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## EPA Roundly Criticized Over Draft Supplement To Civil Rights Plan

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EPA is facing strong criticism from industry and environmentalists on its draft document for addressing discrimination as part of its broader environmental justice (EJ) strategy, with an environmentalist coalition calling the draft "skeletal" and an industry group saying it fails to spell out what the agency is trying to improve.

The comments come in response to EPA's April 17 release of its draft Title VI supplement to its broad-based equity strategy known as Plan EJ 2014. EPA proposed the Title VI supplement under pressure from environmentalists who were critical when the agency's Title VI work was omitted from Plan EJ 2014 despite years-old promises from Administrator Lisa Jackson to improve the embattled anti-discrimination program. The draft sought comment on a series of milestones -- several of which have already passed without proposals from the agency -- for EPA to revise its grant award process to limit discrimination.

Title VI of the Civil Rights Act bars recipients of federal funds from acting in a discriminatory manner, and the agency has long been under pressure to boost its Title VI enforcement. The proposal was seen as one that could improve Title VI requirements going forward but would not help the agency address its decades old backlog of outstanding discrimination complaints under that section of the law (*Inside EPA*, April 20).

EPA accepted comment through July 19 and has not yet made the comments available, but comments obtained by *Inside EPA* show the agency is facing widespread criticism on the draft.

A coalition of environmental groups, for instance, writes in July 3 comments that "[i]t is time for the EPA to put the teeth back into the civil rights tiger, and use its authorities under this important civil rights law to remedy actions with unjustified disparate impacts. Until that happens, Title VI enforcement will continue to be illusory." *Relevant documents are available on InsideEPA.com. (Doc ID: [2404863](#))*

Coalition members the Center on Race, Poverty and the Environment, Earthjustice, Sierra Club and other groups and individuals also continue their criticisms of EPA's Office of Civil Rights (OCR) for a settlement it agreed to in 2011.

Known as *Angelita C*, the settlement revoked an initial draft finding of disparate impact on Hispanic children in California. EPA had not informed the parents of the children -- who were exposed to methyl bromide at their schools -- of the initial finding. The revocation of the disparate impact finding and closed-door negotiations enraged environmentalists and ultimately

led to a January meeting with Jackson, which eventually prompted release of the Title VI supplement.

"Though we are eager for EPA to develop a strong enforcement program that will ensure compliance with the nondiscrimination requirements of Title VI, we raise concerns about *Angelita C* in more detail because OCR's handling of the case continues to demonstrate to recipients of federal financial assistance that EPA is still not prepared to demand that recipients change their ways to assure compliance," the activists say.

Activists also say the strategies and goals of the supplement "raise serious questions about how EPA will resolve longstanding concerns about the implementation of its own Title VI regulations, let alone broader challenges that Plan EJ 2014 seeks to address," despite EPA's espoused commitment to EJ issues. They also criticize the agency's "lack of attention to community concerns and the limited role of complainants" in anti-discriminatory efforts and the agency's failure to finalize a separate 12-year-old Title VI draft guidance for permit recipients and administrators.

The industry group Business Network for Environmental Justice (BNEJ) also criticizes the draft supplement in its June 21 comments, saying the plan "does not discuss any specific gaps or perceived shortcomings in the current Title VI program" and "does not explain why EPA believes that any action is required at this time.

"As a result, it is very difficult for commenters to evaluate the various tasks, activities and reports that are listed in the draft plan contemplated here," BNEJ says.

Because of the lack of information, BNEJ says, "The draft plan as a whole seems to neglect stakeholder engagement. Of the 11 separate activities listed . . . only two even mention stakeholder involvement at all and one of them immediately qualifies this by saying that EPA will '[e]ngage interested stakeholders as appropriate.' We urge EPA to fully integrate stakeholder involvement into all aspects of the draft plan."

BNEJ, an arm of the National Association of Manufacturers, also faults EPA for not addressing the Supreme Court's 2001 holding in *Alexander v. Sandoval* which required litigants to prove discrimination was intentional in order to bring a claim. "Clearly this prohibition of intentional discrimination should be EPA's main focus as it proceeds with implementation of Title VI," the group says.

Civil rights attorney David Ludder urges EPA in July 17 comments to require grant recipients to establish proactive "disparate impact assessments" to demonstrate compliance with Title VI, rather than passive requirements EPA imposes now. He made a similar pitch earlier this year in response to Jackson's request for comments on an agency-issued report for how to develop a model civil rights program (*Inside EPA*, Feb. 24).

**Elsewhere in comments, the Rosemere Neighborhood Association blasts EPA** for failing to address its backlog of equity complaints. The association brought a deadline suit against the agency for failing to address the group's long-standing Title VI discrimination complaint against the city of Vancouver, WA, which led to a landmark 2009 federal appeals court ruling finding the agency had engaged in a "pattern of delay" in addressing complaints and renewed attention on the agency's program.

The group addresses its July 17 comments to Jackson, detailing the history of its discrimination claim and says, "Despite Rosemere's lawsuit and the subsequent national debate of the failures of

the OCR, and despite your continued promises for EPA to increase efficiency in that office to make environmental justice a national priority, the OCR continues to fail in its intake and investigation guidelines in regard to Title VI complaints." The comments also note that EPA's plan to re-evaluate Title VI investigative protocols "was something that was promised by OCR more than two years ago," as part of a settlement with Rosemere.

Rosemere did win agreement from EPA to release quarterly updates of OCR's Title VI petition backlog and the most recent update, dated July 3, shows the agency has accepted a new complaint challenging a Clean Air Act permit issued by the Florida Department of Environmental Protection for the Northwest Florida Renewable Energy Center.

OCR also recently accepted a complaint for investigation that alleges discrimination against poor black residents of Perry County, AL, by the Alabama Department of Environmental Management (ADEM) for issuing permits for a landfill that accepted spilled coal ash from the massive Tennessee Valley Authority ash spill in 2008 (*Inside EPA*, June 22).

An ADEM spokesman defends the state's permit-issuance process as one that is not discriminatory and consistent with the law. An attorney familiar with the filing says ADEM's response to OCR was due July 18. -- *Dawn Reeves*

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**Re: Plan EJ 2014 Supplement - Advancing Environmental Justice Through Title VI**

Dear Sir or Madam:

This comment responds to the solicitation of comments on EPA's Plan EJ 2014 Supplement - Advancing Environmental Justice Through Title VI (<http://www.epa.gov/environmentaljustice/resources/policy/plan-ej-2014/plan-ej-civil-rights.pdf>). EPA has proposed four major strategies for Advancing Environmental Justice through Title VI of the Civil Rights Act:

1. Establish a robust Title VI pre-award and post-award compliance program.
2. Strengthen Title VI in EPA's National Program Management guidance, performance partnership agreements and performance partnership grants.
3. Partner with other federal agencies to improve and strengthen compliance with Title VI.
4. Advance EJ goals through Limited English Proficiency initiatives.

EPA has previously recognized that compliance with Title VI by EPA financial assistance recipients has often not been demonstrated and that EPA financial assistance recipients may view the Title VI compliance certification requirement as a "pro forma" prerequisite for obtaining financial assistance. In addition, EPA has previously suggested that it may strengthen its regulations to require that financial assistance recipients develop Title VI implementation plans and provide additional reporting of their Title VI compliance activities. See EPA's Developing a Model Civil Rights Program for the Environmental Protection Agency (Civil Rights Executive Committee, April 13, 2012) ([http://www.epa.gov/epahome/pdf/executive\\_committee\\_final\\_report.pdf](http://www.epa.gov/epahome/pdf/executive_committee_final_report.pdf)).

Many financial assistance recipients, particularly states, certify compliance with Title VI as a condition of receiving financial assistance from EPA but do nothing to ensure that their programs and activities comply with Title VI. Their Title VI compliance efforts are limited to defending their actions when complaints alleging Title VI violations are filed with EPA. For Title VI to be successful, EPA's Title VI regulations must be amended to require that financial

assistance recipients develop and implement programs to ensure and demonstrate that their programs and activities comply with Title VI.

State financial assistance recipients should, prior to issuance, reissuance, or modification of a permit, prepare and publish a "disparate impact assessment" to demonstrate compliance with Title VI of the Civil Rights Act of 1964 (P.L. 88-352), 42 U.S.C. § 2000d, and 40 C.F.R. Part 7, Subpart B. The assessment should (1) identify the population that may be adversely affected by the permitted activity; (2) determine the demographics of the affected population by race, color, and national origin; (3) determine the universe of other permitted activities that may adversely affect the affected population; (4) determine the nature and severity of the adverse effects of the permitted activity and universe of permitted activities on the affected population; (5) determine whether the adverse effects on individuals of a particular race, color, or national origin are disproportionate; (6) determine whether the permitted activity will have the effect of subjecting individuals to discrimination because of their race, color, or national origin or of defeating or substantially impairing accomplishment of the objectives of the program or activity with respect to individuals of a particular race, color, or national origin; and (7) include any other analyses necessary to demonstrate compliance with Title VI of the Civil Rights Act of 1964 (P.L. 88-352), 42 U.S.C. § 2000d, and 40 C.F.R. Part 7, Subpart B. Certain categories of permits might be exempted because they clearly do not have any potential to adversely affect any population. Screening procedures can be developed that will identify affected populations that are clearly not of a protected race, color, or national origin and which do not require further analysis.

Below is a proposed rule amendment to 40 C.F.R. § 7.80:

40 C.F.R. § 7.80 Applicants

(a) *Assurances*— (1) *General.* (i) Applicants for EPA assistance shall submit an assurance with their applications stating that, with respect to their programs or activities that receive EPA assistance, they will comply with the requirements of this part. Applicants must also submit any other information that the OCR determines is necessary for preaward review. The applicant's acceptance of EPA assistance is an acceptance of the obligation of this assurance and this part.

(ii) Applicants for EPA financial assistance shall submit an assurance with their applications stating that they have developed, adopted, and implemented a program that is capable of ensuring and demonstrating compliance with § 7.35(b) and (c). Such program shall include the capability to assess whether the recipient's programs or activities have the effect of subjecting individuals to discrimination because of their race, color, national origin, or sex.

(2) *Duration of assurance*— (i) *Real property.* When EPA awards assistance in the form of real property, or assistance to acquire real property, or structures on the property, the assurance will obligate the recipient, or transferee, during the period the real property or structures are used for the purpose for which EPA assistance is extended, or for another purpose in which similar

services or benefits are provided. The transfer instrument shall contain a covenant running with the land which assures nondiscrimination. Where applicable, the covenant shall also retain a right of reverter which will permit EPA to recover the property if the covenant is ever broken.

(ii) *Personal property*. When EPA provides assistance in the form of personal property, the assurance will obligate the recipient for so long as it continues to own or possess the property.

(iii) Other forms of assistance. In all other cases, the assurance will obligate the recipient for as long as EPA assistance is extended.

(b) Wastewater treatment project. EPA Form 4700–4 shall also be submitted with applications for assistance under Title II of the Federal Water Pollution Control Act.

(c) Compliance information. Each applicant for EPA assistance shall submit regarding the program or activity that would receive EPA assistance:

(1) Notice of any lawsuit pending against the applicant alleging discrimination on the basis of race, color, sex, handicap, or national origin;

(2) A brief description of any applications pending to other Federal agencies for assistance, and of Federal assistance being provided at the time of the application; and

(3) A statement describing any civil rights compliance reviews regarding the applicant conducted during the two-year period before the application, and information concerning the agency or organization performing the reviews.

(4) A description of the program required by paragraph (a)(1)(ii) of this section.

Absent strengthening of 40 C.F.R. § 7.80, states and other financial assistance recipients may not develop or implement compliance assurance programs. I encourage EPA to adopt revisions to 40 C.F.R. § 7.80 to ensure development and implementation of Title VI compliance assurance programs and not leave the protection of such fundamental rights to mere non-binding agency policy.

Sincerely,

David A. Ludder