



Rights Advocates Fault Rare EPA Discrimination Finding's Process Focus

May 7, 2021

Civil rights advocates say a rare preliminary finding of discrimination EPA issued to Missouri is welcome but still disappointing, as it focuses on flaws in how the state complies with EPA nondiscrimination requirements rather than the substance of the complaint that a minority St. Louis community is suffering from disproportionate pollution impacts.

The March 30 preliminary finding of noncompliance from Lilian Dorka, director of EPA's External Civil Rights Compliance Office (ECRCO), to Missouri Department of Natural Resources (DNR) Director Carol Comer, "conveys partial preliminary findings" to an administrative complaint filed under Title VI of the Civil Rights Act by the Great Rivers Environmental Law Center, the Dutchtown South Community Corp. and other groups.

David Ludder, an attorney who has filed many Title VI petitions with EPA, says the agency's main concern should be "the abatement of disproportionate impacts on minority communities" but "so far, EPA has dodged the" issue.

Advocate Richard Grow, who worked on civil rights issues for decades at EPA, says of the Missouri probe, "nothing EPA has said so far goes beyond procedural requirements . . . and while the advocates say, rightly, that a disparate impact analysis is needed, I see no signs that EPA has (ever) said that under the rubric of" Title VI.

The Sept. 4, 2020 complaint alleges that the Missouri DNR violated Dutchtown residents' civil rights and EPA's nondiscrimination policies when it approved a March 10, 2020 Clean Air Act operating permit for the Kinder Morgan Transmix Company in South St. Louis. The groups asked for a disparate impact analysis to determine how the permit will cumulatively affect the residents.

ECRCO continues to investigate whether DNR violated the residents' civil rights by issuing the permit.

The preliminary finding addresses DNR's noncompliance with long-established EPA rules to implement the Civil Rights Act that bar recipients of federal funds from discriminatory actions. DNR is required to have policies to ensure people have meaningful access to its services, and that it issues policies consistent with Title VI and other civil rights provisions.

With respect to the process issues, "ECRCO has determined that the preponderance of the evidence supports a conclusion that MoDNR failed to comply with its longstanding obligations under federal nondiscrimination laws and EPA's nondiscrimination regulation to have an implement a nondiscrimination program," EPA says.

Dorka in her letter to Comer also finds that the state did not provide meaningful access to individuals with limited English proficiency and disabled people during the air permitting process.

The finding also lays out a number of steps ECRCO wants the DNR to take to rectify the noncompliance issues, including posting a notice of nondiscrimination on its web page, posting a notice of grievance procedures to resolve discrimination complaints on its website, designating at least one nondiscrimination coordinator, and providing outreach to limited English speakers and individuals with disabilities.

DNR told the groups filing the petition that it was not required to conduct an analysis of disparate impacts but declined to comment to the Missouri Independent, which first reported the ECRCO preliminary finding.

A Kinder Morgan spokeswoman said DNR identified no concerns about its compliance with air law requirements.

Great Rivers could not be reached for comment, but other civil rights advocates faulted the preliminary finding for failing to address the substantive issue in the complaint -- the request for a disparate impact analysis, particularly given that President Joe Biden and EPA Administrator Michael Regan say they want to prioritize addressing harms in low-income and minority communities overburdened by pollution.

Ludder says EPA's preliminary finding is "consistent with EPA's resolution of the complaint against the Jefferson County (AL) Department of Health re air permits issued to Walter Coke and ABC Coke, i.e., a focus on process rather than the health and environmental consequences of polluting industries in neighborhoods of color."

He says EPA should be focusing on the potential harms to equity communities. “If the Biden administration and Administrator Regan are earnest about civil rights and environmental justice, they have to address more than process and begin addressing impacts and the states’ failure to take Title VI or EPA seriously,” he said.

However, an EPA spokeswoman says, “It is important to note that EPA has not concluded its investigation of this complaint or reached final conclusions of fact or law regarding the issuance of the air quality permit. EPA continues to look into the possibility that communities of color have been subjected to discrimination as a result of MoDNR’s air quality program permitting, with alleged impacts on health and quality of life for the Dutchtown community.”

The spokeswoman adds that because the investigation is ongoing, “EPA cannot comment on any additional specifics” until it is complete.

Pressure On Rights Enforcement

Title VI rules at EPA and other federal agencies bar recipients of federal funds from implementing “methods or criteria” or allowing “siting” decisions that could result in disparate impacts, yet agencies have not provided guidance for what this requirement means much less how they will enforce it, Grow says.

Grow, the rights advocate, adds that other agencies have gone further than EPA’s process finding. For example, he cites a 2015 “historic agreement” between the Federal Highway Administration (FHWA) and the Texas state highway agency that the Lawyers Committee for Civil Rights Under Law said was worth tens of millions of dollars in mitigation and relocation funding for residents of Corpus Christie, TX. The action addressed a new highway project in the Hillcrest neighborhood whose residents are already hemmed in by a ship channel, refineries and an interstate highway.

FHWA also issued four “letters of finding” discrimination/disparate impacts between 2015 and 2017.

The Biden EPA continues to face pressure to boost civil rights enforcement as part of administration-wide EJ efforts, including from the Title VI EJ Alliance which urged ECRCO to “build an effective civil rights enforcement office at EPA.”

Also, former Obama EPA Region 4 Administrator Heather McTeer Toney told Inside EPA Feb. 18 that, “Title VI has to be a big priority because EPA has been made aware of the significant problems,” including a recent Office of Inspector General (OIG) report critical of how ECRCO oversees the program.

The Biden EPA General Counsel’s office is working with the OIG to resolve those issues and has been granted an indefinite deadline extension to do so.

In a separate case, Ludder notes his clients are awaiting a decision by a state trial court on whether the Alabama Department of Environmental Management’s (ADEM) discrimination grievance procedures the state put in place following ECRCO’s preliminary findings in that investigation are lawful.

ADEM argues that the rules are internal and do not need to be released for public comment. The groups went to court to argue they should be allowed to weigh in on the nondiscrimination grievance process before it is finalized.

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