

Environmental Justice and the Civil Rights Act of 1964: How the EPA's Rule Changes Could Bring North Carolina Further From Justice

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I. Introduction

Although many people correctly identify environmental stewardship as a core function of the Environmental Protection Agency (“EPA”),¹ many overlook another integral element of the EPA’s mission: the protection of human health.² Though its name indicates that the mission of the EPA is to protect the environment, the connection between human health and the environment is indivisible; the EPA is as much as steward to the environment as it is a steward to the people.

Because of this mission to protect human health, the EPA also has a role in promoting civil rights with regard to environmental issues.³ One of EPA’s potentially most impactful instruments in preventing environmental injustice and civil rights violations is the power it is given under Title VI of the Civil Rights Act of 1964.⁴ However, the EPA’s enforcement of Title VI has a troubled history, with accusations of intentionally delayed investigations and decisions as well as criticisms of the leadership and staff tasked with protecting civil rights.⁵

¹ *Our Mission and What We Do*, EPA, <https://www.epa.gov/aboutepa/our-mission-and-what-we-do> (last updated August 18, 2016).

² *Id.*

³ *EPA’s Title VI—Policies, Guidance, Settlements, Laws, and Regulations*, EPA, <https://www.epa.gov/ocr/epas-title-vi-policies-guidance-settlements-laws-and-regulations> [hereinafter *EPA’s Title VI*] (last updated April 20, 2016).

⁴ See Civil Rights Act of 1964, 42 U.S.C. § 2000d (2012).

⁵ Joe Davidson, *Highly Critical Report on EPA’s Office of Civil Rights*, THE WASH. POST (April 27, 2011), https://www.washingtonpost.com/local/politics/highly-critical-report-on-epas-office-of-civil-rights/2011/04/27/AFpLwz0E_story.html?utm_term=.00ee34c9854c

II. Background on the EPA Title VI Regulations

The EPA Title VI Regulations govern the EPA's responsibilities as a federal agency under Title VI of the Civil Rights Act of 1964.⁶ Title VI requires that no program or activity receiving federal assistance discriminate on the basis of race, color, or national origin.⁷ While Title VI only explicitly bars intentional discrimination, the Supreme Court has expanded its scope to include discriminatory effects that occur even in the absence of discriminatory intent.⁸ Title VI also requires the EPA to ensure that the recipients of EPA funding do not use the funds improperly.⁹ The EPA drafted its Title VI Regulations in order to comply with the Department of Justice's requirement that all federal agencies write their own regulations for Title VI implementation.¹⁰

The EPA's Office of Civil Rights (OCR), rather than its Environmental Justice office, is responsible for investigating complaints under Title VI.¹¹ The EPA's Title VI Regulations require the OCR to acknowledge a complaint within five days of its filing and then decide whether or not to accept a complaint within twenty days of its acknowledgment.¹² For an accepted complaint, the OCR must also notify the recipient of federal funds of the investigation's preliminary findings as well as recommendations within 180 days of the start of the investigations.¹³ However, the agency does not have a

⁶ *EPA's Title VI*, *supra* note 3.

⁷ The Civil Rights Act of 1964, 42 U.S.C. § 2000(d) (2012).

⁸ *United States v. Fordice*, 505 U.S. 717, 729 (1992).

⁹ *Title VI and Environmental Justice*, EPA, <https://www.epa.gov/ocr/title-vi-and-environmental-justice-epa> (last updated April 20, 2016).

¹⁰ *The Facts on Title VI of the Civil Rights Act of 1964*, EPA, <https://www.epa.gov/ocr/facts-title-vi-civil-rights-act-1964> (last updated April 20, 2016).

¹¹ *Title VI and Environmental Justice*, *supra* note 9.

¹² 40 C.F.R. § 7.120 (2015).

¹³ *Id.* § 7.115.

record of adhering to this regulation; so far it has taken, on average, 254 days to reach a jurisdictional decision.¹⁴

Many experts agree that Title VI has the potential to be one of the most legally viable options for addressing environmental justice issues.¹⁵ However, the OCR has yet to formally make a finding for discrimination under a Title VI complaint.¹⁶ Most of the complaints submitted to the EPA are either rejected without investigation or dismissed upon investigation.¹⁷ The EPA cites these problems and inefficiencies as the reason for its proposed rule changes.¹⁸

Aware of the problems within the OCR, the EPA commissioned Deloitte Consulting to conduct a comprehensive analysis of that office.¹⁹ In 2011, Deloitte Consulting released a scathing review of the EPA's OCR.²⁰ The report stated that the OCR does not place enough emphasis on "critical discrimination cases affecting employees and disadvantaged communities."²¹ The EPA quickly acknowledged the report and responded by stating that it would work to address the issues Deloitte had raised.²² The changes to the Title VI regulations are a continuation of the process EPA started when it commissioned the Deloitte report.

¹⁴ Kristen Lombardi, Talia Buford & Ronnie Greene, *Environmental Racism Persists and the EPA is One Reason Why*, THE CENTER FOR PUBLIC INTEGRITY (Aug. 3, 2015, 5:00 AM), <https://www.publicintegrity.org/2015/08/03/17668/environmental-racism-persists-and-epa-one-reason-why>.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Complaints Filed with the EPA Under Title VI of the Civil Rights Act of 1964*, EPA, <https://www.epa.gov/ocr/complaints-filed-epa-under-title-vi-civil-rights-act-1964> (last updated April 20, 2016).

¹⁸ 80 Fed. Reg. 77,284, 77,284-89, (Dec. 14, 2015).

¹⁹ Davidson, *supra* note 5.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

III. The Proposed Rules Changes

On December 14, 2015, the EPA published its proposed rule change in the Federal Register.²³ The comment period was approximately two months long, ending on February 12, 2016.²⁴ No additional proposals or an official rule have yet been announced.

The most contentious, and likely most impactful, proposed rule change is the removal of the aforementioned deadlines regarding the acknowledgement, acceptance, and recommendations in receiving a complaint, set out by § 7.120 of the regulations.²⁵ The EPA argues that the removal of these regulations more closely matches the Title VI regulations set out by other federal agencies, which do not have deadlines and which the EPA admits are more successful at addressing complaints.²⁶ By removing these deadlines, the EPA says that it will be able to more adequately address the complaints by taking the time to do a complete investigation of the purported issues.²⁷

The EPA would then replace the specific deadlines with a requirement that complaints are addressed “promptly.”²⁸ The EPA argues this new flexibility would improve its complaint response program by enabling it to perform a more complete review in order to determine the best course of action for a remedy.²⁹ The EPA accurately states that the deadlines are entirely self-imposed and are not indicative of any requirement under title VI of the Civil Rights Act of 1964.³⁰ The EPA also states that changing the regulations in this way would assist its ability to advance environmental justice through Executive

²³ 80 Fed. Reg. 77, 284 (Dec. 14, 2015).

²⁴ *Id.*

²⁵ See Katherine Leushel, *Environmental Justice and EPA’s Title VI Program*, FEDGREEN, <http://fedgreen.org/environmental-justice-epas-title-vi-program>.

²⁶ 80 Fed. Reg. 77, 284 (Dec. 14, 2015).

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations³¹ (which directs agencies to identify and address adverse and disproportionately high effects on health in low income and minority dominated areas, implementing environmental justice and promoting nondiscrimination).³²

Additionally, the EPA proposes to change the requirement that the OCR investigate “all” claims to a requirement that OCR only investigate claims that “indicate a possible failure to comply.”³³ The EPA justified this proposed change as a way to provide both the discretion necessary to filter out meritless complaints and the time required to adequately address legitimate complaints.³⁴

IV. Possible Outcomes for the Rules Changes

While the EPA asserts that this rule change will increase its ability to hold recipients of federal funding accountable for discrimination, many critics of the change believe it will do just the opposite.³⁵ The EPA already does not follow its deadlines; it takes nearly a year to come to a decision regarding complaints despite the twenty-day deadline.³⁶ The various comments on the proposed rules are overwhelmingly negative. Although both the EPA and its critics believe that change is necessary, most critics do not believe that these proposed rules are the correct way to implement that change.³⁷

³¹ *Id.*

³² *Summary of Executive Order 12898 – Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*, EPA, <https://www.epa.gov/laws-regulations/summary-executive-order-12898-federal-actions-address-environmental-justice> (last updated October 17, 2016).

³³ *Id.*

³⁴ *Id.*

³⁵ Leushel, *supra* note 25.

³⁶ Lombardi et. al., *supra* note 14.

³⁷ *See* Leushel, *supra* note 25.

Many advocates of environmental justice see this rule proposal as a way for the EPA to avoid any legal responsibility when dealing with discrimination complaints.³⁸ Those advocates are not wrong, in that removing the deadlines would take away a major incentive the EPA had to follow through on its response to complaints. Without those rules, it will likely be much more difficult to successfully sue EPA for delaying a response to a complaint.³⁹

Alternatively, even those that criticize the EPA can see the logic behind the proposed changes. The EPA is constantly criticized and is often required to defend its actions in court.⁴⁰ Maintaining this defensive posture requires many of the EPA's resources – especially time and money – at a time when it could be utilizing those resources in a more positive way.⁴¹ Removing the deadlines, and thereby removing a potential reason for a lawsuit, would theoretically free up some of the EPA's sources to be used in a more productive manner.

Therefore, there seem to be two potential results of this proposed rule change. One potential result, which the majority of commenters believe to be likely, is that the removal of deadlines will only exacerbate the problems that the EPA currently faces with the deadlines in place and that the OCR will become even less effective.⁴² The other potential result would be that the relaxing of obligations actually does free up resources for the EPA to utilize in addressing Title VI complaints. If additional resources are the result, then the

³⁸ See Zoe Carpenter, *How the EPA Has Failed to Challenge Environmental Racism—and Beyond*, THE NATION (Jan. 28, 2016), <https://www.thenation.com/article/how-the-epa-has-failed-to-challenge-environmental-racism-in-flint-and-beyond/>.

³⁹ See *id.*

⁴⁰ See *id.*

⁴¹ See *id.*

⁴² See SOUTHERN ENVTL. L. CTR., COMMENT LETTER ON PROPOSED REGULATIONS CONCERNING NONDISCRIMINATION IN PROGRAMS OR ACTIVITIES RECEIVING FEDERAL ASSISTANCE FROM THE ENVIRONMENTAL PROTECTION AGENCY (Jan. 15, 2016), <https://www.regulations.gov/document?D=EPA-HQ-OA-2013-0031-0093>.

success of the rule would depend on whether or not the EPA actually takes advantage of those resources for the purpose of addressing complaints.

V. Impact of the Rule Change on North Carolina Communities

Several North Carolina groups have commented on the proposed rule. They include the Southern Environmental Law Center, the UNC School of Law Center for Civil Rights, the Duke Environmental Law and Policy Clinic, and the North Carolina Department of Environment and Natural Resources.⁴³ The general consensus among these groups is that the rule change will likely weaken the OCR's abilities to follow through on complaints of discrimination.

The comment from the Duke Environmental Law and Policy Clinic most clearly and descriptively explains the concerns with the proposed rule. They argue that the problems facing the EPA and the OCR are caused by institutional issues rather than by their self-imposed regulations.⁴⁴ The Clinic states that OCR staff do not have the necessary expertise and that there are numerous management and procedural problems, among other issues.⁴⁵ Changing the rule does not address these problems. This was also part of the conclusion from the Deloitte report,⁴⁶ indicating that the EPA is aware of these particular issues and possibly delegitimizing some of the EPA's claims regarding the potential of the proposed rules to be effective.

⁴³ Nondiscrimination in Programs or Activities Receiving Federal Assistance from the Environmental Protection Agency: Docket Summary, REGULATIONS.GOV, <https://www.regulations.gov/docket?D=EPA-HQ-OA-2013-0031>.

⁴⁴ DUKE ENVTL. L. & POL'Y CLINIC, COMMENT LETTER ON PROPOSED REGULATIONS CONCERNING NONDISCRIMINATION IN PROGRAMS OR ACTIVITIES RECEIVING FEDERAL ASSISTANCE FROM THE ENVIRONMENTAL PROTECTION AGENCY (Jan. 15, 2016), <https://www.regulations.gov/document?D=EPA-HQ-OA-2013-0031-0034>.

⁴⁵ *Id.*

⁴⁶ Davidson, *supra* note 5.

The clinic goes even further to say that the elimination of deadlines will not only reduce their accountability, but will actually contribute to their organizational and managerial problems.⁴⁷ Instead, the clinic argues that the EPA should embrace these deadlines as part of their solution to the organizational problems in the OCR.⁴⁸

With a fairly high percentage of its residents identifying as minorities, North Carolina could potentially face significant impacts from the proposed rule changes. One issue from North Carolina that has been brought up as a complaint to the OCR is the impact of industrial swine facilities and the pollution they create.⁴⁹ These facilities are primarily located near minority populations, pollute both surface and groundwater, and are associated with many adverse health effects, primarily on children.⁵⁰

In other communities in North Carolina, the issue is power plants. Coal ash from Duke Energy's power stations disproportionately threatens minority communities.⁵¹ Fracking and its associated environmental dangers would also disproportionately affect minorities.⁵² With numerous potential Title VI complaints, it is clear that North Carolina and its people have a large stake in the result of this proposed rule change.

Should this rule be implemented and the critics' predictions come true, minority communities in North Carolina will likely suffer. Complaints that these communities might have may never receive an appropriate amount of attention from the OCR, as the OCR

⁴⁷ *See* DUKE ENVTL. L. & POL'Y CLINIC, *supra* note 44.

⁴⁸ *See id.*

⁴⁹ UNC SCH. OF L. CTR. FOR C.R., COMMENT LETTER ON PROPOSED REGULATIONS CONCERNING NONDISCRIMINATION IN PROGRAMS OR ACTIVITIES RECEIVING FEDERAL ASSISTANCE FROM THE ENVIRONMENTAL PROTECTION AGENCY (Jan. 15, 2016), <https://www.regulations.gov/document?D=EPA-HQ-OA-2013-0031-0094>.

⁵⁰ *Id.*

⁵¹ SOUTHERN ENVTL. L. CTR., *supra* note 42.

⁵² *Id.*

could reject complaints based on perceived deficiencies without any preliminary analysis.⁵³ This means that complaints could be rejected even before they reach the jurisdictional stage. This creates an extra burden on those making the complaints, as they have the added challenge of formulating their complaint such that it is near perfect, so that the OCR does not reject the complaint based on any perceived deficiency.

Based on the unreliability of actions by the OCR under its current Title VI rules, minority communities in North Carolina have little reason to be hopeful with these particular proposed rule changes. It is likely that these communities will face an even steeper uphill battle in getting their voices not only listened to but even simply heard.

VI. Conclusion

The rule change proposed by the EPA regarding its Title VI regulations appears to have the right motivations behind it. However, most critics agree that these particular steps are not the correct way to fix the current issues that the EPA and the OCR face in responding to, investigating, and remediating complaints. These rule changes appear to relieve the EPA of some of its liability under Title VI as well as make it more difficult for those making the complaints to have their grievances addressed.

⁵³ DUKE ENVTL. L. & POL'Y CLINIC, *supra* note 44.