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EPA Plan Expected To Limit New Title VI Petitions Though Backlog Remains

EPA is proposing a series of steps to strengthen consideration of anti-discrimination requirements in its grant award process, including revising its Civil Rights Act (CRA) rules, a move that observers say will help the agency avoid new petitions alleging discrimination but will likely do little to address the decades-old backlog of unanswered petitions.

In particular, the plan stops short of recent calls from advocates for the agency to clarify its policy on when grant recipients create a disparate impact on poor or minority communities. One informed source calls the proposal a “dud” and predicts activists “will be livid with outrage. It has no content. It doesn’t say anything about what [the CRA] does or does not do.”

But an attorney who has filed several complaints alleging that EPA grants violate the CRA says the proposal still “offers some serious possibilities for preventing, rather than merely readdressing, disparate burdens on communities of color” in the future.

The agency April 17 floated a draft supplement to its multi-year environmental justice (EJ) plan, known as Plan EJ2014, that sets a series of milestones for the agency to revise its process for ensuring that its grant awards do not violate CRA’s Title VI, which prohibits discrimination by recipients of federal funds. EPA’s Office of Civil Rights (OCR) is seeking comment on the draft document, “Advancing EJ Through Civil Rights,” through June 19.

The law generally bars federal spending which “encourages, entrenches, subsidizes or results in racial [color or national origin] discrimination,” including in cases where EPA funds may be used for regulatory or permitting purposes. In some cases, activists have sought to use the requirement to block states that receive federal funds from permitting polluting facilities in poor or minority neighborhoods. But EPA has refrained from bringing suits under the law since the 2001 Supreme Court decision in *Alexander v. Sandoval*, which set a high legal bar for private suits by requiring proof of intentional discrimination.

In the aftermath of the ruling, EPA has been unable to act on dozens of pending Title VI petitions alleging discrimination by state and local agencies that receive EPA funding. The backlog of petitions has prompted a series of lawsuits from environmentalists seeking to force EPA to act. In one case, *Rosemere Neighborhood Association v. EPA*, the U.S. Court of Appeals for the 9th Circuit in 2009 strongly criticized EPA inaction in responding to petitions.

In response, EPA Administrator Lisa Jackson vowed to address the backlog, though the agency’s response has been slow and civil rights and other activists have continued to press EPA.

Now the agency is seeking comment on a series of proposals — and related milestones — to revise its grant award process to limit discrimination. For example, the draft obligates the agency to develop Title VI terms and conditions as part of pre-grant award activity by May, revise grant forms by June and develop a grant monitoring strategy by August. It also vows to improve post-grant award Title VI compliance and launch a compliance pilot program by September.

EPA also will evaluate its Title VI implementing regulations with assistance from the Department of Justice (DOJ) and make any changes necessary, saying it will issue a notice of proposed rulemaking for public comment this fall.

To address future Title VI complaints, EPA will review its programmatic standard operating procedures and templates for processing complaints and conducting compliance reviews. It says it will develop a Title VI Complaints and Compliance Review Manual by March of next year.

It will also coordinate with EPA program offices to determine how Title VI can be incorporated into EPA’s National Program Management guidance; coordinate with the Interagency Working Group on Civil Rights; and collaborate with DOJ to identify best practices and otherwise strengthen the use of Title VI.

Sources say the plan stops short of providing activists with the broad range of provisions they had sought in a list of “demands” presented to EPA to address the backlog, including rescinding a Title VI settlement that sidestepped a preliminary disparate impact finding and resolving the Title VI complaint backlog within six months.

But the demands led to a January meeting with Administrator Lisa Jackson, and that led to the agency agreeing to add Title VI to its Plan EJ2014.

EPA Associate Administrator for Environmental Justice Lisa Garcia told an April 10 Environmental Law Institute event in Washington, DC, that the supplement is “a huge ask” from environmentalists, though the agency agreed that anti-discrimination work needed to be a major piece of its equity plan after it was omitted from the original version.

One source calls the draft “a really interesting document and in many ways surprising,” in part because while it does

not acquiesce to the list of demands that environmentalists presented to EPA last fall, it will significantly improve consideration of equity going forward.

“The activists were outraged and focused very much on lopping off some heads” but EPA does not agree to any of those steps, the source notes. Instead EPA “did something profoundly more meaningful and deliberative because the document shows they appreciate there is a reason why these cases aren’t resolved. It isn’t that OCR does a terrible job . . . it’s because these are very difficult cases.”

The upshot is that the steps EPA outlines will avoid Title VI petitions being filed in the future, because the agency will be having discussions with grantees at the time they are seeking EPA funding. “That will make this a much more robust process,” the source says. “And that will allow EPA to head off complaints in the future. This is actually a way that might make Title VI real in environmental programs because it’s not brinkmanship because you are meeting states at a moment when they want something for you. You are doing it in a moment that evaluates the whole program, rather than a specific Title VI complaint, so it is easier to talk about protections for communities. . . . It won’t help resolve the old cases, and they will have to do that, but this dramatically improves the program. This is a very intelligent document.”

The source adds it is good that EPA did not pick a state and revoke its funding — the only remedy in a successful Title VI complaint — while noting that some advocates will not be satisfied until EPA takes such an unlikely step.

Additionally, the attorney who has filed Title VI complaints with OCR adds that the pre- and post-award compliance programs and re-evaluation of the Title VI regulations “could, if done properly rather than timidly, avoid disparate burdens and fulfill the promise of Title VI.” But the source adds, “My greatest fear is that EPA will generate yet another program that is ineffective in protecting communities of color.”

However, an environmentalist affiliated with the Rosemere Neighborhood Association in Vancouver, WA, which brought the successful deadline suit against EPA, is not impressed by the draft, calling it “more bureau-babble white-wash.”

“When the *Rosemere* case was being pursued, EPA had no investigative guidelines, and they were supposed to adopt some procedures established by DOJ. . . . These tools have, after all these years, not been implemented. It’s almost as if they go out of their way to avoid having solid procedures to investigate a complaint.”

And this document, instead of committing to develop specific procedures, says EPA will collaborate with DOJ and ask for technical assistance. “Bogus in my mind,” the source says. “If a body is charged with investigation, it should have a clear pathway to do that. . . . This document does not provide for that.”

Other equity advocates declined to comment, saying they had not yet read the document.

But the informed source calls the draft a “dud” and predicts activists “will be livid with outrage. It has no content. It doesn’t say anything about what Title VI does or does not do. It’s also mendacious. EPA continues to pretend that Title VI is a powerful environmental justice statute, though it still can’t say how, and then indicates that it will nonetheless rigorously apply Title VI to state environmental programs — somehow — and push state environmental programs into implementing environmental justice.” The source adds the plan suggests that EPA intends to “strong arm” the states “without being able to describe what is required under Title VI. EPA should just admit that Title VI . . . has little relevance to environmental programs which are by and large run in a nondiscriminatory manner.”

The source adds that even though EPA includes “deliverables” and deadlines in the document, “I don’t think EPA can deliver credible guidance without first resolving the inherent conflict between what Title VI actually does and what it wants state environmental programs to do for it in order to achieve environmental justice’s political goals.” — *Dawn Reeves*