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## **EPA NOT ENFORCING CIVIL RIGHTS ACT EFFECTIVELY**

"The U.S. Environmental Protection Agency (EPA) is not doing enough to make Alabama agencies receiving EPA funding comply with the Civil Rights Act of 1964," says David Ludder, an attorney who has filed several civil rights complaints with EPA.

The Civil Rights Act of 1964 prohibits intentional discrimination against persons on the basis of race, color, or national origin by anyone receiving Federal financial assistance. The Act also authorizes Federal agencies to adopt rules prohibiting Federal financial assistance recipients from implementing programs and activities that cause discriminatory effects, even if not intentional.

In a prepared statement delivered to the U.S. Commission on Civil Rights on February 5 (attached), Ludder recounted EPA's historic failures to enforce its rules prohibiting financial assistance recipients from causing discriminatory effects and discussed the civil rights complaints he has filed on behalf of African-Americans against the Alabama Department of Environmental Management (ADEM) and Jefferson County Department of Health (JCDH). A number of those complaints are currently being investigated by EPA's Office of Civil Rights. If EPA finds that ADEM or JCDH violated EPA's rules prohibiting discriminatory effects, those agencies could lose the funding they receive from EPA.

The U.S. Commission on Civil Rights is investigating "Environmental Justice: Toxic Materials, Poor Economies, and the Impact of the Environment on Low-Income, Minority Communities" and is expected to issue a report on the subject later this year. The Commission invited Ludder to address environmental justice and civil rights. Ludder explained that EPA is not doing enough to ensure that ADEM and JCDH have developed and are implementing effective civil rights compliance programs. "Without effective compliance programs, these agencies are sure to face additional civil rights complaints and risk the loss of EPA funding," said Ludder. "More importantly," Ludder said, "people who are entitled to protection under the Civil Rights Act of 1964 will continue to suffer adverse impacts to their health and well-being."



**STATEMENT OF DAVID A. LUDDER, ESQ.**

**Briefing: Environmental Justice: Toxic Materials, Poor Economies,  
and the Impact of the Environment on Low-Income, Minority Communities**

**U.S. Commission on Civil Rights**

**February 5, 2016**

On behalf of myself and the communities and organizations that I frequently represent, I would like to thank the Commission for the opportunity to share my experience and thoughts about EPA's efforts to implement its obligations under Title VI of the Civil Rights Act of 1964. My name is David Ludder and I have practiced environmental and administrative law, primarily in Alabama and Florida, for more than thirty years. I am currently in private practice, and was previously employed as General Counsel with the Legal Environmental Assistance Foundation, Inc. and General Counsel with the Alabama Department of Environmental Management.

During the last four years, I have prepared and filed with the U.S. Environmental Protection Agency five complaints alleging that EPA financial assistance recipients have discriminated against African-Americans in the permitting of polluting facilities. Table 1. The earliest complaint, filed against the Florida Department of Environmental Protection, was accepted for investigation but subsequently dismissed without prejudice because the permittee abandoned its proposal to build a power plant fueled by biomass near a population comprised of 73% African-Americans. The second complaint, filed against the Alabama Department of Environmental Management for its permitting of a privately-operated landfill near a population comprised of 97% African-Americans in Perry County, Alabama (near Uniontown), was

accepted for investigation and remains pending after more than two and one-half years.<sup>1</sup> Two other complaints, filed against the Jefferson County Department of Health for the permitting of toxic air emissions from metallurgical coke manufacturing facilities near populations comprised of 65% and 88% African-Americans, respectively,<sup>2</sup> also were accepted for investigation and remain pending for nearly one year. Finally, the fifth complaint, filed against the Alabama Department of Environmental Management for its permitting of a publicly-operated landfill near a population comprised of 89% African-Americans in Dothan, Alabama, was filed only yesterday. Table 1. Because landfills and toxic air pollution facilities are often located in or near environmental justice communities,<sup>3</sup> additional Title VI complaints are likely to be filed with EPA.

Much has been written about the failure of EPA's Office of Civil Rights to provide effective enforcement of Title VI.<sup>4</sup> EPA's historical record of Title VI enforcement has been dismal.<sup>5</sup> EPA has responded to many of these criticisms with various proposals.<sup>6</sup> My testimony

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<sup>1</sup> The Arrowhead Landfill has been previously discussed by panelists Esther Calhoun and Marianne Engelman Lado.

<sup>2</sup> See GASP, TOXIC CITY: BIRMINGHAM'S DIRTY SECRET (June 2014), at <http://gaspgroup.org/toxic-city-birminghams-dirty-secret/> (last visited Dec. 11, 2015) ("an award-winning 26-minute documentary about the people left behind"); WIAT42, DEADLY DECEPTION, at <http://wiat.com/deadly-deception/> (last visited Dec. 11, 2015).

<sup>3</sup> E.g., UNITED CHURCH OF CHRIST COMMISSION FOR RACIAL JUSTICE, TOXIC WASTES AND RACE IN THE UNITED STATES (1987), at <http://www.ucc.org/about-us/archives/pdfs/toxwrace87.pdf> (last visited Jan. 30, 2016); GENERAL ACCOUNTING OFFICE, SITING OF HAZARDOUS WASTE LANDFILLS AND THEIR CORRELATION WITH RACIAL AND ECONOMIC STATUS OF SURROUNDING COMMUNITIES (RCED-83-168, June 1, 1983), at <http://www.gao.gov/assets/150/140159.pdf> (last visited Jan. 30, 2016); MARY B. COLLINS, ET AL., LINKING 'TOXIC OUTLIERS' TO ENVIRONMENTAL JUSTICE COMMUNITIES, ENVIRON. RES. LETT. 11 (2016) 015004, at <http://iopscience.iop.org/article/10.1088/1748-9326/11/1/015004/pdf> (last visited Jan. 30, 2016).

<sup>4</sup> E.g., DELOITTE CONSULTING LLP, EVALUATION OF THE EPA OFFICE OF CIVIL RIGHTS (2011), available at <http://www.enviro-lawyer.com/DeloitteReport.pdf> (last visited Dec. 4, 2015); KRISTEN LOMBARDI, ET AL., CENTER FOR PUBLIC INTEGRITY, ENVIRONMENTAL JUSTICE, DENIED: ENVIRONMENTAL RACISM PERSISTS, AND THE EPA IS ONE REASON WHY (Aug. 3, 2015), at <http://www.publicintegrity.org/2015/08/03/17668/environmental-racism-persists-and-epa-one-reason-why> (last visited Dec. 4, 2015); U.S. COMM'N ON CIVIL RIGHTS, NOT IN MY BACKYARD: EXECUTIVE ORDER 12,898 AND TITLE VI AS TOOLS FOR ACHIEVING ENVIRONMENTAL JUSTICE (Oct. 2003), at <http://www.usccr.gov/pubs/envjust/ej0104.pdf> (last visited Dec. 11, 2015).

<sup>5</sup> E.g., YUE QIU & TALIA BUFORD, CENTER FOR PUBLIC INTEGRITY, ENVIRONMENTAL JUSTICE, DENIED: DECADES OF INACTION (Aug. 3, 2015), at <http://www.publicintegrity.org/2015/08/03/17726/decades-inaction> (last visited Dec. 4, 2015).

<sup>6</sup> E.g., STAN MEIBURG, EPA'S OFFICE OF CIVIL RIGHTS: IMPROVING OUR PROCEDURES, EDUCATION, AND EXPERTISE TO PREVENT DISCRIMINATORY INJUSTICE (Aug. 17, 2015), at <https://blog.epa.gov/blog/2015/08/epas-office-of-civil-rights-improving-our-procedures-education-and-expertise-to-prevent-discriminatory-injustice/> (last visited Dec. 4, 2015); U.S.

today will focus on EPA's efforts to ensure that financial assistance recipients take effective measures to ensure that their activities do not result in disparate adverse effects on classes of persons protected under the Civil Rights Act of 1964.

### **Complaint investigations**

EPA regulations require that it investigate complaints of discriminatory actions by financial assistance recipients against classes of persons protected by Title VI.<sup>7</sup> A complete or

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ENVIRONMENTAL PROTECTION AGENCY, EXTERNAL COMPLIANCE AND COMPLAINTS PROGRAM STRATEGIC PLAN - FISCAL YEAR 2015 – 2020 (Final Draft for Comment Sep. 10, 2015), at [http://www.epa.gov/sites/production/files/2015-10/documents/strategic\\_plan.pdf](http://www.epa.gov/sites/production/files/2015-10/documents/strategic_plan.pdf) (last visited Dec. 4, 2015); U.S. ENVIRONMENTAL PROTECTION AGENCY, NOTICE OF PROPOSED RULEMAKING, NONDISCRIMINATION IN PROGRAMS OR ACTIVITIES RECEIVING FEDERAL ASSISTANCE FROM THE ENVIRONMENTAL PROTECTION AGENCY, 80 Fed. Reg. 77,284 (Dec. 14, 2015); U.S. ENVIRONMENTAL PROTECTION AGENCY, EPA GENERAL TERMS AND CONDITIONS (effective Oct. 6, 2015), at <http://www2.epa.gov/grants/epa-general-terms-and-conditions-effective-october-6-2015-or-later> (last visited Dec. 4, 2015); U.S. ENVIRONMENTAL PROTECTION AGENCY, DRAFT POLICY PAPERS RELEASED FOR PUBLIC COMMENT: TITLE VI OF THE CIVIL RIGHTS ACT OF 1964: ADVERSITY AND COMPLIANCE WITH ENVIRONMENTAL HEALTH-BASED THRESHOLDS, AND ROLE OF COMPLAINANTS AND RECIPIENTS IN THE TITLE VI COMPLAINTS AND RESOLUTION PROCESS, 78 Fed. Reg. 24739 (Apr. 26, 2013); U.S. ENVIRONMENTAL PROTECTION AGENCY, CIVIL RIGHTS EXECUTIVE COMMITTEE, DEVELOPING A MODEL CIVIL RIGHTS PROGRAM FOR THE ENVIRONMENTAL PROTECTION AGENCY (Apr. 13, 2012), at [http://archive.epa.gov/epahome/ocr-statement/web/pdf/executive\\_committee\\_final\\_report.pdf](http://archive.epa.gov/epahome/ocr-statement/web/pdf/executive_committee_final_report.pdf) (last visited Dec. 7, 2015); U.S. ENVIRONMENTAL PROTECTION AGENCY, TITLE VI OF THE CIVIL RIGHTS ACT OF 1964: ROLE OF COMPLAINANTS AND RECIPIENTS IN THE TITLE VI COMPLAINTS AND RESOLUTION PROCESS (May 4, 2015), available at <http://www.enviro-lawyer.com/FinalRolesofComplainants.pdf> (last visited Dec. 4, 2015); U.S. ENVIRONMENTAL PROTECTION AGENCY, INTERIM CASE RESOLUTION MANUAL (Dec. 1, 2015), at [http://www2.epa.gov/sites/production/files/2015-12/documents/ocr\\_crm\\_final.pdf](http://www2.epa.gov/sites/production/files/2015-12/documents/ocr_crm_final.pdf) (last visited Dec. 4, 2015).

<sup>7</sup> 40 C.F.R. § 7.120, as proposed to be amended in U.S. ENVIRONMENTAL PROTECTION AGENCY, NOTICE OF PROPOSED RULEMAKING, *supra* note 6, provides:

The OCR shall promptly investigate all complaints filed under this section unless the complainant and the party complained against agree to a delay pending settlement negotiations will make a prompt investigation whenever a complaint indicates a possible failure to comply.

(a) Who may file a complaint. A person who believes that he or she or a specific class of persons has been discriminated against in violation of this part may file a complaint. The complaint may be filed by an authorized representative. A complaint alleging employment discrimination must identify at least one individual aggrieved by such discrimination. Complaints solely alleging employment discrimination against an individual on the basis of race, color, national origin, sex or religion shall be processed under the procedures for complaints of employment discrimination filed against recipients of Federal assistance (see 28 CFR part 42, subpart H and 29 CFR part 1691). Complaints of employment discrimination based on age against an individual by recipients of Federal financial assistance are subject to the Age Discrimination in Employment Act of 1967 and should be filed administratively with the Equal Employment Opportunity Commission (see 29 CFR part 1626). Complainants are encouraged but not required to make use of any grievance procedure established under §7.90 before filing a complaint. Filing a complaint through a grievance procedure does not extend the 180 day calendar requirement of paragraph (b)(2) of this section.

(b) Where, when and how to file complaint. The complainant may file a complaint at any EPA office. The complaint may be referred to the region in which the alleged discriminatory acts occurred.

(1) The complaint must be in writing and it must describe the alleged discriminatory acts which violate this part.

properly pleaded complaint must (1) be in writing, signed, and provide an avenue for contacting the signatory (*e.g.*, phone number, address); (2) describe the alleged discriminatory act(s) that violates EPA's Title VI regulations (*i.e.*, an act that has the effect of discriminating on the basis of race, color, or national origin); (3) be filed within 180 calendar days of the alleged discriminatory act(s); and (4) identify the EPA financial assistance recipient that took the alleged

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(2) The complaint must be filed within 180 calendar days of the alleged discriminatory acts, unless the OCR waives the time limit for good cause. The filing of a grievance with the recipient does not satisfy the requirement that complaints must be filed within 180 days of the alleged discriminatory acts.

(c) Notification. The OCR will notify the complainant and the recipient of the agency's receipt of the complaint ~~within five (5) calendar days.~~

(d) Complaint processing procedures. After acknowledging receipt of a complaint, the OCR will immediately initiate complaint processing procedures.

(1) Preliminary investigation. (i) ~~Within twenty (20) calendar days of~~ After the acknowledgment of the complaint, the OCR will promptly review the complaint for acceptance, rejection, or referral to the appropriate Federal agency.

(ii) If the complaint is accepted, the OCR will notify the complainant and the Award Official. The OCR will also notify the applicant or recipient complained against of the allegations and give the applicant or recipient opportunity to make a written submission responding to, rebutting, or denying the allegations raised in the complaint.

(iii) The party complained against may send the OCR a response to the notice of complaint within thirty (30) calendar days of receiving it.

(iv) Complaints alleging age discrimination under the Age Discrimination Act of 1975 will be referred to a mediation agency in accordance with §7.180.

(2) Informal resolution. (i) OCR shall attempt to resolve complaints informally whenever possible. When a complaint cannot be resolved informally, OCR shall follow the procedures established by paragraphs (c) through (e) of §7.115.

(ii) [Reserved]

(e) Confidentiality. EPA agrees to keep the complainant's identity confidential except to the extent necessary to carry out the purposes of this part, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder. Ordinarily in complaints of employment discrimination, the name of the complainant will be given to the recipient with the notice of complaint.

(f) [Reserved]

(g) Dismissal of complaint. If OCR's investigation reveals no violation of this part, the Director, OCR, will dismiss the complaint and notify the complainant and recipient.

discriminatory act(s).<sup>8</sup> Failure to satisfy these threshold jurisdictional requirements resulted in the rejection of 162 of 265 complaints (61%) filed between 1996 and mid-2013.<sup>9</sup>

Current regulations provide that EPA will review a complaint for acceptance, rejection, or referral to the appropriate Federal agency within 20 days.<sup>10</sup> EPA has proposed to eliminate this 20-day time limit<sup>11</sup> and to establish a non-binding 45-day time “target.”<sup>12</sup> While forty-five days may be an appropriate time frame within which to determine whether the threshold jurisdictional requirements are satisfied, the non-binding nature of EPA’s proposal may indicate that EPA expects to frequently exceed the 45-day time “target.” Of 157 complaints rejected by EPA between 1996 and mid-2013, only eight (5%) were rejected within 45 days.<sup>13</sup> The average time taken by EPA to reject a complaint was 271 days.<sup>14</sup> It should be a relatively simple task to review a complaint and determine whether the threshold jurisdictional requirements are satisfied within 45 days. Accordingly, the EPA should make the proposed 45-day time “target” a 45-day time “limit.”

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<sup>8</sup> See 40 C.F.R. § 7.120(b); U.S. ENVIRONMENTAL PROTECTION AGENCY, INTERIM GUIDANCE FOR INVESTIGATING TITLE VI ADMINISTRATIVE COMPLAINTS CHALLENGING PERMITS (Feb. 5, 1998) at 6, available at <http://www.enviro-lawyer.com/InterimGuidance.pdf> (last visited Dec. 4, 2015); U.S. ENVT’L PROTECTION AGENCY, DRAFT REVISED GUIDANCE FOR INVESTIGATING TITLE VI ADMINISTRATIVE COMPLAINTS CHALLENGING PERMITS, 65 Fed. Reg. 39,667, 39,672 (June 27, 2000); Letter from Vicki Simons, Acting Director, U.S. Env’tl Protection Agency, Office of Civil Rights, to David A. Ludder 1 (June 27, 2013), at [http://www2.epa.gov/sites/production/files/2014-05/documents/12r-13-r4\\_accept\\_cmplt\\_redacted\\_0.pdf](http://www2.epa.gov/sites/production/files/2014-05/documents/12r-13-r4_accept_cmplt_redacted_0.pdf) (last visited Dec. 4, 2015); Letter from Velveta Golightly-Howell, Director, U.S. Env’tl Protection Agency, Office of Civil Rights, to David A. Ludder 1 (Aug. 10, 2015); Letter from Velveta Golightly-Howell, Director, U.S. Env’tl Protection Agency, Office of Civil Rights, to David A. Ludder 1 (Mar. 6, 2015); U.S. ENVT’L PROTECTION AGENCY, INTERIM CASE RESOLUTION MANUAL, *supra* note 6, at 6-7.

<sup>9</sup> Analysis of data provided with YUE QIU & TALIA BUFORD, *supra* note 5. The most common reasons for complaint rejection were that (1) the complainant failed to allege a specific discriminatory act; (2) the complainant failed to file the complaint within 180 days after the alleged discriminatory act occurred; and (3) the alleged violator is not a recipient of EPA financial assistance.

<sup>10</sup> See 40 C.F.R. § 7.120(d)(1) quoted *supra* note 7.

<sup>11</sup> U.S. ENVT’L PROTECTION AGENCY, NOTICE OF PROPOSED RULEMAKING, *supra* note 6.

<sup>12</sup> U.S. ENVT’L PROTECTION AGENCY, INTERIM CASE RESOLUTION MANUAL *supra* note 6, at 37-38.

<sup>13</sup> Analysis of data provided with YUE QIU & TALIA BUFORD, *supra* note 5.

<sup>14</sup> *Id.*

Current regulations provide that EPA will complete investigations of complaints and make preliminary findings within 180 days after acceptance of a complaint for investigation.<sup>15</sup> EPA has exceeded this time “limit” in three of the complaints that I filed. Of the fifty-one investigations commenced and concluded by EPA between 1996 and mid-2013, only five (10%) were concluded within 180 days after acceptance.<sup>16</sup> The average time taken by EPA to conclude an investigation was over 1,000 days (2¾ years).<sup>17</sup> EPA has proposed to eliminate the 180-day time limit<sup>18</sup> and to establish no time “target,” explaining that “these amendments recognize that the EPA’s current, self-imposed regulatory deadlines are impracticable given the inherent scientific complexity associated with determining which and how populations are impacted by environmental pollutants; the number of discrimination allegations and theories that may be asserted in any one complaint under Title VI or the other nondiscrimination statutes; and the volume of the complaints received.”<sup>19</sup> The difficulty with the omission of a time limit and time target is that complainants may suffer adverse effects in violation of Title VI the entire time that EPA is investigating a complaint.<sup>20</sup>

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<sup>15</sup> 40 C.F.R. § 7.115(c), as proposed to be amended by U.S. ENVIRONMENTAL PROTECTION AGENCY, NOTICE OF PROPOSED RULEMAKING, *supra* note 6, provides:

(c) Postreview notice. (1) ~~Within 180 calendar days from the start of the compliance review or complaint investigation, the~~ The OCR will notify the recipient in writing by certified mail, return receipt requested, of:

- (i) Preliminary findings;
- (ii) Recommendations, if any, for achieving voluntary compliance; and
- (iii) Recipient’s right to engage in voluntary compliance negotiations where appropriate.

<sup>16</sup> See *supra* note 13.

<sup>17</sup> *Id.*

<sup>18</sup> See *supra* note 15.

<sup>19</sup> U.S. ENVIRONMENTAL PROTECTION AGENCY, NOTICE OF PROPOSED RULEMAKING, *supra* note 6, 80 Fed. Reg. at 77,285.

<sup>20</sup> EPA states: “Removal of deadlines will not allow the EPA to unreasonably delay its resolution of complaints because, in part, the definition of a prompt investigation and resolution turns on the factual context of the complaint. Indeed, the language in the proposed rule is subject to judicial review and is consistent with judicial precedent that recognizes that any investigatory timeframe may be affected by the breadth and complexity of the issues in the complaint.” U.S. ENVIRONMENTAL PROTECTION AGENCY, NOTICE OF PROPOSED RULEMAKING, *supra* note 6, 80 Fed. Reg. At 77,285.

EPA’s recent proposals indicate that it may employ Early Complaint Resolution (ECR)<sup>21</sup> agreements, Alternative Dispute Resolution (ADR)<sup>22</sup> agreements, Informal Resolution (IR)<sup>23</sup> agreements, or Voluntary Compliance (VC)<sup>24</sup> agreements to resolve complaints rather than invoke sanctions against the financial assistance recipient.<sup>25</sup> While these alternatives may be appropriate in some circumstances, there is concern that widespread reliance on these alternatives may become the norm because of budgetary constraints and may result in delayed compliance, failure to achieve compliance, or failure to deter future non-compliance, thereby extending the sufferance of adverse effects by persons entitled to protection from EPA.

EPA has recognized that “[i]n addition to addressing the backlog and incoming complaints, the Title VI program needs substantially greater focus on prevention and compliance. For example, significantly more effort is needed to communicate Title VI responsibilities to recipients of federal funding, and to monitor – through systematic processes – recipient compliance with Title VI requirements.”<sup>26</sup> Accordingly, I turn now to pre-award and post-award compliance reviews.

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<sup>21</sup> Early Complaint Resolution (ECR) involves informal facilitation by OCR so that the complainant(s) and recipient(s) can come to a mutually acceptable agreement. In general, ECR is only appropriate for use in addressing specific and discrete issues that involve individual remedies. U.S. ENV’T’L PROTECTION AGENCY, INTERIM CASE RESOLUTION MANUAL, *supra* note 6, at 17-20.

<sup>22</sup> Alternative Dispute Resolution (ADR) involves the formal mediation of a complaint or complaint allegations between the complainant and recipient, through the use of a professionally trained mediator. The EPA considers the ADR process to be a viable option for complainants and recipients to address some, if not all, of the issues raised in nondiscrimination complaints. U.S. ENV’T’L PROTECTION AGENCY, INTERIM CASE RESOLUTION MANUAL, *supra* note 6, at 20.

<sup>23</sup> Informal Resolution (IR) occurs between OCR and the recipient. The term “informal resolution” refers to any resolution of complaint allegations prior to the issuance of a finding of compliance or noncompliance. U.S. ENV’T’L PROTECTION AGENCY, INTERIM CASE RESOLUTION MANUAL, *supra* note 6, at 21-23.

<sup>24</sup> Voluntary Compliance (VC) agreements are drafted by OCR after a finding on noncompliance and offered to the recipient to avoid enforcement action. U.S. ENV’T’L PROTECTION AGENCY, INTERIM CASE RESOLUTION MANUAL, *supra* note 6, at 28-29.

<sup>25</sup> Sanctions may include the denial, annulment, termination or suspension of EPA financial assistance to the recipient. 40 C.F.R. § 7.130.

<sup>26</sup> U.S. ENV’T’L PROTECTION AGENCY, CIVIL RIGHTS EXECUTIVE COMMITTEE, *supra* note 6, at 13.



## Pre-award compliance reviews

28 C.F.R. § 42.407(b) provides:

*Application review.* Prior to approval of federal financial assistance, the federal agency shall make written determination as to whether the applicant is in compliance with title VI (see 28 CFR 50.3(c) II A). *The basis for such a determination under “the agency’s own investigation” provision (see 28 CFR 50.3(c) II A(2)), shall be submission of an assurance of compliance and a review of the data submitted by the applicant. Where a determination cannot be made from this data, the agency shall require the submission of necessary additional information and shall take other steps necessary for making the determination.* Such other steps may include, for example, communicating with local government officials or minority group organizations and field reviews. Where the requested assistance is for construction, a pre-approval review should determine whether the location and design of the project will provide service on a nondiscriminatory basis and whether persons will be displaced or relocated on a nondiscriminatory basis.

(Emphasis added).

40 C.F. R. § 7.110(a) includes provisions that require EPA to determine whether an applicant for financial assistance is in compliance with 40 C.F.R. Part 7 *before* an award of assistance is granted.<sup>27</sup> For the vast majority of applications for financial assistance, “[t]his determination will be based on the submissions required by §7.80 and any other information EPA receives during this time (including complaints) or has on file about the applicant.”<sup>28</sup> Submission of a completed EPA Form 4700-4 (Rev. 06/2014) will only provide the following information required by 40 C.F.R. § 7.80:

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<sup>27</sup> 40 C.F. R. § 7.110(a), as proposed to be amended in U.S. ENV’T L PROTECTION AGENCY, NOTICE OF PROPOSED RULEMAKING, *supra* note 7, provides:

Review of compliance information. Within EPA’s application processing period, the OCR will determine whether the applicant is in compliance with this part and inform the Award Official. This determination will be based on the submissions required by §7.80 and any other information EPA receives during this time (including complaints) or has on file about the applicant. When the OCR cannot make a determination on the basis of this information, additional information will be requested from the applicant, local government officials, or interested persons or organizations, including aged and handicapped persons or organizations representing such persons. The OCR may also conduct an on-site review ~~only when it has reason to believe discrimination may be occurring in a program or activity which is the subject of the application.~~

<sup>28</sup> 40 C.F. R. § 7.110(a) grants EPA the authority to request additional information and to conduct an on-site review, however this authority is not routinely exercised.

- List all civil rights lawsuits and administrative complaints pending against the applicant/recipient that allege discrimination based on race, color, national origin, sex, age, or disability.
- List all civil rights lawsuits and administrative complaints decided against the applicant/recipient within the last year that allege discrimination based on race, color, national origin, sex, age, or disability and enclose a copy of all decisions. Please describe all corrective action taken.
- List all civil rights compliance reviews of the applicant/recipient conducted by any agency within the last two years and enclose a copy of the review and any decisions, orders, or agreements based on the review. Please describe any corrective action taken.
- Does the applicant/recipient provide initial and continuing notice that it does not discriminate on the basis of race, color, national origin, sex, age, or disability in its programs or activities?
- Does the applicant/recipient maintain demographic data on the race, color, national origin, sex, age, or handicap of the population it serves?

The information required by EPA Form 4700-4 is insufficient to allow EPA to determine whether an applicant for financial assistance is currently *in compliance* with 40 C.F.R. Part 7.

EPA does not propose to demand additional information from financial assistance applicants.<sup>29</sup>

Thus, EPA's procedures do not ensure the *prevention* of violations of Title VI requirements.

EPA should demand that the *applicant* describe, in writing, the program it employs to ensure that its programs and activities will be conducted in compliance with 40 C.F.R. Part 7, including identification of the legal authority it has to implement such a compliance program. For example, if the applicant is authorized to issue permits that might have the effect of causing disparate adverse impacts on a protected class, the applicant should be required to demonstrate that it has the means and authority to deny or condition permits to prevent discriminatory impacts *before* being granted financial assistance by EPA. The Alabama Department of Environmental Management – and probably many other state, regional and local regulatory agencies – lacks the necessary statutory authority to deny, modify, revoke or condition permits

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<sup>29</sup> See U.S. ENV'T'L PROTECTION AGENCY, NOTICE OF PROPOSED RULEMAKING, *supra* note 6.

that will violate Title VI. Absent such authority, EPA should not grant ADEM financial assistance.

### **Post-award compliance reviews**

28 C.F.R. § 42.407(c)(1) provides:

Federal agencies shall establish and maintain *an effective program of post-approval compliance reviews* regarding approved new applications (see 28 CFR 50.3(c) II A), applications for continuation or renewal of assistance (28 CFR 50.3(c) II B) and all other federally assisted programs. Such reviews are to include periodic submission of compliance reports by recipients to the agencies and, where appropriate, field reviews of a representative number of major recipients. In carrying out this program, agency personnel shall follow agency manuals which establish appropriate review procedures and standards of evaluation. Additionally, agencies should consider incorporating a title VI component into general program reviews and audits.

(Emphasis added).

40 C.F.R. § 7.115 includes provisions that authorize EPA to conduct post-award compliance reviews.<sup>30</sup> According to EPA, “[g]rant recipients already agree under existing grant

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<sup>30</sup> 40 C.F.R. § 7.115, as proposed to be amended in U.S. ENV'T'L PROTECTION AGENCY, NOTICE OF PROPOSED RULEMAKING, *supra* note 6, provides:

(a) Periodic review. The OCR may periodically conduct compliance reviews of any recipient's programs or activities receiving EPA assistance, including the request of data and information, and may conduct on-site reviews ~~when it has reason to believe that discrimination may be occurring in such programs or activities.~~

(b) Notice of review. After selecting a recipient for review or initiating a complaint investigation in accordance with §7.120, the OCR will inform the recipient of:

(1) The nature of and schedule for review, or investigation; and

(2) Its opportunity, before the determination in paragraph (d) of this section is made, to make a written submission responding to, rebutting, or denying the allegations raised in the review or complaint.

(c) Postreview notice. ~~(1) Within 180 calendar days from the start of the compliance review or complaint investigation,~~ The OCR will notify the recipient in writing by certified mail, return receipt requested, of:

(i) Preliminary findings;

(ii) Recommendations, if any, for achieving voluntary compliance; and

(iii) Recipient's right to engage in voluntary compliance negotiations where appropriate.

(2) The OCR will notify the Award Official and the Assistant Attorney General for Civil Rights of the preliminary findings of noncompliance.

(d) Formal determination of noncompliance. After receiving the notice of the preliminary finding of noncompliance in paragraph (c) of this section, the recipient may:

(1) Agree to the OCR's recommendations, or

(2) Submit a written response sufficient to demonstrate that the preliminary findings are incorrect, or that compliance may be achieved through steps other than those recommended by OCR.

If the recipient does not take one of these actions within fifty (50) calendar days after receiving this preliminary notice, the OCR shall, within fourteen (14) calendar days, send a formal written determination of noncompliance to the recipient and copies to the Award Official and Assistant Attorney General.

conditions to comply with all federal civil rights laws; however, the requirement is buried among many other general conditions, and potentially is viewed as ‘pro forma’ among recipients.”<sup>31</sup>

Although recipients agree that they will comply with Title VI, they often do nothing to ensure that their programs and activities comply with Title VI.

To address this fundamental flaw, on January 23, 2013, EPA began including the following condition in its financial assistance agreements:

In accepting this assistance agreement, the recipient acknowledges it has an affirmative obligation to implement effective Title VI compliance programs and ensure that its actions do not involve discriminatory treatment and do not have discriminatory effects even when facially neutral. *The recipient must be prepared to demonstrate to EPA that such compliance programs exist and are being implemented or to otherwise demonstrate how it is meeting its Title VI obligations.*

(Emphasis added).<sup>32</sup>

The Alabama Department of Environmental Management has applied for and received millions of dollars in financial assistance from EPA. Each time it applied for financial assistance, it certified that it will comply with all Federal statutes relating to nondiscrimination, including Title VI of the Civil Rights Act of 1964.<sup>33</sup> Each time it accepted a financial assistance award from EPA after January 23, 2013, it agreed that it has an affirmative obligation to

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(e) Voluntary compliance time limits. The recipient will have ten (10) calendar days from receipt of the formal determination of noncompliance in which to come into voluntary compliance. If the recipient fails to meet this deadline, the OCR must start proceedings under paragraph (b) of §7.130.

(f) Form of voluntary compliance agreements. All agreements to come into voluntary compliance must:

- (1) Be in writing;
- (2) Set forth the specific steps the recipient has agreed to take, and
- (3) Be signed by the Director, OCR or his/her designee and an official with authority to legally bind the recipient.

<sup>31</sup> U.S. ENVIRONMENTAL PROTECTION AGENCY, CIVIL RIGHTS EXECUTIVE COMMITTEE, *supra* note 6, at 13.

<sup>32</sup> U.S. ENVIRONMENTAL PROTECTION AGENCY, CIVIL RIGHTS OBLIGATIONS (Jan. 25, 2013), available at [http://www.environmentaljustice.org/Civil\\_Rights\\_Obligations.pdf](http://www.environmentaljustice.org/Civil_Rights_Obligations.pdf) (last visited Dec. 7, 2015). See U.S. ENVIRONMENTAL PROTECTION AGENCY, PLAN EJ 2014 PROGRESS REPORT (Feb. 2013) 42, at <http://www3.epa.gov/environmentaljustice/resources/policy/plan-ej-2014/plan-ej-progress-report-2013.pdf> (last visited Dec. 7, 2015); U.S. ENVIRONMENTAL PROTECTION AGENCY, CIVIL RIGHTS OBLIGATIONS (Oct. 16, 2015) 12, [http://www.epa.gov/sites/production/files/2015-10/documents/general\\_tc\\_as\\_of\\_10-6-2015.pdf](http://www.epa.gov/sites/production/files/2015-10/documents/general_tc_as_of_10-6-2015.pdf) (last visited Dec. 9, 2015). As discussed *supra* at pp. 8-10, this demonstration should be made in the application for financial assistance so that EPA can be assured that the recipient will have an effective compliance program in place when financial assistance is awarded.

<sup>33</sup> SF Form 424B and 424D, at <http://www.epa.gov/grants/epa-grantee-forms#applicants> (last visited Dec. 8, 2015).

implement an effective Title VI compliance program and to ensure that its actions do not involve discriminatory treatment and do not have discriminatory effects, even when facially neutral. It also agreed that it would be prepared to demonstrate to EPA that such a compliance program exists and is being implemented or to otherwise demonstrate to EPA how it is meeting its Title VI obligations.

On July 24, 2013, I asked ADEM to provide me with “a copy of any written Title VI compliance program(s) that ADEM has and/or is implementing to ensure that its actions do not involve discriminatory treatment and do not have discriminatory effects even when facially neutral.” On August 15, 2013, ADEM responded that “[i]t is the Department’s practice to comply with all Federal and State statutes, including Title VI. There are no documents that conform to those requested in your Public Records Request.” In other words, ADEM asserts that it is in compliance with Title VI but has no documented Title VI compliance program.

On August 22, 2013, I requested that the EPA Office of Civil Rights “investigate whether ADEM is in violation of the January 23, 2013 financial assistance award condition regarding Title VI” because ADEM apparently is unable to demonstrate that it has an effective Title VI compliance program.<sup>34</sup> No response was received from EPA. On July 14, 2014, I requested that EPA provide a progress report on any investigation undertaken in response to my August 22, 2013 request. Again, no response was received from EPA. On July 8, 2015, I requested that EPA provide me with the status of any investigation undertaken in response to my August 22, 2013 request. Again, no response was received from EPA. On July 8, 2015, I submitted a FOIA request to EPA for “[a]ll documents relating to EPA OCR’s investigation and resolution of an August 22, 2013 complaint against the Alabama Department of Environmental Management

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<sup>34</sup> Letter from David A. Ludder to Vicki Simons, Director, U.S. Env’tl Protection Agency, Office of Civil Rights (Aug. 22, 2013), available at <http://www.enviro-lawyer.com/2013-8-22OCRLetter.pdf> (last visited Dec. 8, 2015).

(ADEM) submitted by David A. Ludder, including correspondence to and from ADEM concerning the complaint.”<sup>35</sup> On July 17, 2015, EPA indicated that it was reviewing the request. No further response has been received from EPA. EPA’s failure to respond to my August 22, 2013 request for investigation of ADEM’s compliance with the January 23, 2013 grant condition does not instill confidence in EPA’s resolve to enforce Title VI.

On August 20, 2015, I again asked ADEM to provide “any documents/records describing ADEM’s Title VI compliance program that is designed to ensure that ADEM’s permitting actions do not involve discriminatory treatment and do not have discriminatory effects even when facially neutral.” On September 3, 2015, ADEM responded by providing a copy of a November 22, 2004 Nondiscrimination Post Award Compliance Review by the EPA Office of Civil Rights – nothing more. That review, the result of an EPA “desk audit,” concluded that ADEM has adopted “grievance procedures providing for prompt and fair resolution” of discrimination complaints;<sup>36</sup> ADEM has designated a responsible employee for its Title VI compliance efforts and adopted a policy of non-discrimination; and ADEM has adopted public participation procedures and provides accommodation to non-English speaking individuals. Of course, that 2004 post-award compliance review does not address ADEM’s compliance with the grant condition adopted in January 2013. Thus, the 2004 post-award compliance review does not demonstrate that ADEM has adopted and is implementing an effective Title VI compliance program or how ADEM is otherwise meeting its Title VI obligations.

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<sup>35</sup> FOIA Tracking No. EPA-HQ-2015-008747, available at <https://foiaonline.regulations.gov/foia/action/public/view/request?objectId=090004d2807e2850> (last visited Dec. 12, 2015).

<sup>36</sup> EPA stated that the new “grievance procedure should be readily available to the general public in the form of an electronic copy on the ADEM webpage and a paper copy for individuals who do not have access to a computer or who may walk into the main or branch offices.” The grievance procedure is not published on ADEM’s website and has been unknown to the environmental community until September 3, 2015. In addition, the grievance procedure provides that ADEM will make findings of compliance/non-compliance, but does not identify any remedies that ADEM is authorized to provide.

EPA has recently proposed to conduct six post-award compliance reviews annually by 2018, eleven reviews annually by 2021, and twenty-two reviews annually by 2024.<sup>37</sup> This planned number of post-award compliance reviews is woefully inadequate to ensure that EPA financial assistance recipients are in compliance with Title VI requirements. Between January 1, 2015 and December 10, 2015, EPA made 1,906 grants to 792 entities.<sup>38</sup> Under EPA's current plan for conducting post-award compliance reviews, it will take EPA nearly 40 years to conduct one post-award compliance review of every financial assistance recipient.<sup>39</sup>

### **Judicial supervision**

Existing opportunities to enforce agency disparate impact regulations and to obtain judicial review of EPA decisions respecting complaint investigations are ineffectual.

*Alexander v. Sandoval*<sup>40</sup> established that a private right of action exists to enforce section 601 of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, which prohibits intentional discrimination. However, no private right of action exists to enforce disparate impact regulations adopted by federal agencies pursuant to section 602 of the Act, 42 U.S.C. § 2000d-1.

*South Camden Citizens in Action v. New Jersey Department of Environmental Protection*<sup>41</sup> held that 42 U.S.C. § 1983 does not provide a right of action to enforce disparate

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<sup>37</sup> U.S. ENVIRONMENTAL PROTECTION AGENCY, EXTERNAL COMPLIANCE AND COMPLAINTS PROGRAM STRATEGIC PLAN - FISCAL YEAR 2015 – 2020, *supra* note 6 at 12. Each recipient is required to comply with Title VI requirements in the administration and implementation of all its programs and activities, not just those programs and activities for which financial assistance is provided. Public Law 100–259, 102 Stat. 28 (1988); 40 C.F.R. § 7.25 (definition of program or activity and program); U.S. ENVIRONMENTAL PROTECTION AGENCY, INTERIM GUIDANCE FOR INVESTIGATING TITLE VI ADMINISTRATIVE COMPLAINTS CHALLENGING PERMITS, *supra* note 8, at 2-3; U.S. ENVIRONMENTAL PROTECTION AGENCY, DRAFT TITLE VI GUIDANCE FOR EPA ASSISTANCE RECIPIENTS ADMINISTERING ENVIRONMENTAL PERMITTING PROGRAMS (DRAFT RECIPIENT GUIDANCE) AND DRAFT REVISED GUIDANCE FOR INVESTIGATING TITLE VI ADMINISTRATIVE COMPLAINTS CHALLENGING PERMITS (DRAFT REVISED INVESTIGATION GUIDANCE), 65 Fed. Reg. at 39697. Thus, the scope of EPA's post-award compliance reviews should include all programs and activities of the recipient.

<sup>38</sup> Analysis of data provided from U.S. ENVIRONMENTAL PROTECTION AGENCY, INTEGRATED GRANTS MANAGEMENT SYSTEM (IGMS), at <http://www3.epa.gov/enviro/facts/igms/search.html>.

<sup>39</sup> At the very least, EPA should conduct a triennial post-award compliance review of every financial assistance recipient that is a state, regional or local agency responsible for environmental regulation.

<sup>40</sup> 532 U.S. 275 (2001), available at [https://scholar.google.com/scholar\\_case?case=6907411608837736130](https://scholar.google.com/scholar_case?case=6907411608837736130).

<sup>41</sup> 274 F.3d 771 (3rd Cir. 2001), available at [https://scholar.google.com/scholar\\_case?case=10977304158602878386](https://scholar.google.com/scholar_case?case=10977304158602878386).

impact regulations adopted by federal agencies pursuant to section 602 of the Civil Rights Act of 1964, 42 U.S.C. § 2000d-1.

*Rosemere Neighborhood Association v. United States Environmental Protection Agency*<sup>42</sup> held that EPA's failure to meet regulatory deadlines for action on Title VI administrative complaints gave rise to an action under the Administrative Procedure Act to compel agency action unreasonably delayed or unlawfully withheld which was not mooted by EPA's subsequent action.

*Garcia v. McCarthy*<sup>43</sup> held that EPA's actions in negotiating, settling, and dismissing a Title VI administrative complaint are committed to agency discretion and are unreviewable.

Congress should enact legislation to provide for private enforcement of federal agency disparate impact regulations promulgated under 42 U.S.C. § 2000d-1 and/or amend 42 U.S.C. § 2000d-2 to provide for judicial review, in accordance with 5 U.S.C. § 706, of agency action taken with respect to an administrative complaint alleging a violation of 42 U.S.C. §§ 2000d or 2000d-1.

### **Conclusions and Recommendations**

1. EPA should not amend 40 C.F.R. § 7.120(d)(1) to eliminate the time limit for making a decision whether to accept a complaint for investigation. The time limit should be no more than 45 days.

2. EPA should not amend 40 C.F.R. § 7.115(c) to eliminate the time limit for completing investigations of complaints. All complaint investigations should be completed within one year, if not sooner.

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<sup>42</sup> 581 F.3d 1169 (9th Cir. 2009), available at [https://scholar.google.com/scholar\\_case?case=10314741791952220300](https://scholar.google.com/scholar_case?case=10314741791952220300).

<sup>43</sup> No. 13-cv-03939-WHO, 2014 U.S. Dist. LEXIS 5983 (N.D. Cal. Jan. 16, 2014), available at [https://scholar.google.com/scholar\\_case?case=6062902643600376284](https://scholar.google.com/scholar_case?case=6062902643600376284).



3. EPA should amend 40 C.F.R. §§ 7.110(a) and 7.80 to require that an applicant for EPA financial assistance demonstrate that it has, and is implementing, an effective Title VI compliance program; and that it has legal authority to deny, modify, revoke or condition permits, licenses, or other approvals to meet the requirements of Title VI.

4. EPA should devote sufficient resources to conduct, at a minimum, triennial post-award compliance reviews of every financial assistance recipient that is a state, regional or local agency responsible for environmental regulation.

5. Congress should enact legislation to provide for private enforcement of federal agency disparate impact regulations promulgated under 42 U.S.C. § 2000d-1 and/or amend 42 U.S.C. § 2000d-2 to provide for judicial review of agency action, in accordance with 5 U.S.C. § 706, taken with respect to an administrative complaint alleging a violation of 42 U.S.C. §§ 2000d or 2000d-1.

**TABLE 1**

EPA OCR File No.	Complaint Filing Date/Link	Financial Assistance Recipient	Alleged Discriminatory Action	Permittee	Accepted for Investigation	Disposition
11R-11-R4	Dec. 1, 2011 <a href="http://goo.gl/V1OAic">http://goo.gl/V1OAic</a>	Florida Dep't of Env't'l Protection	Issuance of Air Permit No. 0450012-002-AC for new 55 MW biomass power plant	Northwest Florida Renewable Energy Center, LLC	Mar. 22, 2012 (112 days after filing)	Dismissed without prejudice as unripe (project abandoned) Jan. 14, 2013 (298 days after acceptance)
12R-13-R4	June 3, 2013 <a href="http://goo.gl/WOBvei">http://goo.gl/WOBvei</a>	Alabama Dep't of Env't'l Mgmt.	Reissuance and modification (expansion) of Solid Waste Disposal Permit No. 53-03	Perry County Associates, LLC	June 27, 2013 (24 days after filing)	Pending (953 days after acceptance)
03R-15-R4	Feb. 6, 2015 <a href="http://goo.gl/qyqVvW">http://goo.gl/qyqVvW</a>	Jefferson County Dep't of Health	Reissuance of Major Source (Air) Operating Permit No. 4-07-0001-03	ABC Coke, A Division of Drummond Co., Inc.	Mar. 6, 2015 (28 days after filing)	Pending (336 days after acceptance)
08R-15-R4	Mar. 2, 2015 <a href="http://goo.gl/vaa9iK">http://goo.gl/vaa9iK</a>	Jefferson County Dep't of Health	Reissuance of Major Source (Air) Operating Permit No. 4-07-0355-03	Walter Coke, Inc.	Aug. 10, 2015 (161 days after filing)	Pending (179 days after acceptance)
Pending	Feb. 4, 2016 <a href="http://goo.gl/Ec5rVs">http://goo.gl/Ec5rVs</a>	Alabama Dep't of Env't'l Mgmt.	Modification (expansion) of Solid Waste Disposal Permit No. 35-06	City of Dothan, AL	Pending	Pending