Environmental Justice
Community-Based Administrative Advocacy under Civil Rights Law: A Potential Environmental Justice Tool for Legal Services Advocates

By Luke W. Cole

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I. A New Tool for Legal Services Advocates

The national environmental justice movement has discovered a new tool in the struggle against environmental racism: administrative complaints to the U.S. Environmental Protection Agency (EPA) under Title VI of the Civil Rights Act of 1964. /1/ Long used in civil rights struggles, until recently the Title VI administrative complaint was a tool that had seen little use in communities' fights against polluters and unresponsive governments. /2/

Legal services offices are increasingly being called upon to represent low-income clients in environmental justice cases. Title VI administrative complaints are a simple and potentially effective tool in certain environmental justice disputes. This article offers a hands-on introduction to the field and step-by-step instructions on how to file such complaints.

Title VI complaints are perhaps easiest to use in local siting battles -- that is, when a company or government agency seeks to locate a new facility in a given community and the community does not want the facility. However, Title VI complaints can also be used to challenge disproportionate impacts of ongoing industrial operations, the repermitting or expansion of existing facilities, and the underenforcement of environmental laws in communities of color. There are a broad range of situations in which the strategy may be useful, subject only to the limitations of advocates' imaginations.

The article has two sections. First, the article briefly reviews the nuts and bolts of Title VI administrative advocacy, including the specifics of EPA's regulations and how to file a complaint. Second, the article presents some of the lessons learned from using this particular tool of environmental justice advocacy and discusses some of the potential benefits and drawbacks of such advocacy.

II. The Nuts and Bolts of Title VI Administrative Advocacy

Title VI of the Civil Rights Act of 1964, as amended, prohibits discrimination on the basis of race, color, or national origin in programs or activities receiving federal financial assistance. /3/ Under
EPA regulations, Title VI bars disproportionate impact in the administration of environmental programs, including siting and enforcement, thus skirting the formidable barrier to challenging inequality created by the requirement of Washington v. Davis /4/ and Arlington Heights v. Metropolitan Housing Development Corp. /5/ that an equal protection claim be supported by a showing of discriminatory intent, as opposed to discriminatory effect.

A. EPA Regulations Implementing Title VI

EPA’s regulations implementing Title VI explicitly codify the disproportionate impact, or discriminatory effect, standard. Under 40 C.F.R. Sec. 7.35(b),

[a] recipient [of federal funds] shall not use criteria or methods of administering its program which have the effect of subjecting individuals to discrimination because of their race, color, national origin, or sex, or have the effect of substantially defeating or substantially impairing accomplishment of the objectives of the program with respect to individuals of a particular race, color, national origin, or sex. [Emphasis added.]

Note that the recipient of federal funds need not be a governmental entity; private parties who receive federal funds fall within the ambit of Title VI. /6/

The siting of facilities is specifically addressed in 40 C.F.R. Sec. 7.35(c).

A recipient shall not choose 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 under any program to which this Part applies on the grounds of race, color, or national origin or sex; or with the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of this subpart.

Subsection 7.35(b) gives advocates a large handle onto which to grab. If a program has a discriminatory impact, then, almost by default, the "criteria or methods of administering [the state or local] program" led to that impact. Advocates should also keep in mind that there are a range of activities that may implicate Title VI. The complaints EPA has accepted for investigation so far range from challenges to the siting of specific facilities to broad challenges of entire state permitting processes. These complaints represent just the tip of the iceberg of possible Title VI complaints.

The difficulty facing the environmental justice complainant under subsection 7.35(c) is making the case that the funding recipient -- generally a state or local agency -- is "choosing" the site. Historically, agencies have defended against charges of environmental racism by stating that private companies chose the locations, and the government merely processed the companies' permit applications, as if the agencies had no power to reject specific sites.

It is also important to note that "Title VI prohibits only projects with unjustified disparate impacts, rather than all projects that simply have a differential impact upon one sector of a community." /7/
B. **Filing a Complaint**

The actual process of filing a Title VI administrative complaint with EPA is surprisingly simple. One merely writes a letter alleging a discriminatory action or impact by a recipient of federal funds and sends it to the EPA’s Office of Civil Rights or a regional EPA administrator, and EPA does the rest. /8/ Behind this simplicity are a couple of key hurdles: making a successful case and timing.

There are two elements in making a successful prima facie claim, and a complaint must include both to be accepted and processed by EPA. /9/ A Title VI complaint should allege, at a minimum (1), discrimination on the basis of race, color, or national origin, including a description of the discriminatory acts, /10/ and (2) EPA assistance in the discriminatory program or activity. /11/

Ideally, the first point should be supported with allegations of specific incidents of discrimination or statistical analyses of discriminatory impact. The facts obviously differ from community to community, but evidence that demonstrates disproportionate impact should be included. /12/ Advocates should thoroughly investigate these issues before they file to maximize the chances of EPA accepting their complaints. Allegations should be as explicit as possible; one recent complaint was rejected for failure to name a respondent agency, and another was rejected for failure to allege a discriminatory activity.

The second point should be thoroughly researched before filing as well. /13/ A number of the complaints have been rejected by EPA because of the absence of federal funds. If the target is a state agency, then the nexus to federal funding should be relatively easy to document. From 1982 to 1986, for example, EPA grants to states funded 47 percent of state air programs, 38 percent of water quality programs, and 54 percent of hazardous and solid waste programs. /14/ Many local agencies also receive federal money, often through grants from their state environmental agencies.

There is an additional procedural hurdle; complaints must be filed within 180 days of the action complained about, /15/ or allege an ongoing violation of Title VI. /16/ If the 180 days have passed, complainants can ask for a waiver of the 180-day limitation for "good cause." /17/

Once a complaint has been filed, it is largely out of the hands of the complainant. EPA is required to make a determination on whether to accept the complaint within 20 days, /18/ although in practice the agency often takes longer. /19/ If EPA denies the complaint for processing, it informs the complainant by letter. If the complaint is accepted, EPA informs the party complained against (the respondent) that it has accepted the complaint for investigation.

At this point, EPA investigates the allegations in the complaint. That investigation entails data gathering, getting a response from the respondent, and, in some situations, site visits. Because of understaffing and a generally conservative reading of its own Title VI regulations, EPA has not vigorously investigated any of the ten complaints it has thus far accepted for processing. Because of this, advocates should continue to press for full and thorough investigation of their claims. This can include close monitoring of EPA's investigation, submitting briefing on the complaint to EPA,
suggesting avenues of investigation to the agency, and gathering further evidence to support the complaint.

It remains to be seen what response EPA will devise if and when it finds discriminatory impact in one of the ten complaints currently under investigation. According to EPA lawyers and others familiar with the process, EPA can take four possible courses of action:

(1) Attempt to resolve the problem informally. This is the explicit policy in EPA's Title VI regulations. This could mean informal negotiations with the offending party to change a state regulation, for example, to allow for greater public participation.

(2) Terminate funding to the offending party. This process would involve notifying the party of EPA's preliminary findings and, if the party did not agree or respond, making a formal determination of noncompliance with Title VI. Upon such a finding, the offending party would be entitled to request an evidentiary hearing before an EPA administrative law judge (ALJ). If the ALJ ruled against the discriminating party, the party could appeal to the EPA administrator, who would make the final determination. Any party, including complainants, would then have a right to judicial review under the Administrative Procedure Act (APA).

(3) Refer the case to the Justice Department. While no one is quite sure what such a referral might mean, it could lead to prosecution under state or federal law.

(4) Do nothing. If EPA were to articulate some basis for its inaction, a complainant should have a right to judicial review under the APA. Note also that the APA requires agencies to resolve matters presented to them within a reasonable time.

Under Title VI, EPA can enforce the nondiscrimination requirement by these means or "by any other means authorized by law."

III. The Benefits and Drawbacks of Administrative Complaints

While it is early on in the game, environmental justice activists have already begun to distill lessons from the Title VI administrative-complaint experience. Whether the benefits outweigh the drawbacks is a question that can be answered only on a case-by-case basis, depending on the facts in and resources available to individual communities. The discussion below relies heavily on Alan Jenkins's excellent primer on Title VI law, as well as the author's conversations with many environmental justice activists and attorneys around the country.

A. The Benefits

The process is informal. A letter outlining two points -- the alleged discriminatory activity and the receipt of federal funds -- is enough to get an investigation started. Formal evidence need not be offered, although such evidence may speed the inquiry.
A community group does not need a lawyer to file a complaint. In keeping with one of the central tenets of the environmental justice movement, communities can speak for themselves in administrative complaints. This benefit stands in marked contrast to the primacy of the lawyer's role in litigation under civil rights and environmental laws. Although a lawyer is not necessary, consulting with a lawyer in preparing a complaint can help a community group ensure that all procedural requirements are met and that the complaint properly alleges violations of Title VI. Advocates investigating the Title VI route should read, at a minimum, the three published pieces directly related to Title VI in the environmental justice context.

The process can be inexpensive. An important corollary to the first two benefits is that administrative complaints can cost nothing but postage to file.

The process allows the community group to name names. Unlike filing appeals under environmental laws, filing civil rights administrative complaints (as well as civil rights lawsuits) allows a community to call a problem what it is: a violation of the community's civil rights. Civil rights challenges have great symbolic value. Naming names can build morale in a community group and generate publicity that educates the public.

Filing a complaint on behalf of a community organization or group of people can boost the visibility of a local organization's struggle. Because the complaint should come in the context of community-based organizing drives, it can serve as an organizing tool for the client group. (Note that this benefit is largely lost if the complaint is filed on behalf of an individual, rather than a group.)

B. The Drawbacks

EPA can take as long as it wants to investigate a complaint it has accepted for investigation. Although EPA is required to notify the respondent of its preliminary findings within 180 days, this requirement is not realistically enforceable, and EPA has yet to meet the deadline in processing environmental justice complaints. In fact, although the earliest claims were filed in September 1993, EPA has yet to decide formally a single claim it has accepted for investigation. Administrative complaints in other contexts have taken years to resolve.

Complainants are largely left out of the investigation. While EPA can consult with complainants during the investigation of a claim, it might not involve the complainants at all. In fact, EPA could negotiate a deal with the local agency that is the target of the complaint without consulting the complainants.

The remedies available to affected communities are indirect. As James Colopy notes,

There are greater possibilities for remedies in a lawsuit against a funding recipient . . . [because] the administrative process does not provide any direct relief to complainants beyond promised compliance or termination of funding.
Filing a complaint may not toll the statute of limitations for a later lawsuit. One potential pitfall for the unwary complainant is thinking that, because an administrative complaint has been filed, the statute of limitations for a later court suit has been tolled. This is not the case. Under EPA regulations, a Title VI administrative complaint must be filed within 180 days of the alleged discriminatory action. /44/ Title VI lawsuits generally fall under the state personal injury statute of limitations; /45/ in most states that statute of limitation is one year. /46/ If a community group wishes to file a lawsuit, it may be forced to prepare and file suit while awaiting the outcome of its administrative appeal because it is almost certain that EPA will not complete the investigation and processing of a complaint within six months. At the same time, getting a final outcome in an administrative complaint is not a necessary precursor for those who wish to file suit directly. /47/ (Although potential litigants need not wait for the outcome of the administrative complaint, courts are divided on whether or not parties can go to court without ever taking part in the administrative process.) /48/

The process is informal. This sometime benefit can also be a drawback to complainants, because EPA may never inform them of the status of their case. As Jenkins points out, "Although complainants are often afforded informal access . . . they may just as easily be shut out of the process, learning only much later that the agency has found no violation or adopted a compliance agreement that the plaintiff views as deficient." /49/

A lawsuit may provide a more sustained rallying point than an administrative complaint. /50/ Because the investigation and handling of the administrative complaint is largely out of the hands of the complainant, it may be difficult to use the administrative complaint as an ongoing organizing tool in the affected community. A trial in the affected community, on the other hand, can be a useful educational and mobilizing tool. /51/ In either case, advocates and their clients should not rely solely on the administrative complaint avenue. In communities that have relied on the administrative complaint as their sole form of activism or opposition to a local facility, community members have been disappointed. "The Title VI strategy creates more pressure from the top," says Pat Bryant, "but you've got to have pressure from the bottom." /52/ Bryant sees the most successful strategy as a focused local campaign, where the Title VI complaint evolves as one of several tactics. /53/

Title VI is available only if the target agency gets federal financial assistance. Title VI complaints are largely useless against private parties and many local government agencies because of the required nexus to federal funding.

The EPA Office of Civil Rights is understaffed. Until recently, EPA devoted few resources to process Title VI complaints. In July 1994, EPA hired four new attorneys to work solely on Title VI cases; it is not yet clear whether this will be enough staff to investigate and prosecute complaints in a timely fashion.

EPA reads the complaints narrowly. EPA seems unwilling to look beyond site-specific challenges to investigate allegations of institutional racism -- that whole state programs are run in a manner resulting in discriminatory effect. Symptomatic of EPA's narrow focus is its response to one complaint calling for a statewide investigation of Browning-Ferris Industries' alleged placement of garbage dumps in African American communities in Alabama. In denying to accept the complaint
for processing, EPA decided that it was really about a single garbage transfer facility in Birmingham, Alabama. /54/ Similarly, in other cases, broad challenges to state agencies and systemic government policies have been either missed entirely or narrowed considerably in scope by EPA. /55/ To avoid confusion, complainants should be as clear and explicit as possible.

If a complaint is resolved at the administrative level without litigation, complainants' attorneys may not be entitled to attorney fees. /56/ While this will not discourage many community groups from pursuing the administrative complaint, it may make it more difficult for such groups to find private attorneys to represent them in such proceedings. However, as mentioned above, attorneys are not necessary to file administrative complaints. Further, most attorneys who have represented client groups making such claims work for nonprofit advocacy groups (such as environmental groups or legal services offices).

IV. Using Title VI as a Community Empowerment Tool

Pat Bryant, a longtime organizer with the Gulf Coast Tenants Organization, suggests that legal support groups should develop workshops for local activists on how to use Title VI. /57/ Because of its informality and ease of use by lay persons, Title VI advocacy could be radically democratized through the development of a series of workshops for grassroots groups on how to research, document, and file their own complaints. Legal services offices, pooling their collective knowledge of Title VI complaints, could play a vital role in such training. The Center on Race, Poverty & the Environment looks forward to working with legal services field offices throughout the country to develop and implement such training sessions.

V. Conclusion

The new area of Title VI administrative complaints to EPA remains to be explored by community groups and their advocates. Primary questions -- such as whether EPA will decide cases on behalf of complainants -- remain to be answered. But with increased use of such complaints will come increased government response. Although there is a series of potential drawbacks, Title VI complaints remain a viable tool for community struggles against environmental racism.

Footnotes


/2/ One prominent exception is a Title VI administrative complaint to the U.S. Department of Transportation, filed by the Crest Street Community Council (CSCC) of Durham, North Carolina. Residents of the African American Crest Street neighborhood challenged the siting of a freeway that the North Carolina Department of Transportation had planned to build through their community. After receiving CSCC's Title VI administrative complaint, the Transportation
Department informed North Carolina that the construction of the freeway would be a prima facie violation of Title VI. CSCC and the state then negotiated a settlement under which the freeway was rerouted and one interchange was redesigned to save a church and park. See North Carolina Dep't of Transp. v. Crest St. Community Council, 479 U.S. 6, 9 -- 10 (1986). Until September 1993, no one had filed with the Environmental Protection Agency (EPA) an administrative complaint alleging environmental racism. However, since then more than 20 Title VI complaints have been filed.


/8/ Office of Civil Rights, U.S. Environmental Protection Agency, 401 M St. SW, Washington, DC 20460. See Padres para una Vida Mejor v. Laidlaw (Clearinghouse No. 00,000), noted in the sidebar accompanying this article, for a model complaint.

/9/ 40 C.F.R. Secs. 7.30 et seq.

/10/ Id. Sec. 7.120(b)(1).

/11/ Id. Sec. 7.120. "EPA assistance" is defined at 40 C.F.R. Sec. 7.25 as "any grant or cooperative agreement, loan, contract (other than a procurement contract or a contract of insurance or guaranty), or any other arrangement by which EPA provides or otherwise makes available assistance in the form of: (1) Funds; (2) Services of personnel; or (3) Real or personal property[.]

/12/ Include detailed documentation of the alleged discriminatory acts. While, theoretically, EPA will investigate claims against a recipient of EPA funding, complainants significantly increase the chances of their complaints being accepted if they include substantial documentation of the alleged discrimination.

/13/ This requirement is not actually in the Title VI regulations but is a basic jurisdictional requirement. If EPA does not give an offending agency (or private party) money, it has no jurisdiction to investigate complaints. If the offending entity receives funds from another federal source, then the Title VI complaint should be filed with the agency that administers those funds.
/14/ Colopy, supra note 7, at 155 (citing U.S. Environmental Protection Agency, A Preliminary Analysis of the Public Costs of Environmental Protection: 1981 -- 2000 8 (1990)).

/15/ 40 C.F.R. Sec. 7.120(b)(2).

/16/ Advocates should be aware, however, that EPA has thus far read the statute of limitations extremely narrowly on complaints and has not accepted for processing any complaints that on their face allege ongoing discrimination if those complaints were filed after the 180-day statute of limitations. For a detailed discussion of the case law on ongoing discrimination, see Cole, Civil Rights, Environmental Justice and the EPA, supra note 1, and Thelma Crivens, The Continuing Violation Theory and Systemic Discrimination: In Search of a Judicial Standard for Timely Filing, 41 Vand. L. Rev. 1171 (1988).

/17/ 40 C.F.R. Sec. 7.120(b)(2).

/18/ Id. Sec. 7.120(d)(1).

/19/ While EPA has done a fairly good job of letting complainants know in a timely fashion, several complainants have had to wait from ten weeks to three months before hearing the status of their complaints.


/21/ 40 C.F.R. Sec. 7.120(d)(2)(i).

/22/ Id. Sec. 7.130(a).

/23/ Id. Secs. 7.115(c) -- (d), 7.130(b)(1).

/24/ Id. Sec. 7.130(b)(2).

/25/ Id. Sec. 7.130(b)(3).

/26/ 5 U.S.C. Sec. 706(1).
40 C.F.R. Sec. 7.130(a).

28 C.F.R. Sec. 42.108(a). See also Colopy, supra note 7, at 155 n.134.

See, e.g., Cannon, 441 U.S. at 707 n.41 ("Furthermore, the agency may simply decide not to investigate -- a decision that often will be based on a lack of enforcement resources, rather than any conclusion on the merits of the complaint.").

5 U.S.C. Sec. 706(1).

Administrative agencies have the duty to decide issues presented to them within a reasonable time, and reviewing courts have a duty to compel agency action unlawfully withheld or unreasonably denied. Nader v. Federal Communications Comm'n, 520 F.2d 182 (D.C. Cir. 1975).


Note that not all of the benefits and drawbacks of pursuing a strategy using civil rights laws, or legal challenges at all, are explored here but should be discussed and analyzed by communities facing environmental racism. For more on how to make the decision, see Luke W. Cole, Empowerment as the Means to Environmental Protection: The Need for Environmental Poverty Law, 19 Ecol. L.Q. 619, 668 (1993) (setting out three questions for analyzing tactics).


See, e.g., We Speak for Ourselves (Dana Alston ed., 1992).

Interview with Pat Bryant, Executive Director, Gulf Coast Tenants Organization (Oct. 14, 1994).


See Luke W. Cole, Environmental Racism Lawsuits, 11 Everybody's Backyard 18, 18 -- 19 (Nov./Dec. 1993). Such value is often gleaned in the moment of filing the claim rather than in its ultimate resolution. Id.

40 C.F.R. Sec. 7.115(c)(1).

See Jenkins, supra note 33, at 11.

Id.

Colopy, supra note 7, at 167.

40 C.F.R. Sec. 7.120(b)(2).

Wilson v. Garcia, 105 S. Ct. 1938, 1947 (1985) (civil rights claims are best characterized as personal injury claims, thus personal injury statute of limitations governs where available); Almond v. Kent, 459 F.2d 200 (4th Cir. 1972). In states where no statute of limitations governs personal injury actions, the circuits have resolved the issue with somewhat conflicting approaches. E.g., the Tenth Circuit found, under Utah law, a four-year statute of limitations to be the most analogous. Mismash v. Murray City, 730 F.2d 1366 (10th Cir. 1984). However, rejecting a one-year statute of limitations that covered assault, battery, malicious prosecution, and false imprisonment, in a Kansas case the Tenth Circuit applied a two-year statute of limitations for injury to the rights of another. Hamilton v. City of Overland Park, 730 F.2d 613 (10th Cir. 1984). Other circuits have held that the statute covering intentional torts covers civil rights injuries. Jones v. Preuit & Mauldin, 763 F.2d 1250 (11th Cir. 1985) (Alabama, one-year statute of limitations); Mulligan v. Hazard, 777 F.2d 340 (6th Cir. 1985) (Ohio, one-year statute of limitations).


Cannon, 441 U.S. at 707 n.41. In Cannon, the Supreme Court held that parties can go directly to court without a final action on an administrative complaint. The court based its holding on three grounds. First, complainants under Title VI do not get to "participate in the investigation or subsequent enforcement proceedings." Id. at 707 n.41. Second, administrative actions under Title VI do not provide direct relief to a complainant. Id. (Noting that "even if those [administrative] proceedings result in a finding of a violation, a resulting voluntary compliance agreement need not include relief for the complainant.") And, third, an agency may not investigate an administrative complaint at all. Id.

Compare Pushkin v. Regents of Univ. of Colorado, 658 F.2d 1372, 1380 -- 82 (10th Cir. 1981) (no need to initiate administrative complaint to file lawsuit), and Camenisch v. University of Texas, 616 F.2d 127, 135 (5th Cir. 1980) (Clearinghouse No. 23,833) (same), with Scelsa v. City Univ. of N.Y., 806 F. Supp. 1126, 1138 -- 39 (S.D.N.Y. 1992) (Title VI complainants need not exhaust administrative remedies, but they do need to attempt to use administrative process before filing suit). An extensive and useful discussion of this issue appears in Colopy, supra note 7, at 156 -- 58.
/49/ Jenkins, supra note 34, at 11.

/50/ Colopy, supra note 7, at 167.


/52/ Interview with Pat Bryant, Executive Director, Gulf Coast Tenants Organization (Oct. 14, 1994).

/53/ Id.


/55/ See, e.g., Jackson v. Louisiana Dep't of Envtl. Quality (EPA, filed Sept. 13, 1993; accepted Oct. 8, 1993) (challenge to state permitting system taken as challenge to single facility permit); Bryant (Gulf Coast Tenants' Organization) v. Louisiana Dep't of Envtl. Quality (EPA, filed Feb. 21, 1994; denied Apr. 1, 1994) (allegation of systemic discrimination by state agency read narrowly by EPA).


/57/ Interview with Pat Bryant, supra.