

Assessing EPA's Potential Retreat On Title VI Enforcement

By **Susan Richardson and Jeffrey Davidson** (July 31, 2023, 5:57 PM EDT)

A May 24 federal lawsuit filed by the state of Louisiana against the U.S. Environmental Protection Agency in the U.S. District Court for the Western District of Louisiana challenges the scope of Environmental Protection Agency's Title VI authority to redress harms to environmental justice communities.[1]

Shortly after the filing of the litigation, the EPA announced that it was closing its Title VI investigation of Louisiana. The EPA's retreat from an ongoing investigation in response to Louisiana v. EPA raises questions regarding the efficacy of EPA's plans to use Title VI of the Civil Rights Act of 1964 as one of its most important tool to support its environmental justice initiatives.

Title VI of the Civil Rights Act contains two provisions that the EPA utilizes as the basis for environmental justice claims and policy.

First, Section 601 provides that no person shall "on the grounds of race, color, or national origin, be excluded from participating in, be denied the benefits of, or be subject to discrimination under any program or activity" covered by Title VI.

Second, Section 602 authorizes federal agencies to "effectuate the provisions of Section 601 by issuing rules, regulation or orders of general applicability."

The EPA's Title VI regulations are designed to ensure that recipients of federal funds do not take actions that are intentionally discriminatory or have a discriminatory effect based on race, color or national origin.

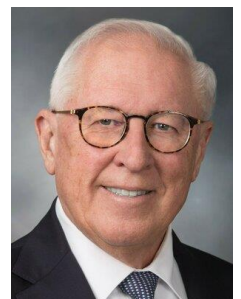
These regulations authorize the EPA to conduct affirmative compliance reviews and provide a process for affected communities to file a Title VI complaint.

After a complaint is filed, the EPA has 20 days to determine whether it merits investigation and 180 days to issue a preliminary finding. If the EPA makes a finding of discrimination, it must request that the recipient of funds address the problem voluntarily.

If the recipient does not take voluntary actions, the EPA can refuse to continue providing federal funds. There is no private right of action to pursue Section 602 claims, so the EPA's cumbersome and extended process is the only route to pursue environmental civil rights claims.[2]



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The EPA's 2022-2026 strategic plan identified Title VI actions as one of the agency's primary tools to advance environmental justice and equity. The strategic plan encourages the EPA to enforce federal civil rights laws to their fullest extent by conducting affirmative investigations in overburdened communities and securing timely and effective resolutions to address discrimination.

Consequently, over past few years, the EPA has accepted a number of Title VI complaints, with investigations prompting requests for the state agency to revisit challenged permits and implement heightened review procedures, including performance of cumulative impact analyses.

The EPA's requests are often based on the disparate impacts of an activity on overburdened populations and the requested actions may go beyond statutory authority and regulations.

In April 2022, the EPA accepted two Title IV complaints regarding the Louisiana Department of Environmental Quality and Louisiana Department of Health Clean Air Act permitting and other activities in Cancer Alley — an 85-mile industrial corridor area along the Mississippi River between Baton Rouge and New Orleans.

The complaints claimed Title VI violations with regard two individual plants as well as general permitting activities in the industrial corridor.[3] On Oct. 12, 2022, the EPA sent a 56-page letter of concern regarding its initial fact finding and analysis based on the Title VI complaints.

The EPA concludes that its initial investigation raises concerns that LDEQ and LDH's permitting and health mitigation activities may have an adverse and disparate impact on Black residents who live or attend school near the plants or within the industrial corridor.

The letter recommends, along with additional air and health monitoring, performance of cumulative risk analyses for each of the plants as well as all future air permitting activity in the industrial corridor.

Immediately prior to initiation of litigation, LDEQ and LDH were negotiating an informal resolution agreement, including a requirement to conduct a cumulative impacts analysis before permitting any projects in Cancer Alley.[4]

At some point, negotiation of the IRA failed. On May 24, Louisiana pushed back by filing the lawsuit against the EPA. Among other things, Louisiana claims that the EPA had overstepped its authority by attempting to moonlight as a social justice warrior rather than focusing on its environmental mission and that the EPA has no statutory or regulatory authority to require an analysis of impacts on communities of color before issuance of the permits.[5]

Louisiana also argues that Title VI only prohibits intentional discrimination — not activities that have a disparate impact on racial groups. On June 21, Louisiana requested a preliminary injunction prohibiting the EPA from "imposing or enforcing any disparate-impact-based requirements against the State or any State agency under Title VI."

Rather than respond this litigation challenge, the EPA elected to drop its pursuit of the two Title VI complaints. In a June 23 letter, the EPA stated that it was administratively closing its investigation of the Title VI complaints and EPA "will not initiate under Title VI or other civil rights laws any further action, enforcement or otherwise, in response to these Complaints."

The EPA touted certain successes as supporting its decision to close its investigation, including revisions to the challenged permits, as well as the EPA's commitment to conduct its own cumulative risk analysis at its own cost.

There can be many reasons why a case does not proceed, and it can be tricky to make inferences about why EPA could have declined to continue pursuing this matter, although one could consider whether the retreat was to avoid an adverse court decision on a key component of the EPA's environmental justice strategy.

Further, regardless, environmental and civil rights organizations may view the closure as a disturbing retreat from the EPA's environmental justice commitment.

On July 6, Louisiana responded to the EPA's withdrawal by narrowing its request for injunctive relief but not dismissing the entire action. Louisiana will continue to pursue an injunction on the disparate impact claims and seeks an injunction against the EPA "attempts to impose cumulative-impact requirements" on any state, specifically citing guidance issued by the EPA in August 2022 and January 2023.[6]

The EPA's withdrawal of the Louisiana Title VI investigations may indicate the EPA's recognition of a possible weak hand in its pursuit of Title VI investigations, especially where the investigation is supported mainly on disparate impacts versus intentional discrimination.

Beyond the eventual outcome of the litigation, it is noteworthy that the EPA's pursuit of the voluntary agreement with LDEQ and LDH was based on the EPA's "concerns," as opposed to substantiated allegations.

Such concerns can lead to the EPA seeking to foist multitudes of obligations on a state agency through a voluntary agreement, which may require the state agency to develop its own evidence proving the EPA's concerns through a voluntary agreement, e.g., cumulative impact analysis and air monitoring.

However, many state agencies have been willing to go along with the EPA's strategy, and reportedly, LDEQ and LDH were amenable to this route until they were not.

Beyond the Louisiana action, the last two years has seen EPA ramping up Title VI investigations, many of which are ongoing and some of which have been completed, resulting in settlement agreements to take action to address identified deficiencies.

The claims presented by Louisiana in its litigation against the EPA, coupled with the EPA's decision to no longer pursue such actions, may have ripple effects on the trajectory of ongoing investigations. However, certain settlement agreements of similar Title VI investigations may provide clues where the federal government may have more success.

For example, the EPA has accepted Title VI complaints in Michigan and Missouri and investigations are ongoing. The Missouri claims are associated with Missouri Department of Natural Resources permitting of a Kinder Morgan facility in St. Louis's Dutchtown, a predominantly Black and Hispanic neighborhood.

The Michigan investigations are related to the Michigan Department of the Environment, Great Lakes and Energy issuance of a permit to Ajax Materials Corp. to install and operate a new hot-mix asphalt plant near the Flint, Michigan, border and issuance of a permit to expand a Stellantis Jeep plant in a Detroit neighborhood.

A common theme of the underlying complaints are the disparate impacts resulting from the permitting decisions and the need for cumulative impact analyses. The Louisiana action demonstrates that, to the extent that the EPA's findings are based on disparate impacts, rather than intentional discrimination, the EPA's goal of entering settlement agreements may be at risk if Michigan or Missouri challenge such findings.[7]

However, the EPA may have more success when the local government welcomes the review of the civil rights issues, or another federal agency steps in to help.

The EPA initiated a Title VI investigation related to the issuance of a permit to Southside Recycling for a new scrap shredder in a low-income, predominantly Latino neighborhood on Chicago's southeast side. Additional concerns were raised as the facility was being constructed to replace a similar operation in a wealthy, largely white neighborhood.

Chicago welcomed the EPA's overtures and accepted its recommendation to halt and eventually deny the permit and conduct a cumulative impacts analysis.

Although the EPA's activities have been slowed through ongoing permit challenges, the U.S. Department of Housing and Urban Development has stepped in to fill the gap, with a parallel Title VI investigation resulting in a settlement agreement very similar to what would be expected from the EPA for an environmental justice community — improved land use and zoning decisions; development of environmental justice actions plans; performance of cumulative impact analyses; and development of standard air permit conditions.[8]

In addition, it is possible that Title VI investigations may be sufficient to show intentional discrimination. The U.S. Department of Health and Human Services and the Alabama Department of Public Health entered into a first-of-its-kind settlement agreement resolving issues related to the chronic underfunding of septic and sewer systems in Lowndes County, Alabama, which were well known and had been reported on for years by the national press.[9]

The agreement will require the APDH to cease enforcing sanitation laws against residents that cannot afford to upgrade its septic systems, which often put homeowners under the threat of arrest, criminal penalties and property liens, and to create an infrastructure improvement plan and identify funding resources, with continuing engagement with the Lowndes County community on a quarterly basis.

The impact of the Louisiana case on EPA's current and future Title VI investigations may rise or fall on whether the district court dismisses the case now that the EPA has closed the administrative matter.

If the district court does not dismiss the case, it is conceivable that the district court could decide to take on bigger policy issues regarding the EPA's use of disparate impacts to deny federal funding, with the case eventually winding its way through a friendly U.S. Court of Appeals for the Fifth Circuit and eventually to the U.S. Supreme Court.

In addition, the EPA's pursuit of cumulative impact analyses as a necessary part of permitting activities in overburdened communities may also falter. Finally, regardless of the outcome, the Louisiana case shows that there are numerous questions, issues and ambiguities regarding the EPA's strategy for enforcement of Title VI to achieve its environmental justice goals.

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[1] Complaint, May 24, 2023, Louisiana v. EPA, Case No. 2:23-cv-0062 (W.D. LA).

[2] Alexander v. Sandoval, 532 U.S. 275 (2001). United States Supreme Court held that there is no private right of action to pursue Section 602 claims for disparate impacts.

[3] EPA assessed whether LDEQ's and LDH's actions have an adverse disparate impact on residents who identify as Black living in or near the following areas: (1) the Denka Performance Elastomer LLC (Denka) facility in LaPlace, Louisiana; (2) the location of the proposed FG LA, LLC (Formosa) facility in St. James Parish; and (3) the Industrial Corridor.

[4] See The EPA was ready to clean up 'Cancer Alley.' Then it backed off. | Grist. <https://grist.org/equity/civil-rights-cancer-alley-louisiana-epa/>. The draft Informal Resolution Agreement was obtained by the Grist in support of this article. <https://s3.documentcloud.org/documents/23864145/20221220-ldeq-ira-draft-shared-w-ldeqdocx.pdf>.

[5] EPA's June 16, 2023 draft Guidelines for Cumulative Risk Assessment Planning and Problem Formulation (<https://www.epa.gov/risk/guidelines-cumulative-risk-assessment-planning-and-problem-formulation>) defines "cumulative risk assessment" as "an analysis, characterization, and possible quantification of the combined risks to health and or the environmental from multiple agents or stressors," a definition that has been used by EPA since 2003; however the scope and meaning of this term continues to change and expand to include non-environmental factors such as socioeconomic concerns and non-chemical stressors, and thus become subject to attack such as that set out in the Louisiana litigation.

[6] The Motion refers to EPA's August 2022 Interim Environmental Justice and Civil Rights in Permitting Frequently Asked Questions (https://www.epa.gov/system/files/documents/2022-08/EJ_and_CR_in_PERMITTING_FAQs_508_compliant.pdf) and January 2023 EPA Legal Tools to Advance Environmental Justice: Cumulative Impacts Addendum (https://www.epa.gov/system/files/documents/2022-12/bh508-Cumulative_Impacts_Addendum_Final_2022-11-28.pdf).

[7] Missouri Department of Natural Resources (MDNR) did agree to enter a Voluntary Compliance Agreement (VCA) (with EPA to implement a number of procedural safeguards; however, the VCA explicitly states that the issue regarding whether MDNR discriminated against or took actions that resulted in disparate impacts to the Dutchtown community in issuance of the permit is still outstanding.

[8] An interesting history of the facility and the HUD response may be found here: HUD accuses city of Chicago of environmental racism by moving polluters to Black, Latino neighborhoods, stemming from General Iron probe - Chicago Sun-Times ([suntimes.com](https://chicago.suntimes.com)) (<https://chicago.suntimes.com/2022/7/19/23270084/hud-civil-rights-general-iron-polluters-black-latino-neighborhoods-lightfoot>).

[9] An 18-month investigation (<https://www.justice.gov/opa/pr/departments-justice-and-health-and-human-services-announce-interim-resolution-agreement>) found areas of concern regarding Title VI compliance, including a "consistent pattern of inaction and/or neglect concerning the health risks associated with raw sewage [and] ... despite ADPH's awareness of the issues and the disproportionate burden and impact placed on Black residents in Lowndes County, it failed to take meaningful actions to remedy these conditions." Opinion | The Homes of Lowndes County, Ala., Are Waiting - The New York Times (nytimes.com), <https://www.nytimes.com/2023/06/19/opinion/environmental-racism-justice.html>; Opinion | A County Where the Sewer Is Your Lawn - The New York Times (nytimes.com), <https://www.nytimes.com/2018/05/22/opinion/alabama-poverty-sewers.html>; Opinion | In Alabama, Poverty and the Coronavirus Are a Double Blow - The New York Times (nytimes.com), <https://www.nytimes.com/2020/11/14/opinion/sunday/coronavirus-poverty-us.html>.