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## A Perspective on the Environmental Protection Agency's Title VI and Environmental Justice Programs

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# A PERSPECTIVE ON THE ENVIRONMENTAL PROTECTION AGENCY'S TITLE VI AND ENVIRONMENTAL JUSTICE PROGRAMS

Melva J. Hayden\*

## INTRODUCTION

I would like to first dispel some of the confusion and shed some light on the view of the Environmental Protection Agency ("EPA") regarding the relationship between environmental justice and Title VI of the 1964 Civil Rights Act ("Title VI").<sup>1</sup> Next, I want share information on the status of the EPA's Interim Guidance.<sup>2</sup> Finally, I will discuss the direction in which the EPA is

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1. Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d-2000d-7. (1964)[hereinafter "Title VI"] (prohibiting discrimination on the ground of race, color, or national origin under any program or activity receiving federal financial assistance).

2. See United States Environmental Protection Agency, *Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits* (1998) [hereinafter *Interim Guidance*].

heading where these equally compelling and necessary programs are concerned.

### I. THE RELATIONSHIP BETWEEN ENVIRONMENTAL JUSTICE AND TITLE VI

While the EPA is now working towards a uniform definition of environmental justice, EPA's Office of Environmental Justice (OEJ) has issued an interim definition. This is a fluid and living definition, and it reads as follows:

The fair treatment and *meaningful* involvement of all people regardless of race, color, national origin or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies. Fair treatment means that no group of people, including racial, ethnic, or socio-economic group should bear a disproportionate share of the negative environmental consequences resulting from industrial, municipal, and commercial operations or the execution of federal, state, local, tribal programs and policies.<sup>3</sup>

The EPA's involvement with environmental justice preceded the issuance of President Clinton's 1994 Executive Order 12898.<sup>4</sup> Early research into environmental justice issues culminated in 1990 with the formation of an Environmental Equity Workgroup whose mandate was to look into allegations that low-income and minor-

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3. United States Environmental Protection Agency, Office of Federal Activities, *Final Guidance For Incorporating Environmental Justice Concerns in EPA's NEPA Compliance Analysis* (emphasis added) (April 1998) <<http://es.epa.gov/oeca/ofa/ejepa/html>>. OEJ Director Barry E. Hill, Esq. issued EPA's interim definition in December 1999. OEJ is working towards a uniform definition of environmental justice.

4. Exec. Order No. 12,898, 59 FR 7629 (1994) [hereinafter Executive Order].

ity communities were suffering disproportionately high and adverse environmental and health effects.<sup>5</sup> In 1992 the EPA published a report of the findings of the Workgroup entitled, "*Environmental Equity: Reducing Risk for All Communities*."<sup>6</sup> The EPA did not believe then, nor do we believe now, that our efforts to protect human health and the environment have been done in a discriminatory or racist fashion. Still, in 1990 the Workgroup indicated to the EPA Administrator<sup>7</sup> that there appeared to be a disproportionate number of instances of lead exposure in children of low income and minority populations.<sup>8</sup> Therefore, the issue of equity in environmental protection and disproportionate impacts on low income and minority populations was definitely an issue that the EPA planned to further explore.

By the time the Executive Order 12898 was issued in 1994, EPA became the lead agency to be a part of an Interagency Working Group on environmental justice.<sup>9</sup>

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5. EPA Administrator William K. Reilly formed the "Environmental Equity Workgroup" in July 1990. The EPA Office of Environmental Equity was established in 1992. In 1994, the Office was renamed the Office of Environmental Justice. See UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ENVIRONMENTAL EQUITY: REDUCING RISK FOR ALL COMMUNITIES, VOLUME 2 SUPPORTING DOCUMENT 7 (1992).

6. See *id.*

7. In 1990 William K. Reilly was Administrator of the U.S. Environmental Protection Agency. The current Administrator of the EPA is Carol M. Browner, who was appointed by President Clinton in January, 1993. See U.S. EPA History Office (last updated Dec. 10, 1999) <<http://www.epa.gov/history/admin/bios/browner/html>>.

8. See UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *supra* note 5, at 15. Specifically, the Workgroup concluded that "[b]lack children have disproportionately higher blood lead levels than White children even when socioeconomic variables are factored in." *Id.*

9. The "Interagency Working Group" formed within three months of the Executive Order consists of the heads of several executive agencies and offices. For a complete list of

President Clinton planned to address high and adverse disproportionate environmental and health impacts on minorities and low income populations.<sup>10</sup> The Executive Order also called for all federal agencies whose mandates involve health or the environment to tell the Interagency Working Group how each agency would incorporate environmental justice into its everyday programs, policies, and activities.<sup>11</sup> Moreover, the Working Group not only had to tell the President how they were going to *develop* strategies, but also how they were going to *implement* those strategies to address disproportionate and high adverse environmental and health impacts on these populations.<sup>12</sup> This is how and why the EPA has made environmental justice one of our highest priorities.

The EPA does not believe that it has been racist in its approach to protecting the environment. The EPA has become aware of the importance of environmental justice to affected communities, thanks to environmental justice advocates like Peggy Shepard,<sup>13</sup> Vernice Miller,<sup>14</sup>

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members, see Exec. Order No. 12,898, 59 FR 7629 at 1-102(a) (1994).

10. See *id.* (calling for the Administrator of the EPA to form an Interagency Federal Working Group on Environmental Justice within three months of the date of the order).

11. See *id.* at 1-103 (requiring each Federal agency to report to the working group its progress in implementing an agency-wide environmental justice strategy). See also *id.* at 1-104 (requiring the working group to submit a report to the President on the federal agencies' progress in implementing this Executive Order).

12. See *id.*

13. Peggy Shepard is the Executive Director and Co-founder of the West Harlem Environmental Action Committee, ("WE ACT") a nonprofit organization working to improve environmental quality and secure environmental justice in predominately African-American and Latino communities in New York City.

14. Vernice Miller has served as Director of the Environmental Justice Initiative of the Natural Resources Defense

and others who have worked with EPA to bring environmental justice issues to our attention and to the forefront. We now believe that there are communities in our region that lack the wherewithal, the connections, or perhaps are not able to hire technical consultants and lawyers, and as a result the EPA may not be aware of adverse and disproportionate impacts the residents may be experiencing.

EPA Region 2 is one of the most culturally diverse regions in EPA. As a result, we have become more culturally aware of and sensitive to the rich diversity that we have among the stakeholders we serve in Region 2.<sup>15</sup> In particular, Region 2 has worked diligently to maintain good working relations with a significant number of federally recognized and non-federally recognized tribal nations and indigenous people. Through our cross-cutting environmental justice, Indian and Indigenous programs at EPA, we have become acutely aware, and are still learning, about the unique cultural and traditional ways in which indigenous people depend upon their natural environment for subsistence.

The EPA has also begun to work with our state partners so that they can adopt environmental justice programs. EPA Region 2 has held several high-level meetings with our state, tribal, and local government partners to discuss environmental justice. We have held some meetings with Commissioner Cahill of the New York State Department of Environmental Conservation

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Council. She is the cofounder of West Harlem Environmental Action ("WE ACT") and a founding member of the New York City Environmental Justice Alliance in the Northeast Environmental Justice Network.

15. For an overview of Region 2's Draft Interim Policies on identifying Environmental Justice Areas, see <<http://www.epa.gov/region2/community/elpolicy/ejindex.html>>.

("NYSDEC"),<sup>16</sup> and with Commissioner Robert Shinn of the New Jersey Department of Environmental Protection ("NJDEP").<sup>17</sup> The advent of environmental justice and the Executive Order 12898 have been watersheds leading the EPA to incorporate environmental justice into the fabric of the Agency. I believe that it is imperative that our state and local government partners and the regulated community rethink the way they approach doing business and protecting the environment in potential environmental justice areas.

Executive Order 12898 has the weight of law within the executive branch of government, but it does not have the same weight of statutory law.<sup>18</sup> What this

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16. The NYSDEC is responsible for the administration and enforcement of the New York Environmental Conservation Law. The NYSDEC has since recently appointed an environmental justice Coordinator, has established an advisory council, and is working towards the establishment of a process to consider environmental justice in its permitting programs through a 1999 EPA funded State and Tribal Environmental Justice Grant. Monica Abreu Conley, Esq. is the NYSDEC Environmental Justice Coordinator. See New York State Department of Environmental Conservation, *Mission and Responsibilities* (visited March 9, 2000) <<http://www.dec.state.ny.us/website/dpac/mission.html>>.

17. The NJDEP is responsible for preserving, sustaining, protecting, and enhancing the environment to ensure the integration of high environmental vitality. The NJDEP has since established an Environmental Equity/Justice Program, an advisory council, and is working toward development of an environmental equity/justice permitting policy through a 1998 EPA funded State and Tribal Environmental Justice Grant. Pamela Lyons is the NJDEP Environmental Justice Coordinator. See New Jersey Department of Environmental Protection, *Mission Statement* (visited March 9, 2000) <<http://www.state.nj.us/dep/commissioner/mission.html>>.

18. See Exec. Order No. 12,898, 59 FR 7629, at 6-609 (1994) ("This order is intended only to improve the internal management of the executive branch and is not intended to, nor does it create any right, benefit, or trust responsibility,

means is that state and local governments are not bound to comply with this environmental justice centered Executive Order.<sup>19</sup> However, they are bound to comply with Title VI.<sup>20</sup>

While this distinction is understood, the relationship between environmental justice and Title VI is not. Another major distinction is that environmental justice issues deal with both race and income. Whereas Title VI deals with discrimination that is solely based on race, creed, or national origin. The EPA Environmental Justice and Title VI programs are two separately administered programs. It is the EPA's perspective that environmental justice is the goal we are endeavoring to achieve in carrying out the Executive Order

Whereas, Title VI has been increasingly used as a legal tool of last resort when affected communities believe their health and their environment is disproportionately and adversely impacted by siting or environmental per-

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substantive or procedural, enforceable at law or equity . . . ."). Executive Order No. 12,898 was issued "pursuant to the authority vested in the President by the Constitution and the laws of the United States of America." *Id.* Executive Order 12,898 ". . . shall not be construed to create any right to judicial review involving compliance or noncompliance of the United States, its agencies, officers, or any other person with this order." Exec. Order No. 12,898, 59 FR 7629 at 6-609 (1994). *Cf.* Steven Ostrow, *Enforcing Executive Orders: Judicial Review of Agency Action under the Administrative Procedure Act* 55 GEO WASH. L. REV. 659 (arguing that courts can and should enforce executive orders having the force and effect of law, even if the order fails to provide explicitly or impliedly for a private cause of action).

19. See Exec. Order No. 12898, *supra* note 4, at § 6-609 (1994).

20. Title VI applies to "any program or activity receiving Federal financial assistance." Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d (1964). "Program or activity" includes all of the operations of "a department, agency, special purpose district or other instrumentality of a State or of a local government" *Id.* at §§ 2000d-4a.

mitting decisions. They are seeking environmental justice to address what they perceive to be environmental injustices. To achieve resolution of their environmental problems and equity concerns, community-based organizations, grass-roots organizations, and members of indigenous communities have sought to invoke provisions of Title VI of the 1964 Civil Rights Act.<sup>21</sup> In my role at the EPA, I have noted that there does seem to be some correlation between the reduced number of Title VI administrative complaints filed when a robust environmental justice program has been established.

## II. THE EPA'S INTERIM GUIDANCE

Environmental justice advocates and their attorneys (often *pro bono* as litigating these complaints is a costly undertaking) are using this old legal tool in a new creative way that was never envisioned when EPA developed its implementing regulations, i.e. to challenge federally assisted environmental permitting programs and processes. As a result, the EPA's Office of Civil Rights has been inundated with many formal Title VI administrative complaints alleging disparate treatment and discrimination based upon siting and permitting decisions. EPA had to formulate guidance to assist the Agency's Office of Civil Rights to move the log-jam of these administrative complaints through to resolution, so we issued the Interim Guidance.

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21. The EPA's Office of Civil Rights and Office of General Counsel are currently working in consultation with the National Environmental Justice Advisory Council ("NEJAC"). The NEJAC is the federal advisory committee to the Agency, the NEJAC Indigenous Peoples Subcommittee, and the Indigenous Network to determine whether Title VI is legally binding upon or applicable to federally recognized tribal and Indian environmental programs. Ann Goode is the Director of the EPA Office of Civil Rights.

Historically, it was intended that it should not be onerous or burdensome for a complainant to file a Title VI administrative complaint. As long as the complaint is in writing, within the 180-day statute of limitation, and specifies the alleged discriminatory act or action, the complaint meets the prima facie elements of a Title VI administrative complaint.<sup>22</sup> A Title VI administrative complaint can be filed in any EPA office.<sup>23</sup> However, only the EPA Office of Civil Rights handles the processing and investigation of these complaints. We are now using the Interim Guidance to deal with these Title VI administrative complaints. Using an old legal tool in a new way has forced EPA to create new guidance and methodologies to resolve these cases.

Unique problems require unique and creative solutions. Affected communities and environmental justice advocates have relied upon EPA's implementing regulations,<sup>24</sup> which not only prohibit recipients of federal assistance from intentionally discriminating on the basis of race, creed, color, or national origin, but also prohibit the programs from having an unintended discriminatory effect.<sup>25</sup> This is an easier burden to meet than to show intent to discriminate. This is why EPA is now inundated with over one hundred of these cases.

As you well know, EPA's Interim Guidance has been deemed to be quite controversial. There have been diverse reactions to the issuance of EPA's Interim Guidance. For example, many of our state and local gov-

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22. The criteria for a complete or properly pleaded complaint are listed in the Interim Guidance. See *Interim Guidance*, *supra* note 2, at 6. These criteria are based on the regulatory requirements found at 40 C.F.R. § 7.120(b)(1), (2).

23. See 40 C.F.R. § 7.125(b).

24. See 40 C.F.R. § 7.10.

25. While Title VI itself prohibits *intentional* discrimination, see 42 U.S.C. § 2000(d), Title VI authorizes the EPA to adopt implementing regulations that prohibit discriminatory effects. See *Interim Guidance*, *supra* note 2, at 2.

ernment partners, and the regulated community have continued to express concern over the ramifications of our Guidance. Perhaps, the most poignant example of concern over EPA's issuance of the Guidance has been expressed by Congress. In its recent appropriations bill, Congress precluded EPA from using any funding from its 1999 appropriations to investigate new Title VI administrative complaints until the Interim Guidance is finalized.<sup>26</sup> Our local government partners have expressed concern that they believe the Interim Guidance will have a chilling effect on redevelopment of brownfields<sup>27</sup> and economic redevelopment programs in disadvantaged communities.<sup>28</sup> In response to this particular concern, EPA has formed a pilot study through its Office of Solid Waste and Emergency Response.<sup>29</sup> Neither Title VI nor a fear of environmental justice concerns were found to be obstacles to the brownfields redevelopment pilots and program.<sup>30</sup> Still, others have raised concerns that the Interim Guidance will preclude states from issuing permits in a flexible and timely fashion.<sup>31</sup>

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26. See Pub. L. No. 105-276, 112 Stat. 2461.

27. Brownfields are abandoned or underused industrial and commercial facilities where expansion or redevelopment is difficult due to real or perceived environmental contamination. See Environmental Protection Agency, *Brownfields Glossary of Terms* (visited March 9, 2000) <<http://www.epa.gov/swerosps/bf/glossary.html>>.

28. See, e.g., Patrick W. Merkel, *Civil Rights and the Environment: EPA, States Creating Another Regulatory Burden*, THE METROPOLITAN CORPORATE COUNSEL, March 1999, at 30.

29. See Environmental Protection Agency, *Brownfields Title VI Case Studies: Summary Report 6* (1999) (finding that Title VI concerns have not "slowed down, blocked or otherwise negatively impacted development activities to date" at the Pilot sites chosen for this study).

30. See *id.* at 7.

31. See, e.g., Jerome Balter, *The EPA Needs a Workable Environmental Justice Protocol*, 12 TUL. ENVTL. L.J. 357 (1999).

States issue many more permits in comparison to the EPA, like the prevention of significant deterioration permits (PSDs), over which EPA still has direct regulatory authority, so EPA understands those concerns. Some critics of our Guidance and our environmental justice program have even raised the issue that race and poverty have no role to play in protecting the environment.<sup>32</sup> Finally, some argue that existing environmental statutes and laws are sufficient to address such concerns.<sup>33</sup>

I am not going to suggest which side of the Title VI debate to embrace. However, I can tell you that EPA has determined that our environmental justice and Title VI programs are necessary to ensure that no community bears a disproportionate burden due to environmental problems. The Agency remains committed to ensuring that all communities have a right to environmental protection so that they can be liveable and sustainable communities. Title VI is a statutory matter that only Congress can address. In the meantime, EPA must put in place guidance and procedures that will enable our Agency, our state and local partners, the regulated community and affected communities to resolve these administrative complaints.

The EPA is also working closely with our state partners to provide assistance to them as they consider developing environmental justice and/or Title VI programs. In fact, we have recently created the State and Tribal Environmental Justice Grant (STEJ) Program.<sup>34</sup> The purpose of the STEJ grant program is to provide incentives to encourage our state partners to develop their

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32. See, e.g., Cindy Skrzycki, *The Regulators: With EPA as Judge Up Against Environmental System*, THE WASH POST, Oct. 23, 1998, at F1.

33. See *id.*

34. For an overview of the State and Tribal Environmental Justice Grant Program see <http://www.epa.gov/oeca/oej/stejoverview.html>.

own Environment Justice programs, policies, or permitting processes that may reduce or prevent the filing of Title VI administrative complaints around permitting and siting decisions.

The Office of Civil Rights has worked closely with our state government partners and other stakeholders represented on the Title VI FACA, the federal advisory committee created for the purpose of recommending revisions to the Interim Guidance, which has concluded its work. The Office of Civil Rights plans to disseminate the revised Guidance sometime in early 2000 for another round of comment before it issues final Title VI Guidance. The Office of Environmental Justice is also planning to issue national environmental justice draft guidance sometime in early 2000. For the critics of both these crucial EPA programs, to quote the Director of the Office of Environmental Justice, Barry Hill, I would conclude by stating "the toothpaste is already out of the tube." It would appear that environmental justice will be around for the foreseeable future. It remains to be seen what will be the ultimate state, local and federal response to these issues.

#### CONCLUSION

The EPA believes that existing environmental statutes provide tools that environmental justice advocates can use, and have been using, in their struggle to achieve environmental justice. However, most of the existing environmental statutes do not address siting or permitting disparities. The EPA does not have all the answers. That is why we drafted the Interim Guidance, to get some necessary feedback. The final form will be the EPA's Title VI Guidance. We are looking forward to working with all of our stakeholders.