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EPA Rights Complaint Process Changes Fail To Ease Petitioner Concerns

EPA's proposal to give petitioners alleging civil rights violations a larger role in resolving complaints is failing to alleviate concerns from environmentalists, including groups who recently had their lawsuit against the agency over its handling of their discrimination complaint dismissed.

EPA Jan. 30 released two draft guidance documents to strengthen its policies for addressing discrimination complaints filed under Title VI of the Civil Rights Act, which prohibits recipients of federal funds from violating anti-discrimination protections mandated by the law. One guidance amends the agency's long-standing position that compliance with a health-based requirement is an adequate defense for a rights violation allegation. The second gives civil rights complainants a first-time formal seat at the table in possible settlement talks.

Under Title VI of the rights law, groups can file administrative complaints with EPA and other federal agencies alleging discrimination by entities that receive federal funds. At EPA, the Office of Civil Rights (OCR) investigates these claims and if it finds discrimination, then the recipient loses its funding. OCR has long been under pressure to issue a discriminatory finding, something it has never done. The office has also drawn criticism from advocates for delayed and weak responses.

Former EPA Administrator Lisa Jackson had sought to make environmental justice and Title VI a priority since the U.S. Court of Appeals for the 9th Circuit in a 2009 ruling, *Rosemere Neighborhood Association v. EPA*, found OCR engaged in a "pattern of delay" in responding to discrimination complaints.

Environmentalists had filed a separate lawsuit in U.S. District Court for the Eastern District of California, part of the same appellate circuit, seeking to force EPA to respond to a complaint first filed in 1994 alleging discrimination by state officials in siting hazardous waste landfills in their communities — facilities that now are proposed to be expanded.

EPA last August dismissed the long-standing petition at issue in the case, *Padres Hacia Una Vida Mejor and El Pueblo Para El Aire Y Agua Limpio v. Lisa P. Jackson*, and then argued that the lawsuit seeking a response should also be dismissed.

On Feb. 5, federal district court Judge Anthony W. Ishii sided with EPA and dismissed the case, rejecting environmentalists' push to win an injunction requiring EPA to respond to any future Title VI complaints over the landfills within strict statutory time frames — a concession environmentalists won in the *Rosemere* case.

Environmentalists say they may appeal the *Padres* ruling to the 9th Circuit, arguing that the lower court is bound by *Rosemere*.

EPA had argued that dismissal was appropriate because the only remedy to the complaint was to compel agency action, a remedy the agency said it satisfied by dismissing the complaint after finding the state agencies did not violate the rights law. EPA also said the plaintiffs' requested injunction that it issue timely responses to any future complaints was one that would "override statutory limits and would provide relief where no duty has been ignored."

Environmentalists had argued that the case was controlled by *Rosemere* and that EPA failed to meet a high burden of showing the complaint was moot. "Defendants must show that plaintiffs will not encounter further regulatory delays in the process of complaints," they said in a filing in the case.

But Judge Ishii found *Rosemere* to be "distinguishable" from this case, noting that the expansion of the hazardous waste sites "has not occurred, is dependent upon further administrative activity and approval, and there is no indication that approval of expansion is in any way imminent. If the expansion does not occur, then there will be no Title VI complaint."

The environmentalists had also sought to depose EPA OCR officials to show they had not meet their legal burden in the case, but EPA opposed that effort and the judge did not order depositions.

Meanwhile, environmentalists familiar with both the *Padres* and *Rosemere* petitions are downplaying the significance of the OCR guidance expanding petitioners' role, which appears to respond directly to a third Title VI petition in a California case known as *Angelita C*. In that case, EPA outraged activists when it issued a first-time draft disparate impact finding in favor of Hispanic school children exposed to methyl bromide, but then revoked that finding in a 2011 settlement with the state that was negotiated without petitioner input or knowledge.

One source says the document establishing procedures for complainant settlement participation "does nothing different than what they already have authority to do. . . . The document is all about EPA's discretion to include or

exclude” petitioners. “So the exact same thing that happened in *Angelita C.* could happen again.”

The source also does not expect EPA to do anything differently in light of the document. “Until they actually change and do something different, I don’t have any expectations that they will. Putting out a document like this says they will keep doing what they have always been doing.” But if they do provide a role for complainants, “I’ll be the first person who applauds them.”

A second source complains that the papers indicate that OCR is reducing itself from an enforcement authority “to nothing more than an intermediary in a mediation process with an outside arbitrator. The enforcement ‘teeth’ that many have been calling for is clearly absent.”

Another environmentalist calls the complainants’ role paper “problematic” because of language that “vitiates the paper’s usefulness. It also contains insulting language, such as referring to complainants as ‘tipsters’ rather than injured people seeking redress.”

In a related matter, OCR’s latest quarterly update of its Title VI petition backlog — its release another result of *Rosemere* — shows just one new complaint filed in the fourth quarter of 2012. OCR has 21 open petitions, a low historical number, while it has referred 15 to other federal agencies, according to the document. — *Dawn Reeves*