999, approximately 1,315 days after its deadline. ER 136. On July 13, 2001, nearly 6 years after it was filed, EPA partially accepted the complaint, and rejected

the allegation of intentional discrimination. ER 136.

EPA also failed to meet its regulatory deadline for a preliminary decision on the complaint in 180 days. EPA has *not yet* issued this decision although it is now nearly eight years after the complaint was accepted and over 12 years after the complaint was filed. EPA dismissed some of the claims in April 2003, almost eight years after the filing of the complaint. ER 136. Several other claims, including one of systemic discrimination by DTSC, remain under investigation although CRPE has not heard anything from EPA on this case in more than four years. ER 136. While this complaint was waiting for EPA's acceptance or rejection decision, the plant at issue had a number of accidents and legal violations, which led to repeated releases of toxic gasses into the surrounding neighborhood. ER 136. Because of almost continuous non-compliance with state and federal law, the plant was ultimately shut down by state regulators. ER 136.

C. *L.A. Comunidades Asambladas Unidas Para un Sostenible Ambiente v. South Coast Air Quality Management District (10R-97-R9).*

CRPE filed this complaint with EPA in July 1997. ER 136. The complaint alleged that the South Coast Air Quality Management District's Old Vehicle Scrapping Program caused substantial and unjustified disparate impacts on predominantly minority communities in the District, in violation of Title VI,

because under District rules, automobiles from a four-county area were scrapped and the credits for their emissions sold to oil company facilities in communities of color, thus concentrating pollution formerly distributed across four counties into several identifiable communities of color. ER 137. EPA failed to accept, reject or refer the complaint within 25 days of receipt and, in fact, never made that decision. ER 137. Over four years after the complaint was filed, complainants' counsel received a call from EPA staffers in Region 9 who told us that EPA was about to reject the complaint unless it was withdrawn. ER138. Under that pressure, the complaint was withdrawn in November 2001. ER 138.

D. *Manzanar Action Committee v. DTSC (11R-97-R9).*

CRPE filed this complaint with EPA on August 7, 1997. ER 138. The complaint alleged that DTSC violated Title VI by issuing a Hazardous Waste Operating Permit to the Southern California Gas Company, Inc. for a facility located less than a quarter mile from a predominantly Latino community. ER 138. EPA failed to accept, reject or refer the complaint within 25 days of receipt. EPA rejected the complaint as untimely on October 28, 1997, around 70 days after it was filed; 45 days over its deadline. ER 138.

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E. *Lucha Ambiental de la Comunidad Hispana v. County of Los Angeles (13R-97-R9).*

CRPE filed this complaint with EPA on November 13, 1997. ER 138. The complaint alleged that Los Angeles County and the Los Angeles County Department of Regional Planning discriminated against nearby Latino residents by granting a permit for the expansion of a dump located one mile from the residents and by continuing to allow the continued operation of the landfill despite continued permit violations. ER 138. EPA failed to accept, reject or refer the complaint within 25 days after receipt. EPA rejected the complaint for lack of financial assistance on August 24, 1999, about 600 days after it was filed; 575 days over its deadline. ER 138.

F. *Angelita C. et al. v. Department of Pesticide Regulation (16R-99-R9).*

CRPE filed this complaint with EPA on June 30, 1999. ER 139. The complaint was filed by children and the parents of children who attend the California schools most exposed to the deadly fumigant methyl bromide, alleging ongoing discrimination in the permitting of this acutely toxic Category I pesticide and all pesticides in California. ER 139. California's Department of Pesticide Regulation ("DPR") failed to consider the impact on minority schoolchildren and failed to implement readily available less discriminatory and less dangerous

alternatives. ER 139. EPA failed to accept, reject or refer the complaint within 25 days after receipt. EPA accepted the complaint for investigation in December 2001, 865 days over its deadline. ER 139.

EPA failed to meet its regulatory deadline for a preliminary decision on the complaint in 180 days. The complaint was filed on June 30, 1999 and EPA has not made this decision although it is over 3,115 days after the filing of the complaint. ER 139. CRPE has not heard anything from EPA about its purported investigation of this accepted complaint in more than six years. ER 139. DPR continues to permit the use of methyl bromide in a discriminatory fashion and millions of pounds of methyl bromide are applied in California's fields every year. ER 139.

G. *Community United for Political and Individual Development v. ADEQ (19R-99-R9)*.

CRPE filed this complaint with EPA on August 6, 1999. ER 139. The complaint alleged that the Arizona Department of Environmental Quality's issuance of a permit under RCRA for a hazardous waste treatment and storage facility just 250 yards south of the community of Randolph disproportionately harmed and discriminated against nearby Latino, Native American and African American residents. ER 140. EPA failed to accept, reject or refer the complaint within 25 days of receipt. EPA accepted the complaint for investigation on

December 17, 2001, 837 days over the regulatory deadline. ER 140.

EPA also failed to meet its regulatory deadline for a preliminary decision on the complaint in 180 days. After four years of no communication (from 1999 to 2003) and no visible activity by EPA on the complaint, EPA then requested information from complainants and set extremely tight deadlines for submission of the information. ER 140. Our clients had become so frustrated with EPA's failure to investigate that they decided not to assist EPA's investigation any further. ER 140. EPA therefore dismissed the *CUPID* complaint in June 2003, approximately 1,425 days after it was filed. ER 140.

H. *African American Environmental Justice Action Network, et al. v. Alabama Department of Environmental Management (28R-99-R4).*

CRPE filed this complaint with EPA on December 22, 1999. ER 140. The Complaint alleged that the Alabama Department of Environmental Management violated Title VI when in modified and issued permits for landfills located in predominantly African American communities but serving predominantly white communities. ER140. EPA failed to accept, reject or refer the complaint within 25 days after receipt. EPA accepted the complaint for investigation on December 11, 2001, about 719 days after it was filed; 694 days over its deadline. ER 141.

EPA also failed to meet its regulatory deadline for a preliminary decision on

the complaint in 180 days. The complaint was filed on December 22, 1999 and EPA dismissed the complaint in June 2003, approximately 1,255 days after the complaint was filed. ER 141.

I. *IWU Negotiating Team v. Arizona Department of Environmental Quality (09R-00-R9).*

CRPE filed this complaint with EPA on August 7, 2000. ER 141. The complaint alleged that the Arizona Department of Environmental Quality violated Title VI by denying the IWU Negotiating Team the opportunity to adequately participate in the public hearing regarding Innovative Waste Utilization's draft permit and misrepresented the outcome of the permitting process. ER 141. EPA failed to accept, reject or refer the complaint within 25 days after receipt. EPA accepted the complaint for investigation on December 11, 2001, 491 days after it was filed; 466 days over the deadline. ER 141.

EPA failed to meet its deadline to issue a preliminary decision within 180 days after initiating complaint investigation. EPA dismissed the complaint on April 30, 2003, 505 days after initiating investigation, 2 years and 8 months after the complaint was filed. ER 141. Although the complaint alleged both discriminatory impact and discriminatory treatment, EPA dismissed the entire complaint on the grounds that it found no intentional discrimination. ER 141.

EPA did not analyze the claims of discriminatory impact, concluding that “insufficient evidence was available to analyze the allegations under a disparate impact standard.” (EPA Investigative Report, April 30, 2005). ER 141. CRPE’s clients were frustrated that EPA apparently failed to investigate the majority of the allegations in the complaint. ER 142.

J. *Ujima Security Council and Youth United for Community Action v. Department of Toxic Substances Control (07R-05-R9).*

CRPE filed this complaint with EPA on June 20, 2005. ER 142. The complaint alleged that DTSC violated Title VI by improperly allowing Romic Environmental Technologies to operate with an expired permit in East Palo Alto, a predominantly minority town, for over 14 years, by taking the unacceptably long period of 11 years to complete a Draft Environmental Impact Report, by failing to provide meaningful notice and opportunity to comment on the Draft EIR by not translating it into Spanish, and by failing to notify residents about serious and numerous violations committed by Romic over five years that potentially threatened the health and well being of the community. ER 142. EPA failed to accept, reject or refer the complaint within 25 days of receipt. To date, EPA has not made this decision. ER 142. In December 2007, over two years after the complaint was filed, EPA sent complainants its notice of receipt of the complaint

and the complaint remains under review.

In April 2007, Youth United for Community Action decided to prepare to file another Title VI complaint with EPA. In this complaint, they would update the allegations in their 2005 complaint in an attempt to hold DTSC accountable for its failure to take action despite verbal agreements to do so. However, in May 2007, DTSC issued an Enforcement Order against Romic, which shut down most of the facility's operations in East Palo Alto.² The facility was subsequently sold and is now scheduled for clean-up.

IV. CRPE HAS DOCUMENTED EPA'S NATIONAL PATTERN OF ILLEGAL DELAY.

CRPE's experiences, unfortunately, are not unique. In 1996, CRPE spoke to 16 of the 20 complainants who filed administrative complaints with EPA between 1992 and October 14, 1996. ER 142. On October 14, 1996 CRPE sent a letter EPA Administrator Carol Browner that detailed EPA's failures to comply with its statutory and regulatory obligations. ER 142. That letter, signed by 16 different complainants, set forth in detail similar failures by EPA to meet its deadlines (although at that time EPA's failures were not nearly as egregious as they are now). ER 142.

² State of California Environmental Protection Agency Department of Toxic Substances Control, Docket HWCA 20006-1227.

The October 14, 1996 letter also pointed out that EPA was similarly in violation of its deadlines in six other complaints. ER 146. Several complainants who were signatories to the letter, *Residents of Sanborn Court, Padres Hacia Una Vida Mejor, et al.*, and *St. Francis Prayer Center*, still do not have resolution of their civil rights complaints, more than 10 years after CRPE sent the letter to EPA Administrator Carol Browner.³

In addition to demonstrating a pattern and practice of illegal delay in resolving complaints, to CRPE's knowledge, EPA has never decided a civil rights complaint on the complainant's behalf. *See e.g., St. Francis/Select Steel Case (05R-98-R5)*. Instead, EPA has violated its own regulations, internal guidances and policies and narrowly construed its enforcement authority to ignore and or dismiss complaints even when those complaints appear meritorious. ER 147.


V. CONCLUSION

In conclusion, although EPA has voluntarily resolved both of RNA's complaints, there are literally dozens more pending cases, including some filed by CRPE that would benefit from this Court's reversal of the Opinion below. We therefore urge this Court to reverse the decision of the District Court and hold that

³ More background on CPRE's work on environmental justice and the EPA is found in the Declaration of Luke Cole, ER 133-147.

the action by Rosemere Neighborhood Association is not moot.

Dated: May 8, 2008



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CENTER ON RACE, POVERTY & THE
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CERTIFICATE OF COMPLIANCE PURSUANT TO
FED. R. APP. P. 32(a)(7)(C) AND CIRCUIT RULE 32-1

I certify that pursuant to Fed.R.App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached Amicus Curiae Brief of Center on Race, Poverty & the Environment in Support of Appellant Rosemere Neighborhood Association is proportionally spaced, has a typeface of 14 points, and contains 3,087 words.

Dated this 8th day of May, 2008



Marybelle Nzagwa

CENTER ON RACE, POVERTY &
THE ENVIRONMENT

PROOF OF SERVICE

I, Marybelle Nzegwu, certify that on May 8, 2008, an original and fifteen (15) copies of AMICUS CURIAE BRIEF OF CENTER ON RACE, POVERTY & THE ENVIRONMENT IN SUPPORT OF APPELLANT ROSEMERE NEIGHBORHOOD ASSOCIATION were sent by first-class mail, postage prepaid to the Clerk of the U.S. Court of Appeals for the Ninth Circuit, P.O. Box 193939, San Francisco, California, 94119-3939. Two (2) copies of AMICUS CURIAE BRIEF OF CENTER ON RACE, POVERTY & THE ENVIRONMENT IN SUPPORT OF APPELLANT ROSEMERE NEIGHBORHOOD ASSOCIATION were sent by first-class mail, postage pre-paid, to:

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