

Fordham Environmental Law Review

Volume 29, Number 1

2017

Article 1

SYMPOSIUM: AMERICA'S WATER CRISIS: AN ISSUE OF
ENVIRONMENTAL JUSTICE

Toward Civil Rights Enforcement in the Environmental Justice Context - Step One: Acknowledging the Problem

Marianne Engelman Lado*

*Yale Law School, marianne.lado@gmail.com

Copyright ©2017 by the authors. *Fordham Environmental Law Review* is produced by The Berkeley Electronic Press (bepress). <https://ir.lawnet.fordham.edu/elr>

**TOWARD CIVIL RIGHTS ENFORCEMENT IN THE
ENVIRONMENTAL JUSTICE CONTEXT:
STEP ONE: ACKNOWLEDGING THE PROBLEM**

*Marianne Engelman Lado**

INTRODUCTION

In 2016, the Flint Water Advisory Task Force, a group appointed by Governor Rick Snyder to review the contamination of drinking water in Flint, Michigan, reached the “inescapable conclusion” that the Flint water crisis was “a case of environmental justice.”¹ The Task Force reported,

Flint residents, who are majority Black or African American and among the most impoverished of any metropolitan area in the United States, did not enjoy the same degree of protection from environmental and health hazards as that provided to other communities.²

* Marianne Engelman Lado, Visiting Clinical Professor of Law, Yale Law School. Special thanks to Rebekah Doyle, Faculty Support Specialist at Yale Law School; two fantastic research assistants, Quentin Karpilow and Jorge DeVicente; Christine Ernst, who shares a passion for civil rights enforcement and who worked tirelessly on our request to EPA to conduct a compliance review in response to the Flint Water Crisis, upon which this article builds; Earthjustice and Yale Law School, each of which provided a home for pursuing social justice in the environmental context; and Father Phil Schmitter and the many environmental justice activists and partners in Michigan who continue to raise their voices to address the daily environmental assaults on their right to drink clean water and breathe fresh air.

1. FLINT WATER ADVISORY TASK FORCE, FINAL REPORT 56 n.20 (2016); *see also* MICH. CIV. RIGHTS COMM’N, THE FLINT WATER CRISIS: SYSTEMIC RACISM THROUGH THE LENS OF FLINT 84 (2017) (“The Flint Water Crisis is a story of government failure, intransigence, unpreparedness, delay, inaction and environmental injustice.”).

2. *Id.* at 56.

Specifically, the Task Force found that government agencies responsible for protecting the health of Flint residents were “callous and dismissive” in responding to the expressed concerns of community members.³ The Task Force placed primary responsibility for the crisis on the Michigan Department of Environmental Quality (MDEQ), which it found suffered “from cultural shortcomings that prevent it from adequately serving and protecting the public health of Michigan residents.”⁴ MDEQ, the Task Force reported, exhibited “a degree of intransigence and belligerence that has no place in government.”⁵

Was the Flint Water Crisis preceded by any hints of possible failure by MDEQ to provide equal protection to the state’s communities of color? If so, does the Crisis also reflect a gap in civil rights enforcement at the federal level by the agency charged with identifying violations of civil right law and taking corrective action? This article asks a speculative but urgent question: what if, long before the state’s role in the Flint Water Crisis hit national headlines,⁶ the federal government had enforced civil rights law in the environmental context and required that MDEQ develop and implement policies and practices to ensure that the health of all people are protected without regard to race, color, or national origin?

Indeed, as far back as the 1990s, community organizations alleged that MDEQ’s permitting programs intentionally discriminated against African Americans on the basis of race, treating communities of color differently than white communities in public participation processes, and that MDEQ’s approval of permits for facilities such as power stations, recycling plants and incinerators disproportionately located in communities of color had unjustified racially discriminatory impacts.⁷ Over time, residents of Michigan filed a series of complaints against MDEQ with the U.S. Environmental Protection Agency (EPA),

3. *Id.*

4. *Id.* at 28.

5. *Id.* at 29.

6. See Caterina Eva Matsa et al., *Searching for News: The Flint Water Crisis*, PEW RESEARCH CENTER (Apr. 27, 2017), <http://www.journalism.org/essay/searching-for-news/> [<https://perma.cc/4MCV-4MPK>] (providing analysis of news coverage of the Flint Water Crisis over time).

7. See Letter from Father Phil Schmitter & Sister Joanne Chiaverini, St. Francis Prayer Center, to Valdas Adamkus, Environmental Protection Agency (Dec. 15, 1992) (on file with author).

alleging that MDEQ discriminated on the basis of race and ethnicity.⁸ Despite a clear mandate to enforce federal civil rights law, however, EPA's Office of Civil Rights (OCR), now called the External Civil Rights Compliance Office (ECRCO), repeatedly failed to identify red flags that might have signaled a pattern of noncompliance by MDEQ with Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, which prohibits discrimination on the basis of race, color, or national origin in any program or activity that receives federal financial assistance.⁹

In the early 1960s, Title VI was intended as a cornerstone of the federal government's effort to address race discrimination. As President John F. Kennedy stated:

8. *See, e.g.*, Letter from Father Phil Schmitter & Sister Joanne Chiaverini, St. Francis Prayer Center, to Diane [sic] E. Goode, Director, EPA (June 9, 1998), https://www.documentcloud.org/documents/2162464-epa_05r-98-r5.html (Select Steel Complaint); Letter to Ann Goode, Director, EPA Office of Civil Rights (June 27, 1998), https://www.documentcloud.org/documents/2162555-epa_09r-98-r5.html (Environmental Injustice Complaint); Letter to Ann Good, Director, EPA Office of Civil Rights (Sept. 23, 1999), https://www.documentcloud.org/documents/2162699-epa_21r-99-r5.html (Administrative Complaint); Letter from Deborah Ann Romak, to EPA Office of Civil Rights (June 22, 1999), https://www.documentcloud.org/documents/2162678-epa_17r-99-r5.html (Title VII Complaint).

9. The number of complaints filed against MDEQ over time is significant when compared to other state and local agencies but not unique. The EPA might also have taken notice of the high number of complaints filed against a handful of MDEQ's sister agencies over time. According to a database compiled by the Center for Public Integrity, of the 265 complaints alleging discrimination not only on the basis of race, color or national origin but also on the basis of sex, disability or related grounds, which were filed with EPA between 1996 and 2013, seven complaints were filed against MDEQ alleging race discrimination. *See* Yue Qiu & Talia Buford, *Decades of Inaction*, CTR. FOR PUB. INTEGRITY (Aug. 3, 2015), <https://www.publicintegrity.org/2015/08/03/17726/decades-inaction> [<http://perma.cc/MX22-TMY4>] (cataloguing disposition of complaints over a 17-year period). The EPA might also have noticed repeated complaints alleging race discrimination against the Alabama Department of Environmental Management (12), the Louisiana Department of Environmental Quality (9), the Maricopa County Air Quality Department (7), the North Carolina Department of Natural Resources, now called Department of Environmental Quality (6), and the California Air Resources Board and other California state agencies. *See id.* A disproportionate number of complaints is suggestive but not conclusive evidence of a pattern of discrimination, and there may be other explanations, such as particularly active complainants in a given location. *See infra* note 163.

Simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination. Direct discrimination by Federal, State, or local governments is prohibited by the Constitution. But indirect discrimination, through the use of Federal funds, is just as invidious; and it should not be necessary to resort to the courts to prevent each individual violation.¹⁰

Though far from delivering on their promise, civil rights laws passed in the 1960s transformed expectations and, to some degree, provided recourse for discriminatory behavior in other sectors of the economy, from employment¹¹ to education¹² and housing.¹³ Federal and state agencies such as the Equal Employment Opportunities Commission and the Office of Fair Housing and Equal Opportunity apply significant resources to anti-discrimination activities. The fate of these anti-discriminatory efforts across the federal government hangs in the balance at the time of writing,¹⁴ but historically civil rights offices in

10. President John F. Kennedy, *Special Message to the Congress on Civil Rights and Job Opportunities*, THE AMERICAN PRESIDENCY PROJECT (June 19, 1963), <http://www.presidency.ucsb.edu/ws/?pid=9283> [<http://perma.cc/3AQV-PZQL>].

11. See Tamara Lytle, *Title VII Changed the Face of the American Workplace*, HR MAG. (May 21, 2014), <https://www.shrm.org/hr-today/news/hr-magazine/pages/title-vii-changed-the-face-of-the-american-workplace.aspx> [<http://perma.cc/PK3M-ZBRW>].

12. See Office for Civil Rights, *Impact of the Civil Rights Laws*, U.S. DEP'T OF EDUC. (1999), <https://www2.ed.gov/about/offices/list/ocr/docs/impact.html> [<http://perma.cc/F4YX-A34A>].

13. See Jorge Andres Soto & Deidre Swesnik, *The Promise of the Fair Housing Act and the Role of Fair Housing Organizations*, AM. CONST. SOC'Y 1, 3-5 (2012).

14. Recent information about the priorities of the Trump Administration cast doubt on whether federal resources will continue to be aimed at addressing inequalities on the basis of race and national origin or dismantling those efforts. See, e.g., Debra Cassens Weiss, *Justice Department to Challenge Universities over Alleged Discrimination against Whites*, A.B.A. J. (Aug. 2, 2017), http://www.abajournal.com/news/article/justice_department_to_challenge_universities_over_alleged_discrimination_ag [<http://perma.cc/L3DW-UDBH>]; Sheryl Gay Stolberg & Eric Lichtblau, *Sweeping Federal Review Could Affect Consent Decrees Nationwide*, N.Y. TIMES (Apr. 3, 2017), https://www.nytimes.com/2017/04/03/us/justice-department-jeff-sessions-baltimore-police.html?_r=0 [<http://perma.cc/7VXY-2GEP>].

the various federal agencies have played critical roles in holding recipients of federal funds accountable for complying with the mandates of Title VI.¹⁵ The U.S. Department of Education, for example, reviews school district disciplinary policies and testing practices for compliance with civil rights laws, and regularly uses its authority to compel school districts to revise policies and practices with racially discriminatory effects or intent.¹⁶ As civil rights lawyer and legal scholar Olatunde Johnson commented, over time and, particularly during the Obama Administration, there was “a growing empirical reality” that federal agencies “might play a central role in advancing equality and social inclusion,” with the concept of inclusion referencing not only nondiscrimination but also “the advancement of participation and opportunity for groups or individuals that face systemic barriers.”¹⁷ Johnson describes civil rights enforcement during the Obama Administration as having unleashed administrative power:

Over the past decade, federal agencies have increasingly taken on the antidiscrimination project, actively

15. *See infra* notes 79-120.

16. The U.S. Department of Education provides statistics on activities by subject matter on an annual basis. *See* U.S. DEP’T OF EDUC., SECURING EQUAL EDUCATIONAL OPPORTUNITY: REPORT TO THE PRESIDENT AND SECRETARY OF EDUCATION 17 fig.12 (2016) (number of Title VI issues raised in complaints in 2016, including admissions, differential treatment/exclusion/denial of benefits, discipline, racial harassment, and retaliation) [hereinafter SECURING EQUAL OPPORTUNITY]. The Department also provides copies of resolution agreements on their website. *See Resolution Letters and Agreements*, U.S. DEP’T OF EDUC., https://www.ed.gov/ocr-search-resolutions-letters-and-agreements?keywords=&title=&keywords_title_VI=%22Title+VI%22&keywords_state= (last visited July 23, 2017).

17. Olatunde C.A. Johnson, *Overreach and Innovation in Equality Regulation*, 66 DUKE L. J. 1771, 1772, 1772 n.1 (2017). This definition of inclusion maps distributional and procedural justice concerns the core concept of environmental justice. *See* Robert D. Bullard & Glenn S. Johnson, *Environmental Justice: Grassroots Activism and Its Impact on Public Policy Decision Making*, 56 J. OF SOC. ISSUES 555, 558 (2000) (defining environmental justice as 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”).

promulgating regulations and guidance to advance inclusion in areas such as housing, education, and employment.¹⁸

What if civil rights enforcement were taken as seriously in the environmental context?

There is an active and pressing empirical and theoretical discourse among academics and activities over the meaning and utility of rights to promote justice.¹⁹ This conversation has particular purchase in the struggle for civil rights, raising questions about whether a focus on rights privileges formal equality over substantive, on the ground, improvements in living conditions.²⁰ Given the complexity and nuance of the debate and despite its significance, this paper focuses more narrowly on the possibility that administrative action can shape policies and practices that have a meaningful impact on disparities in public participation and, ultimately, the distribution of environmental benefits and burdens. EPA has historically failed to hold decision-makers accountable, and recipients of federal funds are not only shielded from enforcement action but also have scant incentive to

18. Olatunde C.A. Johnson, *supra* note 17, at 1772.

19. See generally Duncan Kennedy, *The Critique of Rights in Critical Legal Studies*, in *LEFT LEGALISM/LEFT CRITIQUE* (Janet Halley & Wendy Brown eds., 2002); but see, e.g., PATRICIA WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR* 149 (1991) (“Although rights may not be ends in themselves, rights rhetoric has been and continues to be an effective form of discourse for blacks.”).

20. The 50th anniversary of the Civil Rights Act of 1964 sparked a robust conversation in scholarship and the popular press about the legacy of the law, including its effects on segregation and overt forms of discrimination, in particular, as well as continuing forms of structural discrimination and unconscious bias. One recent article, for instance, quoted the civil rights activist Rev. Hillery T. Broadus stating that 50 years after the signing of the Civil Rights Act much remains to be done to ensure equality for all, citing issues of voting access and criminal justice:

The act “banned overt discrimination; that’s what it did,” she said. Today, “a (black) kid can be walking home from the store and be shot and killed and the man who killed him be found innocent and a (black) woman protecting her children who shoots a gun in the air gets sentenced to 20 years in jail. Where is the sense in all that? Where is the justice?”

Brenda Gazzar, *How the Civil Rights Act of 1964 Changed America*, L.A. DAILY NEWS (July 1, 2014), <http://www.dailynews.com/social-affairs/20140701/how-the-civil-rights-act-of-1964-changed-america> [<http://perma.cc/993X-C8VU>].

review their policies and practices for compliance with the law.²¹ EPA has the power to initiate compliance reviews, as well as to investigate allegations filed by complainants, and where it finds discrimination, withhold federal funds until states and other recipients of federal financial assistance come into compliance.²² Public records reflect that EPA has conducted only one compliance review in its history²³ and has never referred a case to the Department of Justice for prosecution nor initiated proceedings to withhold federal funds for noncompliance with Title VI.²⁴ Without meaningful enforcement of civil rights law in

21. This Article focuses on Title VI compliance and enforcement activities at EPA, although there is reason to believe oversight is lacking across the environment and natural resources family of federal agencies, which includes the U.S. Department of Agriculture; the U.S. Department of Energy; the U.S. Fish and Wildlife Service, within the Department of Interior; and the U.S. National Oceanic and Atmospheric Administration, within the U.S. Department of Commerce; among others. See EDUARDO LAO RHODES, ENVIRONMENTAL JUSTICE IN AMERICA: A NEW PARADIGM 86-104 (2003); U.S. COMM'N ON CIVIL RIGHTS, NOT IN MY BACKYARD: EXECUTIVE ORDER 12,898 AND TITLE VI AS TOOLS FOR ACHIEVING ENVIRONMENTAL JUSTICE 69-71 (2003) (evaluating the Department of Interior's civil rights enforcement program) [hereinafter NOT IN MY BACKYARD]. *Pigford v. Glickman* and *Brewington v. Glickman*, two class action lawsuits brought by black farmers against USDA, catapulted civil rights into the spotlight during the Obama Administration, which then gave significant attention to USDA's civil rights enforcement efforts. See *In re Black Farmers Discrimination Litigation*, 856 F. Supp. 2d 1 (D.D.C. 2011), as amended (Nov. 10, 2011), see generally U. S. DEP'T OF AGRIC., OFFICE OF THE ASSISTANT SECRETARY FOR CIVIL RIGHTS STRATEGIC PLAN FY 2016-2020, <https://www.ascr.usda.gov/sites/default/files/OASCRFY2016-2020Strategic%20Plan.pdf>.

22. See generally Title VI, 42 U.S.C. § 2000d, 40 C.F.R. § 7.130.

23. In response to an inquiry by the U.S. Commission on Civil Rights in 2016, then OCR Director Velveta Golightly Howell indicated that the EPA had completed one post-award compliance review since 2010. See U.S. COMM'N ON CIV. RIGHTS, ENVIRONMENTAL JUSTICE: EXAMINING THE ENVIRONMENTAL PROTECTION AGENCY'S COMPLIANCE AND ENFORCEMENT OF TITLE VI AND EXECUTIVE ORDER 12,898, at 214 (2016) [hereinafter EJ REPORT]. In 2011, EPA entered into an agreement with the Louisiana Department of Agriculture and Forestry (LDAF) to resolve a compliance review and a related civil rights complaint filed under Title VI of the Civil Rights Act of 1964 (Title VI) and a limited English proficiency (LEP) compliance review conducted by EPA pursuant to its authority under Title VI. See *Title VI—Settlements and Decisions*, EPA, <https://www.epa.gov/ocr/title-vi-settlements-and-decisions###ldaf> (last visited Sept. 7, 2017).

24. Letter of Transmittal from Martin R. Castro, USCCR Chair, to Barack Obama, President of the United States (Sept. 2016), in EJ REPORT, *supra* note 23.

the environmental context, state, local and private sector actors make decisions every day that create or exacerbate racial inequalities in exposure to toxic sources on the one hand, and in access to safe and healthy recreational space, on the other. These inequalities, in turn, adversely affect the health status of people of color in the United States.²⁵

Across the country, many environmental justice activists have long ago lost hope in Title VI compliance and enforcement as a means of addressing racial inequalities in public environmental decision-making processes, the distribution of polluting facilities, and access to environmental benefits. Nonetheless, the normative premise of this article is that the failure to hold decision-makers accountable for race and national origin discrimination in the environmental context is unacceptable, and that EPA can and should reform its civil rights compliance and enforcement program. Part I of the article offers a brief background on the Flint Water Crisis, and, particularly, the procedural and distributive justice issues raised by the Crisis. Part II returns to Title VI of the Civil Rights Act of 1964 and discusses the mandate, framework and potential for civil rights enforcement. Part III then turns to the impact of the 2001 Supreme Court decision in *Alexander v. Sandoval*, which limited access to the courts to enforce Title VI to cases of intentional discrimination.²⁶ In the environmental context, *Sandoval* increased reliance on EPA's anemic civil rights compliance and enforcement program, widening the gap in civil rights enforcement in the environmental context. Part IV then focuses on EPA's failure to hold MDEQ accountable for compliance with Title VI in advance of the Flint Water Crisis, highlighting missed opportunities for reforming MDEQ's policies and practices. Finally, the article's conclusion argues for fulfilling the promise of equal protection in the context of environmental justice and posits that the federal government should enforce protections against discrimination on the basis of race and ethnicity in environmental decision-making and the distribution of environmental burdens and benefits. EPA's failure to hold MDEQ accountable is a reminder of the need for a more

25. See, e.g., Rachel Morello-Frosch et al., *Understanding the Cumulative Impact of Inequalities in Environmental Health: Implications for Policy*, 30 HEALTH AFFAIRS 879, 879 (2011); Phil Brown, *Race, Class, and Environmental Health: A Review and Systemization of the Literature*, 69 ENVTL. RES. 15 (1995).

26. *Alexander v. Sandoval*, 532 U.S. 275 (2001).

robust civil rights compliance and enforcement regime. Acknowledging the problem, the focus of this article, is the first step toward any solution. The author's longer-term project involves collaboration with disproportionately impacted communities across the country to develop and implement an agenda to move from recognition of the problem to remedy, a subject for future elaboration and discussion.

I. DISTRIBUTIVE AND PROCEDURAL INJUSTICE IN FLINT

In 1967, Flint signed a long-term water supply contract with the Detroit Water and Sewerage Department (Detroit Water) to provide drinking water to Flint residents. Detroit Water draws from Lake Huron, which is considered a relatively high quality water source.²⁷ By comparison, the Flint River has been an industry dumping ground for decades, and receives high concentrations of chloride from salt applied to roads and walkways each winter. As a result, the Flint River is nineteen times more corrosive than the water that the Detroit Water withdraws from Lake Huron.²⁸ Despite the risk that water from the Flint River would erode pipes and increase the concentration of lead and other metals in the city's drinking water, in April, 2014, a state appointed emergency manager authorized the City of Flint to use the Flint River as an interim source of water in order to save money.²⁹

27. FLINT WATER ADVISORY TASK FORCE, *supra* note 1, at 27.

28. Siddhartha Roy, *Test Update: Flint River Water 19X More Corrosive than Detroit Water for Lead Solder; Now What?*, FLINT WATER STUDY UPDATES (Sept. 11, 2015), <http://flintwaterstudy.org/2015/09/test-update-flint-river-water-19x-more-corrosive-than-detroit-water-for-lead-solder-now-what/> [<http://perma.cc/32XT-94ZA>].

29. See Merritt Kennedy, *Lead-Laced Water in Flint: A Step-by-Step Look at the Makings of a Crisis*, NAT'L PUB. RADIO (Apr. 20, 2016), <http://www.npr.org/sections/thetwo-way/2016/04/20/465545378/lead-laced-water-in-flint-a-step-by-step-look-at-the-makings-of-a-crisis> [<http://perma.cc/4A8T-S8QJ>]; see also FLINT WATER ADVISORY TASK FORCE, *supra* note 1, at 15-26 (providing background information on the Flint water crisis); *Disaster Day by Day: A Detailed Flint Crisis Timeline*, BRIDGE (Feb. 4, 2016), <http://bridgemi.com/2016/02/flint-water-disaster-timeline/> [hereinafter *Bridge Timeline*]. Echoing community concerns, the Flint Water Task Force placed blame not only on MDEQ but also on the emergency manager and, more broadly, a series of state laws that shifted decision-making authority away from local government: "The Flint Water Crisis occurred when state-appointed emergency managers replaced local representative decision-making in

MDEQ's Office of Drinking Water and Municipal Assistance informed Flint officials that corrosion control was not necessary for water from the Flint River. Instead, MDEQ instructed Flint to conduct two six-month testing periods to determine whether corrosion control was needed.³⁰ Legal experts at EPA and elsewhere later concluded that this instruction amounted to a breach of the Safe Drinking Water Act's (SDWA) Lead and Copper Rule,³¹ which requires all municipalities with more than 50,000 residents to employ corrosion control in their water distribution systems.³² This series of decisions also sparked claims that state and local officials, including the director of MDEQ, violated the Equal Protection Clause, as well as federal and civil rights laws, by intentionally discriminating against the predominantly African American population of Flint.³³

Community residents sounded the alarm soon after the switch to the Flint River, raising concerns about the look and taste of water coming out of their faucets.³⁴ EPA also began to ask questions after Flint resident LeeAnne Walters shared water samples in February, 2015, which showed dramatically high levels of lead. MDEQ and other state

Flint, removing the checks and balances and public accountability that come with public decision-making." FLINT WATER ADVISORY TASK FORCE, *supra* note 1, at 1; *see also* MICH. CIV. RIGHTS COMM'N, *supra* note 1, at 109-13. In 2013, local officials and community-based coalitions challenged the state emergency manager law in federal court, alleging violations of constitutional rights and the Voting Rights Act. First Amended Complaint, *Bellant v. Snyder*, 2-13-cv-11370-GCS-RSW (E.D. Mich. Feb. 12, 2014), <http://sugarlaw.org/wp-content/uploads/2017/03/First-Amended-Complaint.pdf>. In 2016, the Sixth Circuit Court of Appeals affirmed a district court decision dismissing the case. *See Phillips v. Snyder*, 836 F.3d 707 (6th Cir. 2016), *cert. den. sub nom. Bellant v. Snyder*, 2017 WL 1300221 (Oct. 2, 2017).

30. FLINT WATER ADVISORY TASK FORCE, *supra* note 1, at 16.

31. Memorandum from Peter Grevatt, Director, EPA Office of Ground Water and Drinking Water, to EPA Regional Water Division Directors (Nov. 3, 2015), https://www.epa.gov/sites/production/files/2015-11/documents/occt_req_memo_signed_pg_2015-11-03-155158_508.pdf (agency clarification on rule requirements).

32. 40 C.F.R. § 141.81(a)(1).

33. *See, e.g., Boler v. Earley*, 865 F.3d 391 (6th Cir. 2017); Class Action Complaint, *Village Shores LLC v. Lockwood*, Case No. 16-14498 (E.D. Mich. March 30, 2017).

34. *See, e.g., What E-Mails Have Shown Us About Flint Water Crisis*, DETROIT FREE PRESS (Feb. 20, 2016), <http://www.freep.com/story/news/local/michigan/flint-water-crisis/2016/02/19/flint-water-crisis-emails/80228582/> [<http://perma.cc/UXW6-7QYC>].

agencies nonetheless compounded the problem by downplaying complaints and also incorrectly asserting that Flint was implementing corrosion control.³⁵ As a subsequent letter to EPA on behalf of local and state residents, as well as national organizations, requesting a federal review of MDEQ's compliance with Title VI stated:

[MDEQ's] failures to protect Flint residents are even more striking when set in the context of the consistent, well-organized feedback provided by the people of Flint. Flint residents familiar with the Flint River's long history of industrial contamination have expressed shock that the River was ever considered as a source of drinking water given its reputation as a polluted waterway. Many began complaining about the taste, odor and color of the city's water immediately after the switch took place.³⁶

For months, MDEQ responded to community concerns with what the Governor's Flint Water Crisis Task Force described as dismissiveness and belittlement,³⁷ until the results of water testing and evidence of heightened blood lead levels in children forced the Governor's office and MDEQ to acknowledge the crisis.³⁸ In a report

35. *See Bridge Timeline, supra* note 29, at Part 2.

36. Letter from Marianne Engelman Lado & Christine Ernst, Earthjustice, to Jocelyn Samuels, U.S. Dep't of Health & Human Services, Lilian Dorka, EPA, & Daria Neal, U.S. Dep't of Just. (June 29, 2016), <http://earthjustice.org/sites/default/files/FlintLetterFinal.pdf> (requesting review of MDEQ and the Michigan Department of Health and Human Services' compliance with Title VI of the Civil Rights Act of 1964 and Section 504 of the Rehabilitation Act of 1973).

37. *See FLINT WATER ADVISORY TASK FORCE, supra* note 1, at 2, App. II (Dec. 29, 2015 Task Force letter to Governor Snyder stating, "[t]hroughout 2015, as the public raised concerns and as independent studies and testing were conducted and brought to the attention of MDEQ, the agency's response was often one of aggressive dismissal, belittlement, and attempts to discredit these efforts and the individuals involved"); *see also* Emily Lawler, *DEQ Spokesman Also Resigns over Flint Water Crisis, Says City 'Didn't Feel Like We Cared,'* MLIVE (Dec. 30, 2015), http://www.mlive.com/lansing-news/index.ssf/2015/12/deq_spokesman_also_resigns_ove.html [<http://perma.cc/RBT5-D3WR>].

38. *See* Siddhartha Roy, *Michigan Health Department Hid Evidence of Health Harm Due to Lead Contaminated Water: Allowed False Public Assurances by MDEQ and Stonewalled Outside Researchers*, FLINT WATER STUDY UPDATES (Dec. 21, 2015), <http://flintwaterstudy.org/2015/12/michigan-health-department-hid->

focused on the role that structural and institutional discrimination and racism played in quieting the voices of Flint residents and “enabling” the contamination of the Flint water supply, the Michigan Civil Rights Commission commented that the Flint community’s lack of political clout “left the residents with nowhere to turn, no way to have their voices heard” The Commission continued, “[t]he people of Flint did not enjoy the equal protection of environmental or public health laws, nor did they have a meaningful voice in the decisions leading up to the Flint Water Crisis. Many argue they had no voice.”³⁹

For environmental justice activists across the country, however, the events in Flint were less an anomaly than yet another example of government officials – and, particularly, officials at environmental agencies—refusing to accord credibility to the input and perspectives of community residents and, ultimately, making decisions that put the lives of communities of color and low-income populations at risk.⁴⁰ In his seminal 1990 book, *Dumping in Dixie: Race, Class, and Environmental Quality*, Dr. Robert Bullard focuses on five case studies of environmental justice, including the struggle to close a lead smelter that recovered lead from used batteries and other materials in West Dallas.⁴¹ Residents of the predominantly African American West Dallas neighborhood where the smelter was located were exposed to emissions from the smelter for decades. In the early 1970s, residents of a public housing project located approximately fifty feet away from the property line of the smelter raised concerns about the impact of lead emissions on children in the neighborhood, and testing confirmed

evidence-of-health-harm-due-to-lead-contaminated-water-allowed-false-public-assurances-by-mdeq-and-stonewalled-outside-researchers/ [http://perma.cc/6GP7-Z9ZH].

39. MICH. CIV. RIGHTS COMM’N, *supra* note 1, at 2.

40. Government dismissiveness and the refusal to accord credibility and weigh the input of community voices in decision-making on environmental issues follows and is a continuation of the long history of exclusion and oppression of African Americans and other disempowered groups in a wide array of decision-making contexts. *See, e.g.*, STEVEN D. CLASSEN, WATCHING JIM CROW: THE STRUGGLES OVER MISSISSIPPI TV, 1955-1969, at 138 (2004) (describing the “refusal to recognize the actual voices and lived experiences of black Mississippians” in broadcasting license renewal proceedings in the 1950s and 1960s).

41. ROBERT D. BULLARD, DUMPING IN DIXIE: RACE, CLASS AND ENVIRONMENTAL QUALITY 40-63 (2000).

that children living nearby had heightened blood lead levels.⁴² The City nonetheless failed to enforce its lead ordinance and the smelter “chronically and repeatedly” violated the law.⁴³ A 1981 study again confirmed high blood lead levels in children in community, but government agencies failed to take effective action to address lead contamination in the neighborhood—not the EPA, nor the state, nor the city.⁴⁴ As in Flint years later, frustrated residents came to hearings asking their government to address the problem.⁴⁵ Finally, years after the protests began, and with more than a decade after studies had demonstrated high blood lead levels in children, the Dallas Board of Adjustments ordered the smelter closed, which Robert Bullard attributed to, as in Flint, “the tenacity of the low-income black neighborhood to withstand the assaults of pollution, inept government officials, and institutionalized racism.”⁴⁶

These two examples of government failure to address lead contamination raise issues of both distributive and procedural justice, which are core concerns of the environmental justice movement.⁴⁷ In its Final Report on the Flint Water Crisis, the Michigan Commission on Civil Rights explicitly discusses both the mal-distribution of environmental burdens in Michigan, acknowledging that environmental hazards are clustered in communities of color, as well as the disregard shown by state officials for the opinions of community residents. As for distributive justice, the Commission described what it called “two inescapable and irreconcilable facts:” first, “[e]nvironmental justice requires that no group bear more of the harm caused by environmental decisions than do other groups,” and second, that “[p]eople of color were disproportionately harmed by [environmental] decisions.”⁴⁸ Rather than placing sources of pollution

42. *See id.* at 47.

43. *Id.* at 47-48.

44. *See id.* at 48-49.

45. *See id.* at 49.

46. *Id.* at 50.

47. *See The Principles of Environmental Justice (EJ)*, The First People of Color National Environmental Justice Leadership Summit (Washington, D.C., Oct. 24-27, 1991), <http://www.ejnet.org/ej/principles.pdf>. The 7th Principle states, “Environmental Justice demands the right to participate as equal partners at every level of decision-making, including needs assessment, planning, implementation, enforcement and evaluation.” *Id.*

48. MICH. CIV. RIGHTS COMM’N, *supra* note 1, at 95.

where they will do least harm, taking into account, for example, the vulnerabilities of the population and cumulative impacts from other sources of pollution, state siting decisions disproportionately and adversely affect African Americans and other people of color.⁴⁹ The Commission concluded, “[w]hen benefits are shared equally, but the harms and risks are repeatedly distributed to impact only a few, it is an environmental injustice and may, in some cases, even rise to the level of environmental racism.”⁵⁰

Moreover, as the Governor’s Flint Water Advisory Task Force found, MDEQ and other government officials exhibited “callous and dismissive” responses to the concerns of Flint residents.⁵¹ As resident Melissa Mays testified to the Commission on Civil Rights, she found herself arguing with government officials: “*I said our water’s poisoned, they said no it’s not, you’re fine. . . . I’ve never been talked to like I’ve been so ignorant or stupid.*”⁵² The Task Force and the Commission both commented on MDEQ’s “cultural shortcomings,” and in its Final Report, the Commission asked:

What if the government officials and employees who dealt with the initial complaints about the Flint water had received training in procedural justice and understood that the history of environmental injustices included a common element of ignoring those actually being affected? Properly trained government employees could have understood environmental justice principles, such as procedural justice, and incorporated them in their work, or consciously been on the lookout for signs of injustice and implicit bias.⁵³

49. *Id.* at 99.

50. *Id.* at 97.

51. FLINT WATER ADVISORY TASK FORCE, *supra* note 1, at 2.

52. MICH. CIV. RIGHTS COMM’N, *supra* note 1, at 105.

53. *Id.* at 105. *See generally* T.R. Tyler, *Social Justice: Outcome and Procedure*, 35 INT’L J. OF PSYCHOL. 117, 117-125 (2000) (relevance of procedural criteria such as whether there are opportunities to participate, whether authorities are neutral, and whether participants are treated with dignity and respect, to satisfaction with outcomes).

Indeed, what if long before the Flint Water Crisis, EPA had enforced Title VI and required MDEQ to develop and implement policies and practices to ensure compliance with the mandates of civil rights law.

II. TITLE VI OF THE CIVIL RIGHTS ACT OF 1964

Before turning to the applicability of Title VI and agency implementing regulations, the strategic focus on civil rights law must be placed in context. First, the Flint Water Crisis and other environmental justice issues implicate not only civil rights law but also the requirements of an array of federal, state, and local environmental laws.⁵⁴ Enforcement of civil rights laws is a complement, not a

54. *See, e.g.*, Federal Water Pollution and Control Act, also known as the Clean Water Act (CWA), 33 U.S.C. § 1311 *et seq.*; the Clean Air Act (CAA), 42 U.S.C. § 7402 *et seq.*; the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4321 *et seq.*; the Safe Drinking Water Act (SDWA), 42 U.S.C. § 300f *et seq.*; the Solid Waste Disposal Act, including subchapter III, the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6901 *et seq.* (governing the disposal of solid and hazardous waste); the Endangered Species Act of 1973 (ESA), 16 U.S.C. § 1531 *et seq.*; the Comprehensive Environmental Response, Compensation and Liability Act of 1980 as amended by the Superfund Amendments and Reauthorization Act of 1986, 42 U.S.C. § 9601 *et seq.*; the recently amended Toxic Substances Control Act (TSCA), 15 U.S.C. § 2601 *et seq.* (governing the regulation of toxic substances); the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. § 136 *et seq.* (registration and control of pesticides); the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1201 *et seq.*; the Low-Level Radioactive Waste Policy Act, 42 U.S.C. § 2021b *et seq.*, the Oil Pollution Act of 1990, 33 U.S.C. § 2701 *et seq.*, and the Lead-Based Paint Poisoning Prevention Act, 42 U.S.C. § 4801 *et seq.*, among others. Individuals and community groups affected by contamination may also have rights under federal and state worker protection, consumer protection, nuisance, and toxics laws such as California's Safe Drinking Water and Toxic Enforcement Act of 1986 (Proposition 65), which requires reasonable warning of exposure to chemicals causing cancer or reproductive toxicity. *See* California Health and Safety Code, Ch. 6.6 § 25249.6. *See generally* CLIFFORD RECHTSCHAFFEN ET AL., ENVIRONMENTAL JUSTICE: LAW, POLICY & REGULATION (2d ed. 2009). *See* Concerned Pastors for Social Action v. Khouri, Case No. 16-10277 (E.D. Mich. May 31, 2016) (order allowing preliminary discovery in Safe Drinking Water Act claims); *see also* Flint Water Crisis, NAT. RESOURCES DEF. COUNCIL, <https://www.nrdc.org/FLINT#sec-documents> (containing links to the settlement agreement and other related court documents) (last visited Sept. 7, 2017). The Flint Water Crisis also raised questions of compliance with the Equal Protection and Due Process Clauses of the Constitution. *See, e.g.*, Boler v. Earley, 865 F.3d 391 (6th Cir. 2017) (ruling on motion to dismiss claims in two cases brought by Flint residents affected by the

substitute for, regulation and enforcement pursuant to federal and state environmental laws. Environmental laws alone, though, fail to address the ways in which race and national origin continues to affect public participation processes, the distribution of polluting sources, disparities in exposure to health hazards, and opportunities to access open space and other environmental benefits. Although some environmental laws contain requirements for public participation,⁵⁵ they do not provide a remedy for discrimination on the basis of race and national origin. Moreover, compliance with standards adopted pursuant to the Clean Water Act, Clean Air Act, or other environmental laws does not ensure that persons are not adversely affected by a permitted facility, particularly if they are exposed to multiple sources of pollution in overly burdened communities.⁵⁶ Environmental regulations and standards are the outcome of political and administrative processes, which must adhere to statutory criteria for rulemaking or policy-making and take account of competing interests. These standards may involve averaging emissions over large geographical areas that, if viewed in isolation, can hide disparities. Environmental standards also change over time⁵⁷ and are rarely updated to account for advances in science.⁵⁸

contaminated water, against various state and local officials and entities, alleging violation of their constitutional rights, pursuant to 42 U.S.C. § 1983, along with other claims).

55. *See, e.g.*, NEPA, 42 U.S.C. § 4332(2)(c)(v) (environmental impact statements subject to public notice and comment).

56. *See generally* STEVE LERNER, *SACRIFICE ZONES: THE FRONT LINES OF TOXIC CHEMICAL EXPOSURE IN THE UNITED STATES* (2010).

57. *See, e.g.*, National Ambient Air Quality Standards for Lead, EPA-HQ-OAR-2006-0735, 73 Fed. Reg. 66,964, 66,966 (Nov. 12, 2008) (codified at 40 C.F.R. pts. 50, 51, 53, 58) (changing ambient standard for exposure to lead particles in place since 1978 from 1.5 to .15 micrograms per cubic meter of air); *see also In re Shell Gulf of Mexico, Inc.*, 2010 WL 5478647, at *2 (EAB 2010) (holding EPA erred in relying solely on compliance with the then-existing annual NO₂ National Ambient Air Quality Standard (“NAAQS”) in finding that Alaska Native population would not experience adverse human health or environmental effects from the permitted activity when the NAAQS was under revision).

58. *See, e.g.*, Lynn E. Blais & Wendy E. Wagner, *Emerging Science, Adaptive Regulation, and the Problem of Rulemaking Ruts*, 86 TEX. L. REV. 1701, 1721-25 (2008) (standards such as new source performance standards under the Clean Air Act and effluent standards under the Clean Water Act are on average twenty years

Second, the assertion of legal rights are most effective when situated within a larger strategy for change and should be evaluated along with communications, organizing, legislative advocacy, and other tactics to achieve not only policy reform but more fundamental transformation on individual, community, and institutional levels. As the late environmental justice lawyer Luke W. Cole and scholar Sheila R. Foster wrote in *From the Ground Up: Environmental Racism and the Rise of the Environmental Justice Movement*,⁵⁹ strategies that are developed and implemented consistent with the Principles of Environmental Justice⁶⁰ “break the cycle of quiescence and transform a community’s mood from a feeling of hopelessness to one of empowerment.”⁶¹

Civil rights enforcement, thus, sits within a larger set of tools and strategies for addressing distributive and procedural justice issues in the environmental context. Together with Executive Order 12,898 (the “EJ Executive Order”),⁶² Title VI is the critical legal mechanism at the federal level⁶³ for recognizing and remedying the role that race and ethnicity play in the distribution of environmental benefits and burdens and the lack of democratic accountability to overburdened communities of color by the local, state and private actors that daily make decisions affecting their health and welfare. Indeed, Title VI and

old, more than fifty percent have never been revised, and most others have been revised once).

59. LUKE W. COLE & SHEILA R. FOSTER, *FROM THE GROUND UP: ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT* (2001).

60. See *Principles of Environmental Justice*, *supra* note 47; see also *Jemez Principles for Democratic Organizing*, Southwest Network for Environmental and Economic Justice (New Mexico, Dec. 1996), <http://www.ejnet.org/ej/jemez.pdf> (requiring inclusivity, bottom up organizing, letting people speak for themselves, solidarity and mutuality, building just relationships, and a commitment to self-transformation).

61. COLE & FOSTER, *supra* note 59, at 157.

62. Exec. Order No. 12,898, 59 Fed. Reg. 7,629 (Feb. 11, 1994) [hereinafter EJ Executive Order].

63. In some jurisdictions, state and local civil rights laws provide another avenue for acknowledging and addressing discrimination in environmental decision-making. See, e.g., Cal. Gov. Code § 11135 (“No person in the State of California shall, on the basis of [race, color and other protected bases] be unlawfully denied full and equal access to the benefits of, or be unlawfully subjected to discrimination . . .”).

the EJ Executive Order are complementary and mutually reinforcing: Title VI and NEPA provided the legal authority upon which the EJ Executive Order was based and, in turn, the Executive Order was intended to strengthen federal enforcement of Title VI. In a memorandum for the heads of departments and agencies issued in tandem with the Executive Order, President Clinton stated that the Executive Order was specifically “intended to promote nondiscrimination in Federal programs substantially affecting human health and the environment” and reiterated that each federal agency has a mandate to enforce Title VI:

In accordance with Title VI of the Civil Rights Act of 1964, each Federal agency shall ensure that all programs or activities receiving Federal financial assistance that affect human health or the environment do not directly, or through contractual or other arrangements, use criteria, methods, or practices that discriminate on the basis of race, color, or national origin.⁶⁴

Whereas Title VI broadly prohibits discrimination on the basis of race, color and national origin by recipients of federal funds, including state and local governments as well as private entities, Executive Order 12,898 applies only to agencies of the federal government and is not enforceable in court.⁶⁵ The Executive Order mandates that each federal agency “make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs,

64. Memorandum on Environmental Justice 1 PUB. PAPERS 280 (Feb. 11, 1994), <https://www.gpo.gov/fdsys/pkg/WCPD-1994-02-14/pdf/WCPD-1994-02-14-Pg279.pdf>.

65. See EJ Executive Order, *supra* note 62, at § 6-609. The failure of a federal agency to consider whether its action is consistent with the mandate of Executive Order 12,898 to identify and address “as appropriate, disproportionately high and adverse human health or environmental effects of programs, policies and activities on minority populations and low-income populations.” *Id.* at § 1-101. However, this order has been ruled arbitrary and capricious under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A). See, e.g., *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, No. 16-1534, 2017 WL 2573994, at 23 (D.D.C. June 14, 2017) (the Corps “needed to offer more than a bare-bones conclusion”); *Communities Against Runway Expansion, Inc. v. F.A.A.*, 355 F.3d 678, 689 (D.C. Cir. 2004).

policies, and activities on minority populations and low-income populations”⁶⁶ While the EJ Executive Order required federal agencies to incorporate environmental justice principles into agency policies and practices, Title VI reaches beyond the federal government to all recipients of federal funds and as statute, applies irrespective of shifting winds in the White House.

The statutory language prohibits exclusion, denial of benefits, and discrimination on the basis of race, color or national origin:

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.⁶⁷

The text provides no definition of exclusion, denial or discrimination and, instead, delegates rulemaking authority to federal agencies to explicate terms and effectuate the law.⁶⁸ The Department of Justice (DOJ), which was subsequently charged under Executive Order 12,250 with coordinating Title VI compliance and enforcement activities,⁶⁹ first published implementing regulations in 1966, prohibiting actions with the purpose or effect of discriminating.⁷⁰ EPA

66. EJ Executive Order, *supra* note 62, at § 1-101.

67. Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d.

68. 42 U.S.C. § 2000d-1 (“Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity . . . is authorized and directed to effectuate the provisions of section 2000d of this title . . . by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute No such rule, regulation, or order shall become effective unless and until approved by the President.”).

69. *See* Exec. Order No. 12,250, 45 Fed. Reg. 72,995, at § 1-101 (Nov. 2, 1980); *see generally* CIVIL RIGHTS DIVISION U.S. DEP’T OF JUST., TITLE VI LEGAL MANUAL (2017), <https://www.justice.gov/crt/case-document/file/934826/download> (outlining the Department of Justice’s role) [hereinafter DOJ Legal Manual].

70. *See* 28 C.F.R. § 42.104(b)(2), 31 Fed. Reg. 10,265 (July 29, 1966) (recipients “may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination . . . or have the effect of defeating or substantially impairing accomplishment of the objectives of the program . . .”).

followed suit, promulgating regulations similarly prohibiting the use of “criteria or methods of administering its program which have *the effect* of subjecting individuals to discrimination . . .”⁷¹ or choosing “a site or location of a facility that has the purpose or *effect* of excluding individuals from, denying them the benefits of, or subjecting them to discrimination . . . or with *the purpose or effect* of defeating or substantially impairing the accomplishment of the objectives of this subpart.”⁷² There are, thus, a number of distinct cognizable allegations pursuant to the law and regulations, including claims of intentional discrimination;⁷³ actions, policies, or practices that have unjustified disparate impacts;⁷⁴ exclusion from participation;⁷⁵ the failure to ensure compliance by conducting a disparate impact analysis;⁷⁶ the failure to provide access to programs and activities to people who are limited English proficient (LEP) through translation and interpretation services;⁷⁷ and intimidation and retaliation.⁷⁸

Each federal agency that extends financial assistance is empowered to effectuate the statute and regulations by investigating compliance

71. 40 C.F.R. § 7.35(b) (emphasis added).

72. 40 C.F.R. § 7.35(c) (emphasis added).

73. *See* DOJ Legal Manual, *supra* note 69, at § VI (proving intentional discrimination).

74. *See id.* at § VII (proving disparate impact).

75. *See, e.g.*, 40 C.F.R. § 7.30 (“No person shall be excluded from participation in . . . any program or activity receiving EPA assistance on the basis of race, color [or] national origin . . .”).

76. A violation of Title VI and its regulations can be established when a recipient fails to consider the disparate impact of a facility’s operation on the basis of race, color or national origin as part of a decision to permit. *See, e.g.*, *S. Camden Citizens in Action v. N.J. Dep’t of Env’tl. Prot.*, 145 F. Supp. 2d 446, 481 (D.N.J. 2001), *modified*, 145 F. Supp. 2d 505 (D.N.J. 2001), *rev’d sub nom. on other grounds*, 274 F.3d 771 (3d Cir. 2001) (granting plaintiff’s request for declaratory judgment on this basis); *see also* Letter from Peter M. Rogoff, Fed. Transit Admin., to Steve Heminger, Metro. Transp. Comm’n, & Dorothy Dugger, S.F. Bay Area Rapid Transit Dist. (Jan. 15, 2010) (noting preliminary results of compliance review revealed failure to conduct equity analysis, putting agency in danger of losing federal funds).

77. *See* *Lau v. Nichols*, 414 U.S. 563, 568 (1974); Department of Justice Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 Fed. Reg. 41,455, 41,457 (June 18, 2002).

78. *See* DOJ Legal Manual, *supra* note 69, at § VIII (proving retaliation).

and, where the agency makes a finding of discrimination, terminating or refusing to grant or continue assistance, or through “any other means authorized by law.”⁷⁹ EPA regulations explicitly establish that EPA may affirmatively initiate compliance reviews, including the collection of data and information from recipients, even absent a complaint.⁸⁰ EPA may also conduct on-site inspections when it has “reason to believe” that a recipient may be in noncompliance.⁸¹ If the compliance review or investigation identifies a violation, EPA regulations set forth a number of options available to the agency to obtain compliance, including reaching a voluntary compliance agreement, terminating or refusing to award or to continue assistance, or referral to the DOJ.⁸² Although the number of recipients of EPA funding varies over time, its thousands of grants, loans, and contracts

79. *See* 42 U.S.C. § 2000d-1 (“[T]his section may be effected (1) by the termination of or refusal to grant or to continue assistance . . . to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement . . . or (2) by any other means authorized by law . . .”). The statute includes a number of procedural protections for recipients of federal funds, requiring that agencies not only make “express finding on the record, after opportunity for hearing,” but also offer recipients the possibility of voluntary compliance and notify the relevant House and Senate committees before denying or terminating funds. *Id.* *See also* 28 C.F.R. § 50.3 (“Where the heads of agencies having responsibilities under Title VI . . . conclude there is noncompliance . . . , several alternative courses of action are open. In each case, the objective should be to secure prompt and full compliance so that needed Federal assistance may commence or continue.”).

80. *See* 40 C.F.R. § 7.115(a). DOJ’s Title VI Legal Manual reaffirms for all agencies that in addition to the complaint process, “federal funding agencies are authorized to initiate affirmative compliance reviews as a mechanism for ensuring recipient compliance.” DOJ Legal Manual, *supra* note 69, at § VII(B). The DOJ Legal Manual further suggests that federal agencies “prioritize vigorous enforcement of their Title VI disparate impact provisions both through investigation of complaints and through compliance reviews.” *Id.*

81. 40 C.F.R. § 7.115(a).

82. *See* 40 C.F.R. § 7.130(a). *See* EPA, CASE RESOLUTION MANUAL §§ 3.12-15 (Jan. 2017) (outlining informal resolution process, before EPA has completed its investigation and made findings) [hereinafter CRM]; *see also id.* at §§ 4.9-10 (voluntary compliance agreements); *id.* at § 7.1 (initiation of administrative proceedings); *id.* at § 7.2 (referral to DOJ).

total in the billions of dollars and are a source of leverage.⁸³ EPA also offers opportunities for complainants and recipients to attempt resolution of allegations informally as well as through more formal alternative dispute resolution.⁸⁴ DOJ coordinating regulations direct EPA and other agencies to submit Title VI and other civil rights matters to DOJ for litigation if the agency determines that informal resolution and the termination of federal funds are not appropriate solutions.⁸⁵ Although EPA has never referred a Title VI case to DOJ for litigation, Title VI authorizes DOJ to file civil actions on behalf of EPA and other executive agencies to enforce the law. Serving as “the federal government’s litigator,” DOJ can seek injunctive relief, specific performance, or other remedies, including monetary damages in cases of intentional discrimination.⁸⁶

Historically, the threat of withholding federal funds created significant leverage in the struggle to address discriminatory policies and practices. After the creation of Medicare in 1966, for example, federal inspectors certifying hospitals for Title VI compliance were charged with ensuring that hospitals took down “white” and “colored” signs, overhauled the use of space, and reformed room assignment policies to dismantle segregation.⁸⁷ More than one thousand hospitals integrated their medical staffs, patient floors and waiting rooms in a matter of months, and, faced with the loss of a significant portion of promised funding, additional facilities subsequently also changed policies and practices.⁸⁸ Historically, also, litigation to enforce Title

83. In fiscal years 2015, 2016, and 2017, the total of EPA grants, loans and contracts exceeded five billion dollars. *See* USASPENDING, www.usaspending.gov (last visited Aug. 12, 2017).

84. *See* CRM, *supra* note 82, at § 3.5 (early complaint resolution); *see also id.* at § 3.11 (alternative dispute resolution).

85. *See* 28 C.F.R. § 42.411(a); DOJ Legal Manual, *supra* note 69, at § III(B) (judicial enforcement).

86. DOJ Legal Manual, *supra* note 69, at § IIIB (judicial enforcement). *See also* 28 C.F.R. § 50.3.

87. David Barton Smith, *Eliminating Disparities in Treatment and the Struggle to End Segregation*, 775 THE COMMONWEALTH FUND 1, 4-5 (2005), http://www.commonwealthfund.org/~media/files/publications/fund-report/2005/aug/eliminating-disparities-in-treatment-and-the-struggle-to-end-segregation/775_smith_ending_disparities_in_treatment-pdf.pdf; *see generally* DAVID BARTON SMITH, HEALTH CARE DIVIDED: RACE AND HEALING A NATION (1999).

88. *See* Smith, *Eliminating Disparities*, *supra* note 87, at 4-5.

VI was a core element of school desegregation efforts: DOJ brought litigation to challenge segregation against more than 500 school districts in the decade after the passage of Title VI.⁸⁹ DOJ's current docket continues to include scores of Title VI enforcement cases, particularly in the education context.⁹⁰

As a practical matter, affirmative compliance reviews initiated by a federal agency and investigations triggered by complaints most often lead to agreements between the administrative agency and the recipient of federal funds rather than litigation, with the threat of litigation in the background.⁹¹ The scope and breadth of civil rights enforcement activities at the federal level has been significant: in fiscal year 2016, for example, the U.S. Department of Education's OCR received 2,439 complaints alleging discrimination on the basis of race or national origin and launched 7 systemic compliance reviews.⁹² The issues raised by the complaints ran the gamut from "differential treatment/exclusion/denial of benefits" to harassment to retaliation to race discrimination in admissions or school discipline, at the elementary, secondary and post-secondary levels.⁹³

Enforcement actions by the U.S. Department of Transportation (DOT) during the Obama Administration offer a window into the potential for more effective federal agency involvement. Under the leadership of Secretary Anthony Foxx, DOT issued new guidance on compliance with Title VI that required grantees to submit a Title VI program to DOT. The guidance requires recipients of Federal Transit

89. Randolph D. Moss, *Participation and Department of Justice School Desegregation Consent Decrees*, 95 YALE L. J. 1811, 1811 n.1 (1986).

90. *See, e.g., Educational Opportunities Cases*, U.S. DEP'T OF JUST., <https://www.justice.gov/crt/educational-opportunities-cases> (last visited Aug. 12, 2017) (list of cases includes: Adams 12 Five Star School District (school district's obligation to ensure timely, adequate and appropriate educational services to English Language learners) and Adams & U.S. v. Matthews (monitoring compliance with desegregation order)).

91. *See DOJ Agreements and Resolutions*, U.S. DEP'T OF JUST., <https://www.justice.gov/crt/doj-agreements-and-resolutions> (last visited Aug. 12, 2017); *see also* SECURING EQUAL OPPORTUNITY, *supra* note 16, at 18-23 (in fiscal year 2016, the Department of Education OCR resolved 309 complaints through early complaint resolution).

92. SECURING EQUAL OPPORTUNITY, *supra* note 16, at 8 fig.3 (number of complaints received).

93. *Id.* at 17 fig.12 (number of Title VI issues raised in OCR complaints).

Administration funding to prepare and file an equity analysis regarding the location of any new facility, details on the racial composition of any advisory panels or boards, a plan detailing how it will ensure meaningful language access for people who are limited English proficient (LEP), and a public participation plan, which must include specifics on outreach to minority and LEP populations, among other things.⁹⁴ Moreover, in a series of cases accepted for investigation by DOT's civil rights compliance offices in its various program areas—such as the Federal Transit Administration and Federal Highway Administration—DOT sent strong signals that it was serious about ensuring nondiscrimination in programs and activities receiving DOT funds.⁹⁵ DOT's guidance and decisions had a direct impact on recipients of DOT funding that were involved in these cases and created incentives for others to follow suit.

94. See Circular 4702.1B, Fed. Transit Admin., Title VI Requirements and Guidelines for Federal Transit Administration Recipients (Oct. 1, 2012), https://www.transit.dot.gov/sites/fta.dot.gov/files/docs/FTA_Title_VI_FINAL.pdf.

95. See, e.g., Urban Habitat, *Transit Breakthrough in Restoring Civil Rights: Title VI Complaint by San Francisco Bay Area Coalition Has National Implications*, REIMAGINE (2010), www.reimaginepe.org/node/5189 [<http://perma.cc/T693-UM9K>]; Joseph D. Rich, *Major Environmental Justice Title VI Agreement Reached in Corpus Christi*, 25 *POVERTY & RACE* (2016) (DOT's process for resolving a case in Corpus Christi "provides a model for improved environmental justice enforcement"); Angie Schmitt, *Documentary to Explore Racial Discrimination in Transportation Planning*, *STREETSBLOG USA* (Oct. 29, 2014), <http://usa.streetsblog.org/2014/10/29/documentary-to-explore-racial-discrimination-in-transportation-planning/> [<http://perma.cc/AG8S-GLCC>] (interview emphasizing national significance of DOT decision in Title VI case). An article published at the end of Secretary Foxx's tenure attributed the Secretary's leadership on Title VI enforcement at least in part to his own background, suggesting that "growing up in his grandparents' house in Charlotte shaped his views on how transportation infrastructure can isolate communities rather than connect them." See Daniel C. Vock, *In Final Push, U.S. Transportation Secretary Calls on Leaders to Rethink Their Mission*, *GOVERNING THE STATES AND LOCALITIES* (Jan. 17, 2017), <http://www.governing.com/topics/transportation-infrastructure/gov-final-push-foxx-transportation-leaders-rethink-mission.html> [<http://perma.cc/M3T4-B4XN>]. "The secretary has said the neighborhood he grew up in had two interstate highways running through it, which essentially cut off the area from the surrounding community." *Id.* See also *Moving to Access: Is the Current Transport Model Broken?*, *BROOKINGS INST.* (Jan. 11, 2017), <https://www.brookings.edu/events/moving-to-access/> (keynote dialogue with Secretary Foxx).

The first such decision was made during the early days of the Obama Administration in response to a complaint filed by Public Advocates, a San Francisco non-profit, on behalf of three community-based organizations, Urban Habitat, Transform, and Genesis, against Bay Area Rapid Transit (BART). The complaint challenged BART's use of \$70 million in stimulus funds to pay for the Oakland Airport Connector, a rail link that when complete, would double costs for low-income riders, a disproportionate number of whom were people of color.⁹⁶ The complaint alleged that the project would have an unjustified discriminatory impact on the basis of race and national origin and, also, that BART had failed to conduct an equity analysis, in violation of Title VI and agency regulations.⁹⁷ FTA investigated the complaint and launched a related compliance review. On February 12, 2010, less than six months after receiving the complaint, FTA Administrator Peter Rogoff notified BART that FTA would not release funds to BART for the Oakland Airport Connector and invited BART, instead, to identify other projects that might be eligible for funding.⁹⁸

On June 26, 2013, DOT's Federal Highway Administration (FHWA) sent a letter of findings to the City of Beavercreek, a predominantly white suburb of Dayton, Ohio, which had denied an application by the Regional Transit Authority (RTA) for the creation of bus stops along a boulevard near the entrance to a suburban mall.⁹⁹ Just under two years before, the non-profit Advocates for Basic Legal

96. *See* Complaint, *Urban Habitat v. Bay Area Rapid Transit District* (Fed. Transit Admin. Sept. 1, 2009), http://www.publicadvocates.org/wp-content/uploads/fta_titlevi_complaint_09109final-1.pdf (the cost of a ride on light rail was projected to be \$6, compared to a \$3 ticket for the existing bus link).

97. *See id.* at 1-2.

98. *See* Letter from Peter Rogoff, to Steve Heminger, Metro. Transp. Comm'n & Dorothy Dugger, Bay Area Rapid Transit (Feb. 12, 2010), http://www.publicadvocates.org/wp-content/uploads/feb_12_bart_mtc_letter.pdf ("Given the fact that the initial Title VI complaint against BART was well founded, I am not in a position to award the [stimulus] funds to BART.").

99. *See* Letter from Warren Whitlock, Fed. Highway Admin., to Michael Cornell, City of Beavercreek & Stanley A. Hirtle, Advocates for Basic Legal Equality, Inc. (June 26, 2013), https://www.justice.gov/sites/default/files/crt/legacy/2014/07/07/DOT_fhwa_decision-lead_v_city_of_beavercreek_june_2013.pdf. According to 2010 Census data, the racial composition of Beavercreek was 88.5% White and 2.5% African American, as compared to the racial composition of Dayton, which was 51.7% White and 42.9% African American. *See id.* at 10 n.34.

Equality, Inc., (ABLE) filed a complaint on behalf of Leaders for Equality and Action in Dayton alleging that Beavercreek's decision had an unjustified disparate impact on the basis of race.¹⁰⁰ Without the planned stops, bus riders coming from Dayton for employment or other purposes, a disproportionate number of whom were African American, would generally have to walk 1.5 miles to the entrance of the mall, including approximately three-quarters of a mile along a six-lane road with no sidewalks.¹⁰¹ The complaint alleged that before voting to reject the bus stops, the City Council proposed nineteen conditions to the RTA, including a number of novel criteria not applied to other locations, including requirements that the RTA provide heated and air conditioned shelters, build thickened concrete pads for stops, limit the use of the stops to smaller sized shuttles rather than full-sized buses, install police phone call boxes, and set aside a \$150,000 deposit in case new traffic signals were needed.¹⁰² FHWA found that Beavercreek's decision to reject the application for bus stops violated Title VI and DOT regulations, and as a condition of continued federal funding, required that Beavercreek take concrete steps to come into compliance with federal law.¹⁰³ These included developing and implementing a new transit stop application process and, specifically, to rehear the RTA's application for bus stops.¹⁰⁴ FHWA's letter of finding also prohibited Beavercreek from imposing nine of the additional criteria, which were "not reasonably necessary to meeting a legitimate, important goal that is integral to the City's mission."¹⁰⁵

On December 17, 2015, FHWA announced an agreement with the Texas Department of Transportation (DOT) to mitigate the discriminatory effects of a project to rebuild Harbor Bridge, a six-lane arch bridge crossing the Corpus Christi ship channel, by cutting

100. See Letter from Ellis Jacobs, Advocates for Basic Legal Equality, Inc., to Title VI Program Coordinator, Fed. Highway Admin. & Title VI Program Coordinator, U.S. Dep't of Transp. (Aug. 10, 2011), <http://equitycaucus.org/sites/default/files/Advocates%20for%20Basic%20Legal%20Equality%20Inc%20Title%20VI%20Complaint%20Beavercreek%20OH.pdf> (complaint filed under Title VI of the Civil Rights Act of 1964).

101. See Letter from Warren Whitlock to Michael Cornell & Stanley A. Hirtle, *supra* note 99, at 1-2.

102. See *id.* at 3-4, 8-9.

103. See *id.* at 16.

104. See *id.*

105. *Id.*

through Hillcrest, a historic African American neighborhood.¹⁰⁶ Earlier that same year, on March 5, 2015, Texas RioGrande Legal Aid filed a complaint under Title VI on behalf of Hillcrest residents alleging that the state DOT had prioritized the economic benefits of the bridge to the Corpus Christi area as a whole, which was approximately 4.3% African American, at the expense of Hillcrest and Washington Coles, two neighborhoods most affected by the project, which were approximately 38% and 31% African American.¹⁰⁷ The complaint alleged that Texas DOT had even stated that the project would “serve as a barrier”¹⁰⁸ between the industrial area and residential communities, which “completely ignored (or intentionally excluded) the residents of the Hillcrest neighborhood, who would be left on the ‘industry side’ of this new ‘barrier.’”¹⁰⁹ In the first half of the 20th century, Hillcrest was explicitly designated for black residents and over time, developed a rich culture and history.¹¹⁰ The proposed Bridge project would not only impact this historic community but was layered on earlier environmental assaults from the nearby port and industry, “including explosions, releases of toxic chemicals, fires, and violations of environmental laws so severe that companies have been criminally prosecuted.”¹¹¹ Complainants believed that the Bridge project would have discriminatory impacts—including increases in air pollution, noise, and isolation, as well as reduction in property values—and that the Texas DOT violated its duty to administer programs in a nondiscriminatory manner.¹¹² By December, the Texas

106. See U.S. Dep’t of Just., *The Federal Highway Administration and Texas Department of Transportation Agree to Mitigate the Discriminatory Effects of Rebuilding the Harbor Bridge in Corpus Christi*, DEP’T OF TRANSP. UPDATES (Spring, 2016), <https://www.justice.gov/crt/fcs/Transportation-Achives#2>; see FED. HIGHWAY ADMIN., VOLUNTARY RESOLUTION AGREEMENT (2017), https://www.fhwa.dot.gov/civilrights/programs/docs/VoluntaryResolution_Agreement.pdf.

107. See Letter from Erin Gaines, Texas RioGrande Legal Aid, to Title VI Program Coordinator, Fed. Highway Admin. (Mar. 5, 2015), <https://savehillcrestfromharborbridge.files.wordpress.com/2015/03/title-vi-complaint-final-w-signatures.pdf> (Title VI complaint).

108. *Id.* at 7.

109. *Id.* at 7.

110. See *id.* at 3-4.

111. *Id.* at 4.

112. See *id.* at 1, 8-14.

DOT agreed to a range of measures to mitigate the effects of the project, including a relocation program for homeowners and renters and mitigation of construction impacts.¹¹³ Perhaps most significantly, in order to resolve the complaint, FHWA met not only with the named recipient, the Texas DOT, but also brought complainants into the negotiations; as an announcement on DOJ's website stated, "[t]his result illustrates the impact of working collaboratively with federal agencies, legal services, advocates, and communities."¹¹⁴

By contrast, EPA has been loath to exercise its authority over recipients of EPA funding. Although EPA regulations require that recipients provide data needed to ensure compliance,¹¹⁵ publish clear notice of nondiscrimination,¹¹⁶ establish grievance procedures to ensure fair resolution of complaints,¹¹⁷ and protect against intimidation and retaliation,¹¹⁸ EPA has yet to create mechanisms to ensure compliance and has failed to require that grantees such as MDEQ develop and submit public participation plans, language access policies, equity analyses, or other programmatic information demonstrating compliance with Title VI.¹¹⁹ In 2016, the Chair of the

113. See U.S. Dep't of Just., *supra* note 106.

114. *Id.* FHWA's inclusive approach is consistent with comments made by Secretary Foxx discussing the need for transportation planners to improve community outreach. In January, 2017, Foxx stated:

Many communities don't feel empowered to engage The community where I'm from, a largely African-American community from the northwest side of the city of Charlotte, every time the transportation department came to them, it was always something bad. So when [transportation planners] come today, folks are thinking, 'What are you going to do to me now?'

Vock, *supra* note 95.

115. 40 C.F.R. § 7.80, 7.85 (2010).

116. 40 C.F.R. § 7.95 (2010).

117. 40 C.F.R. § 7.90 (2010).

118. 40 C.F.R. § 7.100 (2010).

119. EPA finalized language access and public participation guidance documents in 2004 and 2006 but has no systemic enforcement mechanism to ensure compliance. See *Guidance to Environmental Protection Agency Financial Assistance Recipients Regarding Title VI Prohibitions Against National Origin Discrimination Affecting Limited English Proficient Persons*, 69 Fed. Reg. 35,602-35,613 (June 25, 2004); see also *Title VI Public Involvement Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs*, 71 Fed. Reg. 14,207-14,217 (Mar. 21, 2006).

U.S. Commission on Civil Rights summarized EPA's record on civil rights:

EPA's Office of Civil Rights has never made a formal finding of discrimination and has never denied or withdrawn financial assistance from a recipient in its entire history, and has no mandate to demand accountability within the EPA.¹²⁰

Over time, the U.S. Departments of Education, Housing, Health & Human Services, and Transportation have exercised authority and required recipients of federal funds to change policies and practices. Like other agencies, EPA has the authority to require that recipients come into compliance with Title VI and agency regulations, including both substantive and procedural requirements. Query whether a thorough review of MDEQ's compliance with Title VI in the years before the Flint Water Crisis, backed by meaningful threat of enforcement, might have provided impetus for reform.

III. *SANDOVAL* AND INCREASED RELIANCE ON AGENCY ENFORCEMENT

Community residents seeking to address discriminatory practices cannot usually choose which federal agency they would like to investigate their civil rights complaint.¹²¹ Complainants must file with the federal agency that disburses funds to the state or local department or private entity alleged to have violated the law.¹²² Title VI can be

120. Letter of Transmittal from Martin R. Castro, to Barack Obama, *supra* note 24, at 1.

121. If an entity receives funding from more than one federal agency, complainants can file with all relevant funders, and DOJ's Federal Coordination & Compliance Section (FCS) can play a coordinating role. *See* DOJ Legal Manual, *supra* note 69, at § III (A)(4) ("When a complainant files a complaint either with multiple funding agencies that fund a particular recipient or a complaint that implicates multiple agencies, FCS sometimes coordinates the investigation. FCS's role may involve bringing together representatives from the various agencies to ensure that they approach and conduct their investigations in a consistent manner.").

122. State attorneys general may also accept and prosecute complaints alleging violations of Title VI and agency regulations pursuant to statutory authority under state law or common law *parens patriae* powers. *See* *New York by Schneiderman v. Utica City Sch. Dist.*, 177 F. Supp. 3d 739, 747-48 (N.D.N.Y. 2016) (New York Executive Law § 63 and *parens patriae* powers confer authority on the attorney

seen as an accountability statute, and each federal agency has responsibility for ensuring that recipients and sub-recipients of its funds comply with the law. Thus, residents of Corpus Christi raising claims against the Texas DOT, could only file their complaint with one or more federal agencies funding the Texas DOT, and community members challenging discriminatory practices at state and local environmental departments must file their claims with the federal agencies funding their activities, which is often the EPA.¹²³ Outside of the role played by DOJ as litigator on behalf of the federal government with authority to prosecute Title VI cases in court, each agency has jurisdiction over the recipients of its funds, and the remedies afforded by regulation if voluntary compliance is not reached include the denial, annulment, termination or suspension of funding to the particular agency's recipients.¹²⁴

Historically, federal courts have served as a primary mechanism for redress of racial discrimination in the United States.¹²⁵ Before *Alexander v. Sandoval*, federal courts allowed individuals to sue for violations of Title VI and its regulations by implying a private right of action to enforce the law, whether the claim was for intentional

general to prosecute legal actions pursuant to Title VI and other anti-discrimination laws). *See, e.g.*, Resolution Agreement between the Office of the Attorney General of the State of New York and St. Elizabeth Medical Center (Sept. 12, 2003), http://www.nyipi.org/images/FE/chain234siteType8/site203/client/Health%20-%2009.12.04_Agreement%20St.%20Elizabeth's%20Hospital.pdf (settlement of complaint filed with the attorney general by patients who were LEP alleging failure to provide interpretation and translation services in violation of Title VI and agency regulations).

123. Information on whether a public or private entity receives federal funding can be found on USASpending.gov, publicly accessible and searchable website that provides information on federal contracts, grants, loans and other forms of federal financial assistance. *See* USASPENDING, <https://www.usaspending.gov/Pages/Default.aspx> (last visited Sept. 22, 2017).

124. *See, e.g.*, 40 C.F.R. § 7.130(a) (2010) ("EPA may terminate or refuse to award or to continue assistance.").

125. *See, e.g.*, *Shelley v. Kraemer*, 334 U.S. 1, 20 (1948) (judicial enforcement of private racial covenants violates the Equal Protection Clause of the 14th Amendment); *Brown v. Board of Education*, 347 U.S. 483, 493 (1954) (finding segregation in the public educational system violates the Equal Protection Clause); *Lau v. Nichols*, 414 U.S. 563, 566 (1974) (failing to provide language instruction to public schoolchildren who are LEP violates Title VI).

discrimination or actions with unjustified racially disparate effects.¹²⁶ In *Sandoval*, the Court limited the enforceability of Title VI by holding that only acts of intentional discrimination could be the basis of a private suit, thus increasing the importance of agency compliance and enforcement activity.¹²⁷ The impact of *Sandoval* was particularly acute in the environmental context, both because challenges to policies, practices and decisions affecting the siting of environmental hazards frequently raise disparate impact claims and because EPA's OCR was ill-equipped to fill the need for enforcement activities.

The facts of *Sandoval* are well known. Between the 1970s and 1991, Alabama administered the written portion of its driver's license exam in multiple foreign languages.¹²⁸ In 1990, Alabama voters approved an English Only amendment to the state Constitution establishing English as the official state language and authorizing state officials to take steps to ensure that English served as the common state language.¹²⁹ Pursuant to the amendment, the Department of Public Safety adopted a requirement that applicants for a driver's license take the written exam only in English, though the Department undercut the argument that the policy was justified by safety concerns by continuing to allow non-English speaking drivers from other states and countries to obtain an Alabama license without taking the written exam.¹³⁰ Martha Sandoval, the named plaintiff, was not allowed to take any part of her driving test in Spanish. In *Lau v. Nichols*, the Supreme Court interpreted Title VI to require that programs or activities receiving federal funds ensure access to services to persons with limited English proficiency regardless of their ability to speak English.¹³¹ *Sandoval*

126. See *Alexander v. Sandoval*, 532 U.S. 275, 294-96 (2001) (J. Stevens, dissenting) (discussing sharp departure from thirty years of precedent established under Title VI of the Civil Rights Act of 1964, which had allowed a private right of action under Title VI under a disparate impact theory); see also *id.* at 295 n.1; *Lau v. Nichols*, 414 U.S. 563, 566-69 (1974) (allowing private right of action to enforce rights guaranteed by Title VI under a disparate impact theory); but see *Guardians Ass'n v. Civil Service Commission*, 463 U.S. 582 (1983) (representing pre-*Sandoval* decision on private right of action to enforce disparate impact claim).

127. See *Sandoval*, 532 U.S. at 1524 (Stevens, J., dissenting).

128. See *Sandoval v. Hagan*, 197 F.3d 484, 487 (11th Cir. 1999), *rev'd sub nom.* *Alexander v. Sandoval*, 532 U.S. 275 (2001).

129. See *id.* at 487-88.

130. See *id.* at 488.

131. See *Lau v. Nichols*, 414 U.S. 563, 568-69 (1974).

thus sued Alabama under the precedent established by *Lau*, arguing that the requirement that the written exam be taken in English had a disparate impact on the basis of national origin.

In a 5-4 decision written by Justice Scalia, the Supreme Court held the statutory language of Title VI only prohibits acts of *intentional* discrimination¹³² and that Congress had afforded no private right of action to enforce regulations that prohibited actions with an unjustified disparate impact.¹³³ The Court left for another day the validity of regulations promulgated under Title VI that prohibit a broader swath of activity than intentional discrimination, creating an uncertainty that was alleviated at least temporarily by a favorable decision in *Texas Dep't of Housing and Community Affairs v. Inclusive Communities Project*, a challenge to parallel disparate impact regulations in the Fair Housing Act context.¹³⁴

Communities initially had a short-lived hope that they might still be able to bring disparate impact claims to court against state actors under 42 U.S.C. § 1983, which affords a civil action for deprivation of “any rights, privileges, or immunities secured by the Constitution and laws” under color of law.¹³⁵ In 2002, however, in *Gonzaga University v. Doe*, the Supreme Court narrowed the application of Section 1983, rejecting the argument “that our cases permit anything short of an unambiguously conferred right to support a cause of action brought under § 1983.”¹³⁶

The one-two punch of *Sandoval* and *Gonzaga* played out in *South Camden Citizens in Action v. New Jersey Department of*

132. *See Sandoval*, 532 U.S. at 280 (citing *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978)). Section 601 of Title VI only prohibits intentional discrimination. *See id.*

133. *See id.* at 293 (holding no private right of action exists to enforce regulations promulgated under the statute).

134. In a 5-4 decision authored by Justice Kennedy, the Court ruled that disparate impact claims were cognizable under the Fair Housing Act, which prohibits discrimination “on the basis of” race, color and other classifications. *Tex. Dep't of Housing and Comty. Affairs v. Inclusive Communities Project*, 135 S. Ct. 2507, 2525 (2015). Title VI prohibits discrimination “on the ground of” race, color or national origin. 42 U.S.C. § 2000d (2000).

135. 42 U.S.C. § 1983 (1996).

136. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002). *See Bradford C. Mank, Using § 1983 to Enforce Title VI's Section 602 Regulations*, 49 KAN. L. REV. 321, 333 (2001).

Environmental Protection,¹³⁷ a case brought prior to *Sandoval* by community residents challenging a decision by the New Jersey Department of Environmental Protection's (NJDEP) to grant a permit to the St. Lawrence Cement Company to operate a cement plant in South Camden, a predominantly African American and low-income neighborhood in Camden, New Jersey.¹³⁸ South Camden was already home to a cluster of industrial facilities, including two Superfund sites and several other locations suspected of releasing hazardous substances.¹³⁹ Facilities operating in the neighborhood included chemical companies, waste disposal sites, food processing companies, automotive shops, and a petroleum coke transfer station.¹⁴⁰ NJDEP had also granted permits for operation of a regional sewage treatment plant, a trash-to-steam incinerator and a co-generation power plant in the neighborhood.¹⁴¹ Residents in South Camden experienced relatively worse health outcomes.¹⁴² NJDEP nonetheless granted an additional permit in this already overburdened community to allow the operation of a cement plant, which would emit particulate matter, mercury, lead, manganese, nitrogen oxides, carbon monoxide, sulfur oxides and volatile organic compounds.¹⁴³ In 2001, the New Jersey District Court granted a motion for preliminary injunction, finding that the Plaintiffs had a reasonable probability of success on the merits on two claims: first, that NJDEP violated its obligation to consider whether the permit would have a racially disparate adverse impact, and second, that the operation of the facility, St. Lawrence Cement, would in fact have a racially disparate adverse impact.¹⁴⁴

137. *S. Camden Citizens in Action v. N.J. Dep't of Env'tl. Prot.*, 274 F.3d 771 (3d Cir. 2001).

138. According to the court record, the population was 63% African-American, 28.3% Hispanic, and 9% white residents. *See S. Camden Citizens in Action*, 274 F.3d at 774 n.1.

139. *See S. Camden Citizens*, 274 F.3d at 775.

140. *See id.*

141. *See id.*

142. *See S. Camden Citizens in Action v. N.J. Dep't of Env'tl. Prot.*, 145 F.Supp.2d 446, 460 (D.N.J. 2001).

143. *See id.* at 450.

144. *See id.* at 474-81 (obligation to conduct analysis of Title VI compliance in permitting); *see also id.* at 481-97 (disparate impact claim).

As the Court of Appeals later noted, the injunction “had a short shelf life.”¹⁴⁵ Within days, the Supreme Court issued the *Sandoval* opinion, holding that Title VI afforded no private right of action to enforce regulatory prohibitions, thus “eliminat[ing] the basis for the court’s injunction”¹⁴⁶ St. Lawrence Cement moved to dissolve the injunction but the district court ruled that plaintiffs could proceed pursuant to Section 1983, which provided an alternative basis for relief.¹⁴⁷ St. Lawrence Cement then appealed the district court’s injunction back to the Third Circuit Court of Appeals, which, perhaps anticipating *Gonzaga*, reversed the district court.¹⁴⁸ The Court of Appeals held that Section 1983 afforded no second bite at the apple: since Title VI proscribed only intentional discrimination, administrative regulations could not create an interest enforceable through a 1983 action.¹⁴⁹ Six months later, the Supreme Court issued its opinion in *Gonzaga* explicitly rejecting a distinction between whether a statute affords an implied right of action and whether plaintiffs have a right enforceable under Section 1983.¹⁵⁰ Seeking to clarify that Section 1983 is a remedial rather than a rights creating statute, the opinion emphasized, “[t]o the contrary, our implied right of action cases should guide the determination of whether a statute confers rights enforceable under § 1983.”¹⁵¹

The Court’s decisions in *Sandoval* and *Gonzaga* rested on statutory interpretation, and Congress can restore the right of action. To date, however, Congress has failed to pass any of the bills introduced since *Sandoval* to reestablish the ability of community members to go into court to enforce regulatory standards.¹⁵² In the absence of more robust Title VI compliance and enforcement activities at EPA, environmental

145. *S. Camden Citizens in Action v. N.J. Dep’t of Env’tl. Prot.*, 274 F.3d 771, 776 (3d Cir. 2001).

146. *Id.*

147. *See S. Camden Citizens in Action v. N.J. Dep’t of Env’tl. Prot.*, 145 F.Supp.2d 505, 509 (D.N.J. 2001).

148. *See S. Camden Citizens in Action v. N.J. Dep’t of Env’tl. Prot.*, 274 F.3d at 774.

149. *See id.* at 788-90.

150. *See Gonzaga Univ. v. Doe*, 536 U.S. 273, 276 (2002).

151. *Id.* at 283.

152. *See, e.g.*, Equity and Inclusion Enforcement Act, H.R. 2486, 115th Cong. (2017); Servicemembers’ Protection Act of 2012, S. 3322, 112th Cong. (2012); Civil Rights Act of 2008, S. 2554, 110th Cong. (2008).

decision-makers have little reason to believe that they will be held accountable for discriminatory actions that violate EPA regulations.¹⁵³ As has been documented time and again,¹⁵⁴ EPA has largely dropped the ball on Title VI compliance and enforcement, not once withholding federal funds or referring a case to DOJ for enforcement, failing to set clear programmatic standards for recipients,¹⁵⁵ falling behind in case investigations, only once exercising its affirmative authority to initiate compliance reviews, and until recently, falling short on basics such as sufficient training and standard case management protocols to govern

153. See *Environmental Justice: Draft Revised Civil Rights Guidance Clarifies Definitions, Addresses State Issues*, 31 Env't Rep. 1331 (2000) (quoting Russell Hardin, then Director of Michigan's Department of Environmental Quality, saying in 2000 that EPA's Draft Title VI guidance was a "tiger without teeth" and that "he was not going to pay particular attention to it.").

154. See, e.g., EJ REPORT, *supra* note 23, at 2; Qiu & Buford, *supra* note 9 (cataloguing disposition of complaints over a 17-year period); Kristen Lombardi et al., *Environmental Racism Exists and the EPA is One Reason Why*, CTR. FOR PUB. INTEGRITY (Aug. 3, 2015), <https://www.publicintegrity.org/2015/08/03/17668/environmental-racism-persists-and-epa-one-reason-why> [<http://perma.cc/D893-KWKL>] ("Time and again . . . , communities of color living in the shadows of sewage plants, incinerators, steel mills, landfills and other industrial facilities across the country—from Baton Rouge to Syracuse, Phoenix to Chapel Hill—have found their claims denied by the EPA's civil-rights office"); DELOITTE CONSULTING LLP, EVALUATION OF THE EPA OFFICE OF CIVIL RIGHTS 2 (2011), https://archive.epa.gov/epahome/ocr-statement/web/pdf/epa-ocr_20110321_finalreport.pdf (describing OCR's "record of poor performance"); *Rosemere Neighborhood Ass'n v. EPA*, 581 F.3d 1169, 1175 (9th Cir. 2009) (noting plaintiffs' experience of delay "before the EPA appears, sadly and unfortunately, typical of those who appeal to OCR to remedy civil rights violations"); NOT IN MY BACKYARD, *supra* note 21, at 57-59.

155. The history of EPA's publication of an Interim Guidance and subsequent Draft Revised Guidance Documents for implementing Title VI is well documented. See NOT IN MY BACKYARD, *supra* note 21, at 32-55. Afterward, the Commission called on EPA to "avoid any further unnecessary delays and issue a final Title VI guidance on processing complaints and methods to improve permitting programs . . ." *Id.* at 77. In January 2017, before leaving office, the Obama Administration published an initial chapter of a document it called a "Toolkit," intended to clarify existing law and promote compliance. See EPA, U.S. EPA'S EXTERNAL CIVIL RIGHTS COMPLIANCE OFFICE COMPLIANCE TOOLKIT (2017), https://www.epa.gov/sites/production/files/2017-01/documents/toolkit-chapter1-transmittal_letter-faqs.pdf. EPA has only released Chapter 1 of the Toolkit, which covers only a small portion of the territory needed to ensure clarity, transparency, and uniformity in application of relevant legal standards. Compare *id.* with Circular 4702.1B, *supra* note 94.

investigations.¹⁵⁶ Moreover, given the relatively small number of cases filed with EPA, the backlog of complaints it had allowed to accumulate is particularly inexcusable, even taking into account questions of complexity. By comparison, in one year, the U.S. Department of Education's receives more than 2,000 complaints, fully resolving many and, also, initiating multiple affirmative compliance reviews.¹⁵⁷ By contrast, EPA received approximately 265 complaints over the course of eighteen years, between 1996 and 2013, resolving very few, and has largely not used its affirmative authority.¹⁵⁸

IV. LOST OPPORTUNITIES IN MICHIGAN

Counterfactuals are speculative and there is no way of knowing what might have happened had EPA had an effective civil rights enforcement program. Nonetheless, Michigan DEQ's callous disregard for the environmental and health concerns of communities of color in the state¹⁵⁹ – and, particularly, the people of Flint, and its failure to protect the health of Flint residents have deep roots in EPA's failure to give proper attention to red flags and lackluster civil rights

156. Notably, in January 2017, EPA issued a manual on resolving discrimination cases. *See* CRM, *supra* note 82.

157. *See* SECURING EQUAL OPPORTUNITY, *supra* note 16, at 8 fig.3 (complaints received); *see also id.* at 17 fig.12 (number of Title VI issues raised in OCR complaints).

158. Qiu & Buford, *supra* note 9. In 2014, in an effort that was at least in part intended to jumpstart the exercise of EPA's affirmative authority to collect information from recipients and initiate compliance reviews, EPA issued an Advanced Notice of Proposed Rulemaking to amend EPA's Title VI regulations. *See* Nondiscrimination in Programs or Activities Receiving Federal Assistance from the Environmental Protection Agency, 80 Fed. Reg. 77,284, 77,284 (Dec. 14, 2015). EPA acknowledged that existing regulations provided the agency with authority to conduct affirmative compliance activities but sought to clarify obligations before exercising its authority. *See id.* at 77,286. Rather than proposing a comprehensive approach to data collection and compliance reviews, EPA requested comments on a "phased-approach to conducting compliance reviews." *Id.* On January 9, 2017, EPA withdrew the proposed amendments in response to "several adverse comments," especially regarding another proposal that would have removed deadlines for processing administrative complaints and compliance reviews. Nondiscrimination in Programs or Activities Receiving Federal Assistance; Withdrawal, 82 Fed. Reg. 2294, 2295 (Jan. 9, 2017).

159. *See* FLINT WATER ADVISORY TASK FORCE, *supra* note 1, at 2.

enforcement program. By 2014, the year Michigan state officials authorized the switch to water from the Flint River, EPA had received eleven complaints under Title VI from community members in Michigan, including nine against MDEQ.¹⁶⁰ As the Michigan Commission on Civil Rights noted, “[n]either environmental justice, nor the procedural justice requirement to provide the public with meaningful participation in decisions that affect their health, are new concerns in Michigan.”¹⁶¹

Over time, EPA received multiple complaints against MDEQ alleging procedural irregularities – and, particularly, that MDEQ discriminated against and devalued the voices of people of color, as well as claims that permits approved by MDEQ were discriminatory. Had EPA had a more active civil rights compliance and enforcement program, it could have used its affirmative authority to investigate whether MDEQ’s policies, practices, and actions comply with Title VI even absent receipt of a specific complaint meeting jurisdictional standards for accepting allegations and initiating an investigation.¹⁶² The multiple complaints filed raising questions about civil rights compliance in the state and, particularly, by MDEQ, should have served as red flags, providing EPA with ample basis for initiating compliance reviews.

As far back as the early 1990s, a set of complaints filed by St. Francis Prayer Center and the Sugar Law Center for Economic and

160. Complaints filed between 1996 and 2014 can be found in Qiu & Buford, *supra* note 9 (select “Michigan” to generate list of Michigan-based cases). *See also* Letter from Lilian Dorka, EPA, to Heidi Grether, MDEQ (Jan. 19, 2017), <https://www.epa.gov/sites/production/files/2017-01/documents/final-genesee-complaint-letter-to-director-grether-1-19-2017.pdf>, for information on the complaint filed in 1992 against MDEQ regarding its decision to approve a permit for the Genesee Power Station. However, complaints filed before 1995 named the Michigan Department of Natural Resources (MDNR), MDEQ’s predecessor agency. *See, e.g.*, Letter from Kary L. Moss, Sugar Law Center for Economic and Social Justice, to Carol Browner, EPA (Dec. 5, 1994) (alleging “race is the dominant factor in MDNR siting decisions”) (on file with author).

161. MICH. CIV. RIGHTS COMM’N, *supra* note 1, at 101.

162. 40 C.F.R. § 7.115 (a) (2010) (“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.”) (emphasis added).

Social Rights (Sugar Law Center) provided EPA with notice of community concerns about DEQ's disregard for input from Flint's African American population and compliance with Title VI.¹⁶³ In 1992, the St. Francis Prayer Center alleged that MDEQ's decision to grant a permit for an incinerator in Flint, which would burn demolition wood containing lead-based paint and other contaminants, was racially discriminatory both in intent and effect.¹⁶⁴ The St. Francis Prayer Center complaint alleged, among other things, that MDEQ discriminated in its treatment of potential speakers at a hearing about the Genesee Power Station, accommodating the schedule of a white speaker, for example, while not according similar courtesy in response to a request from a potential African American speaker.¹⁶⁵ The complaint also alleged that MDEQ located a hearing on the permit in

163. See Genesee Power Station Complaints, including: Letter from Fr. Phil Schmitter & Sr. Joanne Chiaverini to Valdas Adamkus, *supra* note 7; Letter from Dan J. Rondeau, EPA, to Kary L. Moss, Sugar Law Center for Economic and Social Justice (Sept. 16, 1994) (rejecting Sugar Law Center complaint as untimely). Author and co-author discovered through litigation and conversations with EPA and DOJ personnel that EPA assigned case number 1R-94-R5 to both complaints. See Complaint, *CARE v. EPA*, 2015 WL 4510599 (N.D. Cal 2015); see also Carlton Waterhouse, *Abandon All Hope Ye That Enter?: Title VI, Equal Protection, and the Divine Comedy of Environmental Justice*, 20 *FORDHAM ENVTL. L. REV.* 513 (2009) (recounting experience of complainants in the Genesee Power Station case).

164. Letter from Fr. Phil Schmitter & Sr. Joanne Chiaverini, St. Francis Prayer Center, to William Rosenberg, EPA (Dec. 15, 1992) (on file with author).

165. Letter from Dan J. Rondeau to Kary L. Moss, *supra* note 163, at 2-3 (reflecting EPA's knowledge of the allegations as of 1994); Letter from Fr. Phil Schmitter & Sr. Joanne Chiaverini, St. Francis Prayer Center, to Herb Tate, EPA (Dec. 15, 1992) (on file with author). The Michigan Air Pollution Control Commission conducted the hearing process, enforcing delegated functions now carried out by MDEQ. See Letter from Lilian Dorka, to Heidi Grether, *supra* note 160, at 2. Although the complaints filed with EPA against MDEQ reviewed in this section alleged discrimination against African Americans, EPA's failure to enforce Title VI has significance for the racially and ethnically diverse population of Michigan more generally. Notably, the signatories to a June 29, 2016 letter sent to OCR and the U.S. Department of Health and Human Services OCR requesting a compliance review included, among others, the Genesee County Hispanic Latino Collaborative and the Yemen American Benevolent Association. See Letter from Marianne Engelman Lado & Christine Ernst, to Jocelyn Samuels et al., *supra* note 36 (requesting review of MDEQ and the Michigan Department of Health and Human Services' compliance with Title VI of the Civil Rights Act of 1964 and Section 504 of the Rehabilitation Act of 1973).

Lansing, 65 miles away from the proposed facility, “making it difficult for people of color and people of low-economic status to be heard.”¹⁶⁶ Two years later, the Sugar Law Center reiterated concerns about the adverse impacts of the facility and also asserted that MDEQ “engaged in a pattern and practice of race discrimination by siting incinerators almost exclusively in predominantly minority communities,”¹⁶⁷ alleging that “race is the dominant factor in [MDEQ] siting decisions.”¹⁶⁸

EPA rejected the complaint filed by the Sugar Law Center¹⁶⁹ but accepted the St. Francis Prayer Center complaint for investigation in 1995,¹⁷⁰ nonetheless the St. Francis Prayer Center’s complaint languished at EPA for decades. Finally, in 2017, in the wake of publicity around the Flint water crisis and under pressure from litigation alleging that EPA unreasonably delayed and unlawfully withheld agency action in responding to Title VI complaints,¹⁷¹ issued its second finding of discrimination in the history of the agency.¹⁷² Specifically, EPA found that MDEQ discriminated by treating participants in its public participation process differently on the basis of race: as alleged in 1992, EPA found that the hearing process, “deviated from what was described as its standard operating procedures for handling requests to speak in advance of the public comment period resulting in African Americans’ requests being denied while requests by Whites to speak in advance were granted.”¹⁷³ Michigan’s Air Pollution Control Commission, which was delegated authority to run the public hearings and issue the initial operating permit,¹⁷⁴ treated members of the predominantly African American community concerned about the facility “less favorably than people at

166. Letter from Dan J. Rondeau, EPA, to Kary L. Moss, Sugar Law Center for Economic and Social Justice (Jan. 31, 1995) (on file with author).

167. Letter from Kary L. Moss, Sugar Law Center for Economic and Social Justice, to Valdas Adamkus, EPA (July 6, 1994) (on file with author).

168. Letter from Kary L. Moss to Carol Browner, *supra* note 160, at 2.

169. Letter from Dan J. Rondeau to Kary L. Moss, *supra* note 163.

170. Letter from Dan J. Rondeau to Kary L. Moss, *supra* note 166, at 3.

171. *CARE v. EPA*, 2015 WL 4510599 (N.D. Cal 2015).

172. *See* Letter from Lilian Dorka, to Heidi Grether, *supra* note 160, at 3 (finding sufficient evidence of discriminatory treatment but insufficient evidence that the permit subjected African Americans to disproportionate adverse health impacts).

173. *Id.* at 9.

174. *See id.* at 7.

other permit hearings for facilities [in] non-African American communities.”¹⁷⁵ Moreover, when the Commission finally held a hearing near the predominantly African American neighborhood near the Power Station site, MDEQ requested the presence of uniformed and armed security officers, a precaution not sought for the hearing in Lansing.¹⁷⁶ As EPA stated in its 2017 Closure Letter, “[a]t the time, the use of armed and uniformed officers was uncommon and appears to have only happened at the hearing held in the African American community.”¹⁷⁷ EPA’s Closure Letter continued:

In light of the rarity at the time of the use of the armed and uniformed officers; no apparent or articulated need for their presence; and the commonly known historical use of threat of police force to intimidate African Americans who attempt to exercise their civil rights, this use of the officers is yet another example of how the African American community was treated less favorably than White communities who sought to exercise their rights at permit hearings.¹⁷⁸

Even at this point, in 2017, after making a finding of discriminatory treatment and expressing “significant concerns about MDEQ’s current public participation program and whether MDEQ can ensure that these instances of discriminatory treatment would not occur today,”¹⁷⁹ EPA failed to hold MDEQ accountable, issuing only non-binding recommendations and closing the case rather than initiating a process for withholding federal funds or referring the case to the Department of Justice.¹⁸⁰

Each of the complaints filed with EPA reveals its own story, but each also represents a neglected opportunity for EPA to heed warnings about MDEQ’s disregard for communities of color seeking to have their concerns heard and its failure to protect the health of Michigan residents without regard to race and ethnicity. The complaint filed in

175. *Id.* at 11.

176. *See id.* at 14.

177. *Id.* at 15.

178. *Id.* at 17.

179. *Id.*

180. *See id.* at 30-35 (deferring further investigation and action to another open Title VI case filed against MDEQ in response to the Flint water crisis).

June 1998 by the St. Francis Prayer Center to challenge MDEQ's approval of yet another permit in Flint, this one awarded to the Select Steel Corporation for a steel recycling plant,¹⁸¹ triggered perhaps the most notorious response by EPA's OCR.¹⁸² The *Select Steel* complaint again alleged that MDEQ conducted the permitting process in a discriminatory manner and that the proposed facility—which would be located less than 2 miles from the Genesee Power Plant—would have a discriminatory impact on African Americans resulting from potential emissions of volatile organic compounds (VOCs), lead, manganese, mercury, and dioxin.¹⁸³ OCR dismissed the complaint after an expedited investigation evaluated whether the potential emissions of the various toxic substances violated existing environmental standards, ultimately finding that any emissions that did not violate such standards could not be adjudged harmful.¹⁸⁴ The case established what would come to be known as the “rebuttable presumption”—that is, the rebuttable presumption that compliance with environmental laws is a defense to a disparate impact claim.¹⁸⁵ As the U.S. Commission wrote in 2003,

EPA's Office of Civil Rights dismissed the St. Francis Prayer Center's complaint based on the absence of specific EPA regulations monitoring the types of dioxin emissions

181. Administrative Complaint, EPA File No. 05R-98-R5 (June 9, 1998), https://www.documentcloud.org/documents/2162464-epa_05r-98-r5.html.

182. See NOT IN MY BACKYARD, *supra* note 21, at 40-42 (discussing the political and media firestorm sparked by Select Steel complaint); see also Luke W. Cole, *Wrong on the Facts, Wrong on the Law: Civil Rights Advocates Excoriate EPA's Most Recent Title VI Misstep*, 29 ENVTL. L. REP. 10,775 (1999).

183. See Letter from Ann E. Goode, EPA, to Father Phil Schmitter & Sister Joanne Chiaverini, St. Francis Prayer Center, (Oct. 30, 1998), https://www.documentcloud.org/documents/2162464-epa_05r-98-r5.html.

184. See *id.* at 3-5.

185. See Order Denying Review, In re Select Steel Corporation of America Permit No. 579-97, Docket No. PSD 98-21, at 13 (Sept. 11, 1998), [https://yosemite.epa.gov/oa/eab_web_docket.nsf/Unpublished-Final-Orders/1890AA3427C194748525706C0053DB75/\\$File/select.pdf](https://yosemite.epa.gov/oa/eab_web_docket.nsf/Unpublished-Final-Orders/1890AA3427C194748525706C0053DB75/$File/select.pdf) (denying review of the *Select Steel* decision on jurisdictional grounds); *but see* Joint Petition to Re-Open Select Steel Investigation, or, in the Alternative, to Set Aside Investigative and Analytical Methods 9 (EPA Office of the Administrator), <http://www.d-rem.org/wp-content/uploads/2016/02/epa-petition-w-luke-1.pdf> (arguing *Select Steel* holding is flawed but narrow and that it did not create a rebuttable presumption). See *id.* at 16-25.

that were applicable to the Select Steel facility. EPA also found that the permit satisfied the National Ambient Air Quality Control Standards for ozone and lead.¹⁸⁶

According to EPA's reasoning, unless emissions violated standards established by environmental laws, it could not evaluate them as harmful, and therefore, EPA would assume there was no adverse impact for purposes of Title VI.¹⁸⁷ To environmental justice advocates and community members, *Select Steel* became emblematic of EPA's failure even to acknowledge much less address actions by recipients of federal funds that violate the regulatory prohibition against actions with discriminatory effects.¹⁸⁸ If EPA dismissed *Select Steel*, which challenged a permit in an already "deeply polluted area" that was largely African American, where concerns were raised about emissions of such pollutants as lead, manganese, mercury, dioxin, and VOCs, query whether there were any impacts that EPA would recognize as sufficiently adverse to support a finding of discrimination.

On June 27, 1998, EPA received a complaint challenging MDEQ's November 24, 1997, approval of a waste to energy incinerator in Dearborn Heights, near a community that was 62% African American.¹⁸⁹ The complaint raised concerns about potential mercury emissions from the incinerator, alleging that the facility would have a disparate adverse impact on the basis of race and indicating that the incinerator was only one of a cluster of toxic sources recently approved by MDEQ in the community.¹⁹⁰ In April, 1999, OCR rejected the complaint as untimely because it had been filed after the 180-day limit established by EPA regulations.¹⁹¹ OCR acknowledged that it had

186. NOT IN MY BACKYARD, *supra* note 21, at 41.

187. *See id.*

188. *See id.* at n.93 (*citing* Joint Petition to Re-Open Select Steel Investigation, or, in the Alternative, to Set Aside Investigative and Analytical Methods, *jointly filed in Communities for a Better Env't v. South Coast Air Quality Mgmt. Dist.* (10R-97-R9); *Hyde Park and Aragon Park Improvement Comm., Inc. v. Envtl. Prot. Div., Georgia Dep't of Natural Resources, et al.* (8R-94-R4)).

189. *See* Letter to Ann E. Goode, EPA (June 27, 1998), https://www.documentcloud.org/documents/2162555-epa_09r-98-r5.html.

190. *See id.* at 5-6.

191. *See* Letter from Ann E. Goode, EPA (April 1, 1999), https://www.documentcloud.org/documents/2162555-epa_09r-98-r5.html (rejecting

authority to waive the 180-day requirement for good cause, in this case on the ground that complainants had sought to resolve their concerns by appealing the permit decision, but ruled that complainants would have had to file within 60 days of the resolution of its appeal, which was issued on March 26th. Complainants had missed the deadline by two days.

On October 21, 1998, EPA received yet another complaint alleging that MDEQ's approval of permits discriminated on the basis of race.¹⁹² Complainants challenged MDEQ's decision to permit two underground injection wells in Romulus, raising concerns about the impacts of hazardous liquid waste brought to the community for disposal, the integrity of the wells themselves, and MDEQ's approval of a cluster of facilities nearby in Wayne County.¹⁹³

In the past year in Wayne County, we have had three toxic facilities being permitted: 1. Wayne Disposal, Inc. for PCB disposal, permit granted April 14, 1997; 2. . . . a waste-to-energy facility, permit granted Dec. 29, 1997; and [3.] Environmental Disposal Systems, Inc. for a COMMERCIAL class 1, Toxic, Hazardous/Non-hazardous Waste Injection Well(s)¹⁹⁴

Complainant(s) asked rhetorically what was wrong with locating the facilities elsewhere, suggesting that “politically connected residents” who could afford to hire their own attorneys would block proposals to site such toxic sources in their neighborhoods but that Romulus was politically disenfranchised.¹⁹⁵ Ignoring the pattern and practice allegation suggested by the complaint's discussion of the clustering of facilities in Wayne County, OCR dismissed the complaint on

complaint on timeliness grounds); *see also* 40 C.F.R. § 7.120(b)(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.”).

192. *See* Letter to Ann E. Goode, EPA (Oct. 21, 1998), https://www.documentcloud.org/documents/2162622-epa_12r-98-r5.html.

193. *See id.*

194. Letter to Ann E. Goode, *supra* note 189, at 6.

195. *Id.*

timeliness grounds.¹⁹⁶ Once again, the complaint triggered no compliance review.

On June 22, 1999, Romulus City Council member Deborah Ann Romak filed another complaint alleging that MDEQ discriminated against African American residents of Romulus by issuing two permits to Environmental Disposal Systems to drill and operate two deep waste disposal wells.¹⁹⁷ OCR dismissed allegations about MDEQ's failure to provide adequate opportunities for public participation in the permitting process as untimely, finding that MDEQ issued the permits in 1991 rather than in 1999, after MDEQ and the operator of the site signed a consent agreement and stipulation, as complainants had alleged.¹⁹⁸ OCR also dismissed disparate impact claims, finding there was "no meaningful possibility" of seismic activity, no reasonable potential for offsite noise impacts, that the injection zone would be contained and prevent deterioration of water quality, and that, though "unplanned water quality impacts could occur," federal and state permit design requirements "ensure" that the likelihood of such impacts was "very small."¹⁹⁹ As for truck noise, water impacts from truck accidents, and the effects of the operation on air quality, soil quality, and surface water, OCR found that these would not have a disproportionate effect on the basis of race and thus did not run afoul of the law.²⁰⁰ OCR's closure letter indicated that though it had found no violation of Title VI on the facts of the Environmental Disposal Systems permit, its investigation raised concerns about the "adequacy of MDEQ's approach to assure its future compliance with Title VI."²⁰¹ OCR recommended that MDEQ independently evaluate its compliance with Title VI and urged MDEQ to develop relevant Title

196. *See* Letter from Ann E. Goode, *supra* note 191, at 1.

197. Letter from Karen Higginbotham, EPA, to Russell J. Harding, MDEQ (Dec. 11, 2001), https://www.documentcloud.org/documents/2162678-epa_17r-99-r5.html (Acceptance Letter indicating that EPA had accepted Romak's complaint for investigation).

198. *See* Letter from Karen Higginbotham, EPA, to Russell J. Harding, MDEQ & Deborah Ann Romak (Nov. 15, 2002), https://www.documentcloud.org/documents/2162678-epa_17r-99-r5.html (Closure letter).

199. *Id.* at 2-3.

200. *See id.* at 3.

201. *Id.* at 4.

VI compliance policy.²⁰² The agency nonetheless closed the case and failed to initiate a compliance review.

In July and September, 1999, OCR received two additional complaints filed to challenge MDEQ's decision to permit the injection wells in Romulus.²⁰³ The September complaint alleged that MDEQ afforded "separate but equal" status to residents of Romulus and Wayne County, which had populations that were disproportionately African American when compared to the state.²⁰⁴ The complaint stated that all citizens of these communities, by virtue of living in a disproportionately African American jurisdiction, were "discriminat[ed] [against] by association."²⁰⁵ Ultimately, OCR rejected the July complaint as untimely²⁰⁶ and the September complaint because the complainant had not clarified whether he or she was an "authorized" representative of African Americans in Romulus.²⁰⁷

In June, 2001, the Sugar Law Center filed another complaint against MDEQ, this time challenging a permit issued in December, 2000, to S & S Metal Processing Company for the installation of a scrap metal shredder in Flint.²⁰⁸ EPA accepted for investigation allegations that MDEQ's public participation process discriminated on the basis of race and, also, that the permit would disproportionately and adversely affect the African American community living in proximity to the

202. *See id.*

203. *See* Letter from Karen Higginbotham, EPA (undated), https://www.documentcloud.org/documents/2162688-epa_18r-99-r5.html (Rejection Letter); *see also* Letter from Karen Higginbotham, EPA (undated), https://www.documentcloud.org/documents/2162699-epa_21r-99-r5.html (Rejection Letter).

204. Letter to Ann E. Goode, EPA Office of Civ. Rights (Sept. 23, 1999), https://www.documentcloud.org/documents/2162699-epa_21r-99-r5.html (Complaint).

205. *Id.* at 28.

206. *See* Letter from Karen Higginbotham, EPA (undated), https://www.documentcloud.org/documents/2162688-epa_18r-99-r5.html.

207. *See* Letter from Karen Higginbotham, EPA (undated), https://www.documentcloud.org/documents/2162699-epa_21r-99-r5.html.

208. *See* Letter from Alma Lowry, Maurice and Jane Sugar Law Center for Social and Economic Justice, to Ann Goode, EPA (June 25, 2001), https://www.documentcloud.org/documents/2162524-epa_08r-01-r5.html.

facility.²⁰⁹ EPA issued a closure letter in June 2006 indicating that it was satisfied that MDEQ had taken appropriate steps both to resolve the allegation that it had failed to provide adequate controls for mercury emissions and to provide additional opportunities for public participation.²¹⁰

In June 2004, EPA received a complaint alleging that MDEQ made false statements about the impacts of the injection wells in Romulus, and that its actions constituted discrimination on the basis of income and education.²¹¹ On November 15, 2005, OCR rejected the complaint on the ground that it failed to meet jurisdictional requirements because the allegations did not allege race discrimination.²¹² Notably, though the complaint did not explicitly mention the racial composition of the affected area, African Americans comprised approximately 30% of the population of Romulus, as compared to 14.2% of state residents as a whole.²¹³

In 2015, the Center for Public Integrity analyzed the disposition of all complaints filed with OCR between 1996 and 2013.²¹⁴ It found that “[o]ver a 17-year period ending in 2013, dozens of communities of color turned to [OCR] for help. In more than nine of every 10 times, however, it rejected or dismissed their claims of civil rights violations.”²¹⁵ Consistent with this pattern, OCR found grounds for neglecting, rejecting, or otherwise disposing of complaints against MDEQ filed since the early 1990s. The basis for OCR’s action in any given case may have been well-founded, but at any time, OCR also

209. See Letter from Karen Higginbotham, EPA, to Russell J. Harding, MDEQ (Jan. 2, 2002), https://www.documentcloud.org/documents/2162524-epa_08r-01-r5.html.

210. See Letter from Karen D. Higginbotham, EPA, to Thomas W. Stevens, Maurice and Jane Sugar Law Center for Economic and Social Justice (June 23, 2006) (on file with author).

211. See Letter to U.S. Comm’n on Civ. Rights (June 4, 2004), https://www.documentcloud.org/documents/2162527-epa_08r-04-r5.html (Complaint).

212. See Letter from Karen D. Higginbotham, EPA (Nov. 15, 2005), https://www.documentcloud.org/documents/2162527-epa_08r-04-r5.html (rejecting complaint).

213. These statistics are based on Census 2000 data. See *American FactFinder*, U.S. CENSUS BUREAU, <https://factfinder.census.gov/faces/nav/jsf/pages/index.xhtml#> (last visited Sept. 13, 2017) (enter city or state name; click “go,” then click “Census 2000: General Demographic Characteristics”).

214. See Qiu & Buford, *supra* note 9.

215. See Qiu & Buford, *supra* note 9.

had the authority to initiate a compliance review and, all told, the agency missed multiple opportunities to demand that MDEQ reform its approach to public participation and consider the impacts of its policies and practices—including but not limited to its permitting program—on environmentally overburdened communities of color in the state.

Perhaps conditions in Flint would have been different if at any point since the early 1990s, OCR sent a clear message to MDEQ that unless it came into compliance with Title VI, EPA was going to withhold federal funds. At that point, MDEQ and EPA might have reviewed MDEQ's public participation policies and practices, language access policy, data collection, and criteria for approving a site selection, for example – including whether MDEQ evaluated whether the permit would have a disparate impact on the basis of race and national origin, and negotiations might have led to reforms. Unfortunately, the Supreme Court relegated Title VI enforcement largely to federal agencies, and EPA abdicated its responsibility.

CONCLUSION: TOWARD COMPLIANCE & ENFORCEMENT

We are at a crossroads for civil rights enforcement in the environmental justice context. From our vantage point in 2017, it may be hard to imagine the status of various forms of employment discrimination had Congress failed to establish the Equal Employment Opportunity Commission (EEOC)²¹⁶ and enforcement of employment discrimination laws had been reliant on the activities of agency OCRs. Enforcement is imperfect, but there is recourse to the EEOC and the courts for acts of discrimination on the basis of protected characteristics such as race and sex. By contrast, there is no societal expectation that when recipients of federal funds in the environmental context fail to conduct public participation processes fairly, treating all people equally without regard to race or national origin, EPA will enforce Title VI and implementing regulations. Likewise, there is no expectation of accountability for decisions to allow multiple polluting facilities to cluster in communities of color. Instead, despite regulatory prohibitions on recipients from using criteria or methods of

216. *See* Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-4 (creating the Equal Employment Opportunity Commission).

administration “which have the effect of subjecting individuals to discrimination”²¹⁷ or from choosing a site for a facility that has the “purpose or effect” of denying the benefits of a program or discriminating on the basis of race, color or national origin,²¹⁸ pervasive inequality is tolerated, with devastating effects on the lives and health of people living in environmentally overburdened communities.²¹⁹ Public and private recipients of EPA funding make decisions without fear of civil rights enforcement.

The author recalls a discussion with an environmental lawyer about a claim, consistent with the district court’s initial ruling in *South Camden*,²²⁰ that a state environmental department must conduct a disparate impact analysis before permitting a significant potential source of pollution. The environmental lawyer, seeking to clarify whether the request for a disparate impact analysis was well founded, focused on whether EPA had previously required other states or localities to conduct equity analyses to ensure compliance with Title VI. The implication was that EPA’s failure to require such an analysis had become an unfortunate and largely immutable reality. Along similar lines, should EPA be forgiven for having failed to conduct a thorough review of MDEQ’s compliance with Title VI given that EPA had no affirmative compliance review program? The answer must be no; justice requires that we envision meaningful civil rights compliance and enforcement and resist allowing noncompliance to be the norm.

217. 40 C.F.R. § 7.35(b).

218. 40 C.F.R. § 7.35(c).

219. *See generally* LERNER, *supra* note 56.

220. *See* S. Camden Citizens in Action, 145 F. Supp. 2d 446, 481 (D.N.J. 2001) (granting plaintiff’s request for declaratory judgment because a violation of Title VI and its regulations is established when a recipient fails to consider the disparate impact of a facility’s operation on the basis of race, color, or national origin as part of the decision to permit, concluding that an interpretation otherwise “would eviscerate the intent of Title VI, namely, to prevent agencies which receive federal funding from having the purpose or effect of discriminating in the implementation of their program”); *see also* Letter from Peter M. Rogoff, Fed. Transit Admin., to Steve Heminger, Metro. Transp. Comm’n, & Dorothy Dugger, S.F. Bay Area Rapid Transit Dist. (Jan. 15, 2010), <https://oaklandliving.files.wordpress.com/2010/01/fta-letter-to-mtc-and-bart-on-oakland-airport-connector.pdf> (preliminary results of compliance review revealed failure to conduct equity analysis, putting agency in danger of losing federal funds).

In the post-2016 era, pushing forward with a civil rights strategy to achieve environmental justice may seem pie-in-the-sky, particularly given reliance on federal agencies for enforcement. Yet this is a long-term fight, one that begins with an understanding that in the environmental context, decision-makers must be accountable for discrimination on the basis of race and ethnicity. There are any number of next steps, from reforms at EPA²²¹ to a *Sandoval* fix.²²² Perhaps ultimately there should be a single agency, analogous to the EEOC, which enforces Title VI. Preventing another Flint Water Crisis requires no less than acknowledging our failures and then reimagining civil rights enforcement in the environmental justice context: environmental decision-makers should no longer be exempt from civil rights law.

221. *See, e.g.*, Letter from Marianne Engelman Lado, Earthjustice, to Gina McCarthy & Gwendolyn Keyes Fleming, EPA (Nov. 5, 2013) (recommending that EPA modify policies and practices governing communications to engage overburdened communities; improve transparency by making information about civil rights enforcement more readily available; resolve uncertainty by revising legal standards and finalizing guidance documents; address its backlog of investigations; improve capacity and interagency coordination, and ensure that remedial measures secure Title VI compliance).

222. *See Alexander v. Sandoval*, 532 U.S. 275 (2001) and *supra* notes 126-158 and accompanying text (bills affording a private right of action to enforce disparate impact claims).