

New EPA Data On Civil Rights Backlog May Help Reshape Equity Agenda

New EPA data provide first-time details of the agency's backlog in handling Civil Rights Act complaints dating back to 1993 and show repeated failures to meet regulatory deadlines for responding to complaints, which activists say bolsters their calls for an overhaul of the agency's Office of Civil Rights Office (OCR) amid EPA efforts to make equity a key factor in enforcement, permitting and other decisions.

The data was compiled as part of a settlement with activists over a civil rights complaint. An *Inside EPA* review of the data shows OCR has received more than 300 complaints since the early 1990s, and continues to investigate about 30 of them, including 12 awaiting jurisdictional decisions.

The backlog has already prompted EPA Administrator Lisa Jackson to reform the agency's process for addressing complaints filed under Title VI of the Civil Rights Act. Jackson has also made environmental justice a top priority during her tenure, including incorporating equity into key policy considerations. EPA did not respond to a request for comment on the new data.

Some sources say the OCR backlog is due in part to EPA's ongoing struggles to settle on a legally defensible definition for what qualifies as a decision that has a "disproportionate impact" on minority communities justifying a complaint. Disproportionate impact refers to policies or actions that are racially neutral on their face, but have the effect of discriminating because they disproportionately harm minorities.

Disproportionate impact is also crucial to EPA's recently released draft work plan outlining how EPA can incorporate equity into its policy making and other decisions. The draft plan includes a broad objective of using regulatory tools to advance environmental justice, under which the agency proposes several goals, including strengthening the science of disproportionate impact and cumulative risk analysis.

One informed source says that while the new backlog data may increase the pressure on OCR to address the outstanding complaints, it will not help the office determine how to substantively address the allegations, including complaints that claim disproportionate impact. "The problem is they don't know how to resolve these quickly," the source says, adding that the complaints are often complex and sensitive."

EPA produced the 23-page spreadsheet of discrimination complaints it received during the last 17 years as part of a landmark legal agreement it reached with the Rosemere Neighborhood Association last month. The settlement followed a historic federal appeals court ruling in September that found "a pattern of delay" in EPA's response to the association's discrimination complaint and scores of other similar Title VI complaints.

Title VI of the Civil Rights Act prohibits discrimination on the basis of race, color and national origin in programs and activities receiving federal funding. Agencies including EPA have rules to prevent discrimination in awarding financial assistance to recipients. But enforcement of those rules was stymied after the Supreme Court in 2001 set a high bar requiring plaintiffs to show intentional discrimination before claims can proceed in court, leaving those who believe they suffered discrimination only the option of filing administrative complaints.

The new data — which under the terms of the settlement agreement EPA must update quarterly -- show that OCR is still conducting jurisdictional reviews of 12 petitions filed between January 2009 and March 2010, all of which were supposed to have been decided within 20 days, according to EPA rules. "Three matters are still under jurisdictional review from 2009, so clearly they still have a problem," says a source familiar with the data.

OCR rejected more than 130 petitions on jurisdictional grounds and dismissed about 15 on the merits, with none of those resulting in a finding of discrimination that triggers sanctions, according to the spreadsheet.

The data also show that OCR is still reviewing the first Title VI complaint it ever received, agreeing in January 1995 to investigate a petition filed in July 1994. No decision has been made on that complaint in 15 years. Additionally, the data show OCR has informally resolved a handful of complaints through voluntary agreements.

The source familiar with the data says the information provides first-time proof of OCR's poor track record handling Title VI complaints, not only documenting its failure to meet a single 20-day jurisdictional deadline but also showing that OCR has failed to complete any accepted petitions within the 180-day deadline.

New Scrutiny Of OCR

Prominent environmental justice advocate Robert Bullard told *Inside EPA* in an April 9 interview that the data should place "the burden back on the federal EPA to make sure that this injustice of not addressing petitions in a timely manner is corrected." Bullard and other observers say that the data should put heightened scrutiny on OCR, adding to existing calls

for the office to overhaul and accelerate its process for handling Title VI complaints.

Jackson ordered OCR to reform and speed up its process for resolving Civil Rights Act discrimination claims in response to the 2009 ruling by the U.S. Court of Appeals for the 9th Circuit in *Rosemere Neighborhood Association v. EPA*. In a statement to *Inside EPA* Sept. 17, Jackson said the court “found a consistent pattern of EPA delays in responding to complaints under Title VI of the Civil Rights Act of 1964. These delays are indefensible and unacceptable. What may have been acceptable under a previous administration is certainly not acceptable under this one.”

Bullard said the data EPA released as part of the *Rosemere* settlement is “out of the box now. I don’t think you can say that this information is not damaging. It is damaging, and so I think there has to be some corrective measures that would address this and build trust and reinstate some credibility with the way future complaints will be handled.”

An EPA source has previously said that OCR has long avoided pursuing civil rights complaints alleging discrimination based on disparate environmental impact for fear that the agency would lose such a case if challenged in court. Disparate impact claims are difficult to prove and rife with legal uncertainty, sources say, and a loss in court would set a damaging legal precedent that could establish a strict test for what qualifies as a disparate impact under civil rights law, making it more difficult to bring such claims in the future, OCR fears.

Following the settlement, the Rosemere Neighborhood Association vowed to publicize the backlog updates to pressure OCR to address the delays and hopefully issue a finding that a civil rights violation has occurred.