

Despite Jackson's Vows, EPA Faces New Suit For Stalled 'Rights' Petitions

Despite promises in 2009 from Administrator Lisa Jackson that EPA would quickly respond to dozens of stalled civil rights petitions, environmentalists June 30 filed a new suit seeking to compel the agency to act on a petition that has been languishing for 16 years and represents one of the first such petitions lodged with the agency.

The suit, filed in federal district court in California, comes as the agency's Office of Civil Rights (OCR) has dismissed a handful of other petitions alleging discrimination by recipients of EPA funds. EPA has yet to find that a single action has violated the Civil Rights Act and may be raising the bar by dismissing petitions alleging "intentional discrimination" rather than reviewing them based on the agency implementing regulation's lower threshold of "disparate impact," sources say.

The suit, *Padres Hacia Una Vida Mejor, et al. v. Lisa P. Jackson*, is intended to build on environmentalists' success in challenging the agency in 2009 over its failure to respond to a discrimination petition filed under Title VI of the Civil Rights Act, which prohibits recipients of federal funds from operating in a discriminatory manner.

Title VI prohibits discrimination on the basis of race, color and national origin in programs and activities receiving federal funding. EPA and other agencies have rules to prevent discrimination in awarding financial assistance to recipients. EPA's regulations require OCR to make an initial determination on a complaint within 25 days and then issue a preliminary finding within 180 days of accepting a complaint for investigation.

But action on the petitions has been stymied since 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. EPA has been reluctant to issue a discrimination finding over concern that a decision would be challenged in court.

In the 2009 case, *Rosemere Neighborhood Association v. EPA*, a federal appellate court upheld a lower court ruling that found that the agency had engaged in a "pattern of delay" in failing to respond to a petition alleging that the city of Vancouver, WA, violated Title VI of the rights law by failing to properly use EPA funds to make environmental improvements in its work area, and then retaliated against the association after it filed the complaint.

In response to the ruling, Jackson vowed to reform and speed up its process for resolving claims, saying in a statement that she had directed staff "in the strongest terms, to review and reform the Title VI process so that complainants receive timely responses and decisions. By reforming and revitalizing the Title VI program, and expeditiously resolving pending complaints, EPA will advance its mission of protecting human health and the environment."

But the just-filed lawsuit is targeting the agency for failing to respond to a petition submitted to OCR in 1994, one of the oldest languishing petitions to date. The petition says the California Department of Toxic Substances Control (DTSC) and other state and local agencies that regulate the state's three toxic waste dumps acted in a discriminatory manner by siting them exclusively in disadvantaged communities.

"All three toxic waste dumps are located in rural, low-income, Latino communities who disproportionately bear the burden of toxic waste disposal," the complaint says. "EPA's failure to comply with its own regulations for processing Title VI complaints is part of a pattern and practice whereby EPA consistently fails" to investigate complaints.

The plaintiffs are seeking judgment that "EPA has unlawfully withheld legally mandated agency action," as well as a court order requiring the agency to address the current and any future Title VI complaints filed by the plaintiffs in accordance with its rules — similar to what *Rosemere* plaintiffs won. However, the *Rosemere* petition has stalled and plaintiffs in that case are still expressing frustration with EPA and Jackson in particular over failure to take meaningful action.

Still, a *Rosemere* source is pleased that a second case was filed. "It is no surprise that they filed their case, as it was *Rosemere*'s intention to open the door for other groups to bring their complaints to the courts as a 'pattern and practice of delay.' . . . Obviously, waiting 15 years for a decision is absurd. It is interesting that the new case names Lisa Jackson personally, perhaps tightening the political noose. She has been traveling the country talking about how important [environmental justice] is but has not cleaned up the OCR. It is *status quo*, even after our case." However, the source adds that because of the *Rosemere* precedent, "It will be easier for other groups to follow suit and gain leverage over these serious time delay issues."

EPA could not be reached for comment but issued a statement to the *Fresno Bee* that it won't discuss pending litigation.

The Center on Race, Poverty & Environment (CRPE), representing plaintiffs in the new case, said in a release that the

court should compel EPA to end the discrimination caused by DTSC that allowed the siting and expansion of toxic waste dumps in Kettleman City, where residents suffer from unusually high birth defect rates. “Unfortunately, their plight is not alone. Presently there are 32 other Title VI complaints that were filed before President Obama took office and Jackson became administrator,” CRPE says.

The group also cites a Deloitte Consulting report Jackson commissioned to evaluate OCR’s performance, which in April delivered a scathing assessment of the troubled office, finding it has not “adequately” adjudicated discrimination complaints filed by outside groups and has “struggled” to address internal discrimination complaints (*Inside EPA*, April 15).

A CRPE source says, “Our clients want Jackson to keep her promise to make environmental justice a priority. They want EPA to resolve their complaint and grant the relief that Congress provided in the Civil Rights Act. They want California to stop dumping toxic waste only in low-income, rural, Latino communities.”

While the *Padres* case seeks to compel EPA to act on a long-stalled petition, the agency has recently rejected 10 other petitions on substantive or jurisdictional grounds, in keeping with Jackson’s promise to address the petition backlog following *Rosemere*.

However, a review of the substantive rejections, obtained by *Inside EPA* under the Freedom of Information Act, shows that OCR is setting a high bar by rejecting claims that allege “intentional discrimination” even though EPA rules only require petitioners show disparate impact.

That approach is likely influenced by the 2001 high court decision in *Alexander v. Sandoval*, which required proof of intentional discrimination, effectively seen as closing the courthouse door to such claims and leaving the petition process as the only option for relief.

For example, EPA Dec. 30 dismissed a Title VI complaint alleging the Indiana Department of Environmental Management (IDEM) intentionally discriminated against African American residents in Gary, IN, by failing to notify them of a permit issued for a medical facility. “OCR finds no violations of EPA’s Title VI regulations and concludes that the facts do not establish that IDEM intentionally discriminated on the basis of race in providing copies of the notice of decision regarding the Midwest Medical Solutions facility to the African American community,” the dismissal letter says.

OCR also conducted an investigation into the claim noting it “can not conclude that the impact of the distribution of the notice of decision ‘bears more heavily on one race than another.’”

Additionally, OCR in a second dismissal letter also issued Dec. 30 rejected allegations that the Arizona Department of Environmental Quality intentionally discriminated against African-American and Latino residents of Phoenix by not requiring its Community Emergency Notification System contractor to provide them outreach and education about the plan. “OCR finds insufficient evidence in the record to support the complainant’s allegation of intentional discrimination,” the letter says.

Sources familiar with OCR say while complainants may have alleged intentional discrimination and set the bar higher than they had to, EPA rules are designed to prevent a discriminatory impact regardless of intent.

“It’s a bit slick, literal, exacting and pedantic to dismiss a case because it alleges intentional discrimination without considering disparate impact, and EPA has been reluctant to do that in the past. But they’re under pressure to clear cases and get rid of the backlog,” one source says. “EPA has adamantly maintained that the regulations prohibit unintentional disparate effects regardless of intent.”

The *Rosemere* source adds that the IDEM dismissal sounds “as if OCR is defending the defendant rather than figuring out ways to substantiate a Title VI claim. . . . Clearly, the [state] failed to operate in an inclusive fashion and made decisions on how to limit the mailing list to avoid public backlash. . . . There should have been a *prima facie* case of discrimination established in this case rather than a dismissal. It’s the classic power play shell game to place all this nasty stuff in poor neighborhoods.” — *Dawn Reeves*