

EPA Faces Tough Test In Rights Inquiry Of 'Minor Source' Biomass Permit

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EPA has agreed to investigate whether Florida officials violated the civil rights of African-Americans by granting a minor source air permit for a proposed biomass facility near their community. But the agency may face a tough challenge finding any discrimination because the state says it complied with all the permit requirements and consideration of the rights issue falls outside of its delegated powers, sources say.

As a result, one informed source says the agency has "boxed itself in," by accepting petitions for investigation where it is unlikely to make an actual discrimination finding -- even though it still has a large backlog of unsettled cases.

EPA's Office of Civil Rights (OCR) recently accepted for investigation a November 2011 petition against Florida's Department of Environmental Protection (FDEP) alleging it discriminated in issuing a permit for the Northwest Florida Renewable Energy Center, according to OCR's July 3 quarterly update of its database of petitions filed under Title VI of the Civil Rights Act. *Relevant documents are available on InsideEPA.com. (Doc ID: [2405303](#))*

OCR also agreed in June to investigate a similar Title VI complaint alleging that the Alabama Department of Environmental Management violated the civil rights of poor black residents in Perry County, AL, by granting a permit allowing a solid waste landfill to accept coal ash waste from the massive Tennessee Valley Authority spill.

Title VI generally bars federal spending on actions that discriminate. While activists have sought to use the authority to force EPA to block state permits for facilities near poor or minority communities, they have yet to succeed in part because the Supreme Court in a 2001 decision in *Alexander v. Sandoval* set a high legal bar by requiring proof of intentional discrimination.

In the aftermath of the ruling, EPA has been unable to act on dozens of pending Title VI petitions alleging discrimination by state and local agencies that receive EPA funding. The backlog of petitions has prompted lawsuits from environmentalists seeking to force EPA to act, which have pressed OCR to seek to reduce its backlog of petitions.

Also as part of its EJ 2014 initiative, EPA has also floated a plan intended to speed review of new Title VI petitions but industry and environmentalists criticized the proposal as being too thin on details (*Inside EPA*, July 20).

The office is also under pressure to issue an actual finding of discrimination or take other steps that would result in an "acceptable remedy" to activists, such as denying permits in areas that are overburdened.

Advocates reiterated such calls at a July 24 meeting of the agency's National Environmental Justice Advisory Council (NEJAC), where they again urged the agency to rescind its only substantive Title VI finding, which rejected discrimination claims because the area near the facility at issue met ambient air quality standards.

EPA issued that decision, known as *Select Steel*, in 1998, the same year it issued interim guidance it has never finalized that says compliance with applicable regulations is not enough to show compliance with Title VI.

Speaking at the NEJAC meeting, Rhode Island activist Steve Fischbach said, "If EPA doesn't apply the proper legal standard, it's going to exacerbate environmental injustice." In addition, he added, "Title VI enforcement by EPA makes the filing of complaints rather futile."

And Nicky Sheats, a NEJAC member, said at the July 24 meeting that EPA must issue guidance for how it will conduct a Title VI investigation and include a list of possible remedies.

The Nov. 30, 2011, complaint alleged that FDEP discriminated when it issued a minor source emissions permit for the planned 55-megawatt biomass plant, which is slated for construction in Port St. Joe, FL.

The petition cited EPA's 1998 interim guidance for investigating Title VI administrative complaints, noting, "[M]erely demonstrating that the permit complies with applicable environmental regulations will not ordinarily be considered a substantial, legitimate justification." The complaint adds that the adverse impacts will "fall disparately upon members of the African-American race" with the new facility allowed to "aggravate and compound historical impacts suffered by the population from other facilities within the area."

EPA, however, has yet to finalize that 14-year-old guidance or establish any other clear criteria for what constitutes a Title VI violation. "The complaint takes EPA at its word that Title VI of the Civil Rights Act creates an environmental civil right . . . and that someone can inadvertently, unintentionally and unknowingly violate that environmental civil right. (EPA not having specifically or definitely defined that right or issued any standards)," the informed source says.

But FDEP in its April 25 response obtained by *Inside EPA* asserts it did not discriminate in issuing the permit, which it notes goes above and beyond minor source requirements. For example, the state says the permit for the planned plant includes national emission standards for hazardous air pollutants (NESHAP) and additional limits on certain criteria pollutants.

Florida is delegated to issue federal NESHAP permits and "that delegation does not provide DEP authority to consider factors other than those promulgated in the NESHAP when administering the NESHAP program to provide additional protections for particular populations," FDEP's response says. "The NESHAP do not contain consideration of land-use, zoning or demographics in their administration. Presumably the EPA regulations establish emission-limiting requirements sufficiently protective of nearby populations to preclude the need for any such population-specific evaluation. In any event, DEP applied the NESHAP as promulgated, as is required by its federal delegation."

The informed source says the state's response shows that EPA will have a difficult time addressing the petition. Instead, by continuing to accept these types of complaints -- based on a

jurisdictional review that only includes a funding nexus -- the agency appears to keep on the same path of boxing itself into a corner.

For example, the source notes that the permit at issue in Florida is "a very routine, minor permit," and the complaint "does not allege any irregularity in the issuance of the permit. The discriminatory act is only that the state issued a valid environmental permit in an area that has a nearby population that is disproportionately" comprised of minorities.

The informed source says FDEP's response "makes EPA look dumb as well as hypocritical: EPA itself is not subject to Title VI, and the [state's] answer points out that the permit complies with, and in fact exceeds, all of EPA's environmental standards and requirements."

The source adds that EPA continues to accept such complaints because of a longtime "permissive standard" by its general counsel where, "for the last two decades, EPA has been broadcasting that issuing a permit can be discriminatory if the nearby population is disproportionately minority, thereby inviting people to file complaints on that basis. When they do, EPA has no choice but to accept them for investigation. But then what to do with them?"

EPA in the past has found technical reasons to deny or refer complaints to other agencies, has convinced complainants to withdraw their petitions and has entered into settlements that dismiss complaints without reaching a conclusion.

However, EPA's most recent settlement in a case known as *Angelita C.*, which it entered into with a California agency last summer, enraged environmentalists because it revoked a draft first-time disparate impact finding.

In accepting the Florida complaint, "[N]ow maybe EPA has a complaint that it can't get rid of . . . and EPA will either have to live up to its advertising and make a finding of discrimination, which would invite a legal challenge that might eviscerate its Title VI environmental civil rights strategy and legal theory, or admit that the strategy has no legal basis in the first place," the informed source says.

But anything short of an affirmative finding is likely to disappoint activists. At the NEJAC meeting, they asked OCR Director Rafael DeLeon directly when the office would issue a finding of discrimination.

DeLeon said he could not answer that question because investigations are case specific. He did note the progress the office has made while acknowledging much more to do, and said OCR hopes to include complainants more in its investigations. -- *Dawn Reeves & Dave Reynolds*