Utah Law Review

Volume 2024 | Number 1 Article 3

1-2024

Old and New Environmental Racism

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OLD AND NEW ENVIRONMENTAL RACISM

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Abstract

Over the past five decades, the U.S. Environmental Protection Agency ("EPA") moved from purposeful disregard of environmental racism to a public embrace of environmental justice as an organizational priority. Unfortunately, its efforts to address environmental discrimination remain a work-in-progress. This Article posits that the Agency's core difficulties have arisen out of its reluctance to accept the continuing salience of race and the substantive implications for its regulatory work. It has blinded the Agency to the evolving manifestations of environmental discrimination and associated harms. The effect has been to impede the aggressive enforcement of antidiscrimination laws, particularly the discriminatory effects regulations of Title VI of the Civil Rights Act.

In this Article I argue that the EPA's past failure to seriously grapple with the salience of race in its approach to environmental justice has created three serious blind spots in the Agency's civil rights enforcement program. First, EPA has extended unwarranted trust regarding compliance, even in instances of repeated discrimination complaints. Second, its superficial (albeit earnest) reviews of discriminatory effect allegations with respect to pollution risks have ignored the harms that even small increments of pollution risks can pose to communities of color. And third, its commitment to scientific analysis has allowed science to

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become a shield against social justice concerns and compounded environmental harms to environmental justice communities.

While these issues are specific to the Title VI context, like the proverbial canary in the coal mine, they call attention to deep-seated policy issues endangering the environmental welfare of vulnerable communities more generally. There are straightforward policy fixes to address the specific shortcomings identified here. The Biden Administration's efforts in this regard have been substantial and promising. However, long-term solutions to the environmental quality shortfall experienced by vulnerable communities more generally will require structural and cultural changes in the Agency.

INTRODUCTION

Raw sewage and fecal matter accumulating in backyards, sometimes backing up into homes,[1] public health emergencies due to lead-contaminated drinking water,[2] chemical and toxic waste-contaminated flood waters endangering residents after natural disasters,[3] and air pollution emergencies that send thousands to local hospitals for respiratory distress[4] are conditions that one might imagine in the poorest countries of the developing world or in an America from a century ago. Yet they are regularly encountered by people of color and other marginalized communities around the United States.

The disparate environmental conditions of minority communities and other marginalized populations have proven to be among the toughest, if not *the* toughest, long-standing environmental regulatory problem to vex the Environmental Protection Agency ("EPA" or "Agency").[5] Starting with the EPA's creation of the

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[1] *See* Catharine Smith, *Meet the Americans Who Live with Open Sewers in Their Yard*, HUFFINGTON POST (Dec. 18, 2017), https://www.huffpost.com/entry/sanitation-open-sewers-black-belt_n_5a33baf5e4b040881be99da5 [https://perma.cc/3XRT-4BQC]; *and* Sarah Kaplan, *Battling America's 'Dirty Secret*,*'* WASH. POST (Dec. 17, 2020), https://www.washingtonpost.com/climate-solutions/2020/12/17/climate-solutions-sewage/ [https://perma.cc/PDP3-RBMX].

[2] Eric Lutz & Erin McCormick, *A Black Town's Water Is More Poisoned than Flint's*, THE GUARDIAN (Sept. 21, 2021, 5:00 AM), https://www.theguardian.com/us-news/2021/sep/21/benton-harbor-michigan-lead-water-poisoned [https://perma.cc/YCC9-TSGV].

[3] Michael Biesecker & Frank Bajack, *Evidence of Spills at Toxic Site During Floods*, ASSOCIATED PRESS (Sept. 18, 2017, 5:38 PM), https://apnews.com/article/north-america-environment-hurricanes-floods-pasadena-892513ce11a146b0b0bd88ab17575f78 [https://perma.cc/8CQW-W4LB].

[4] Susan Cagle, Richmond v. Chevron*: The California City Taking on Its Most Powerful Polluter,* THE GUARDIAN (Oct. 9, 2019, 7:00 PM), https://www.theguardian.com/environment/2019/oct/09/richmond-chevron-california-city-polluter-fossil-fuel [https://perma.cc/8FNS-Q9VT].

[5] For an overview of the origins and development of the environmental justice movement, see ROBERT D. BULLARD, UNEQUAL PROTECTION: ENVIRONMENTAL JUSTICE

Office of Environmental Equity in 1991, the federal agency has supported a number of policies and initiatives addressing serious disparities in pollution conditions and environmental quality across communities. From the beginning, however, the EPA chose to ignore the embedded nature of racial biases in the regulatory system and approached these issues from a color-blind perspective.[6] Unfortunately, ignoring race as a salient characteristic of environmental disparities has seriously hampered effective responses.[7] For decades, it blinded the Agency to the continuing significance of race, especially as then-Reverend Benjamin Chavis described it when he coined the phrase "environmental racism." For Chavis, environmental racism described not only the discriminatory targeting of communities of color with pollution and toxics, but also the *failure of government officials to act on such racial disparities*. In his words, environmental racism was the product of "racial discrimination in environmental policymaking[,] enforcement of regulations and laws[,] the deliberate targeting of communities of color for toxic waste disposal and the siting of polluting industries[, and] the history of excluding people of color from the mainstream environmental groups . . . and regulatory bodies."[8] In fact, the continued pervasiveness of racial disparities even decades later has prompted at least one media commentator to call environmental racism another version of "The New Jim Crow."[9]

Over the decades, the EPA's reluctance to seriously grapple with racial discrimination issues has created blind spots in its programmatic work on environmental discrimination issues. Even if pollution itself does not discriminate on the basis of race, it has become clear that its effects do. Pollution exposure and other environmental risks are well known to compound and worsen pre-existing health risks and socio-economic disparities, disproportionately burdening communities of color.[10] Ignoring that reality comes at the peril to those who most need the protections of the EPA's regulatory mission.

AND COMMUNITIES OF COLOR (1994), ROBERT D. BULLARD, CONFRONTING ENVIRONMENTAL RACISM: VOICES FROM THE GRASSROOTS (1993), Richard J. Lazarus, *Pursuing "Environmental Justice": The Distributional Effects of Environmental Protection,* 87 NW. U. L. REV. 787, 853–55 (1993), and Sheila Foster, *Justice from the Ground Up: Distributive Inequities, Grassroots Resistance, and the Transformative Politics of the Environmental Justice Movement*, 86 CAL. L. REV. 775 (1998).

[6] *See infra* Part I.B.

[7] It is the same question that is challenging the Biden administration's Justice40 Initiative, designed to advance environmental justice objectives. *See* Lisa Friedman, *White House Takes Aim at Environmental Racism, but Won't Mention Race*, N.Y. TIMES (Feb. 15, 2022), https://www.nytimes.com/2022/02/15/climate/biden-environment-race-pollution.html [https://perma.cc/6YCT-DML7].

[8] Benjamin F. Chavis, *Foreword* to BULLARD, CONFRONTING ENVIRONMENTAL RACISM, *supra* note 5, at 3.

[9] Vann R. Newkirk II, *Environmental Racism Is the New Jim Crow*, THE ATLANTIC (June 5, 2017), https://www.theatlantic.com/video/index/529137/environmental-racism-is-the-new-jim-crow/ [https://perma.cc/KB99-UQCC]; *see also* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 2 (2010).

[10] *See* discussion *infra* Parts I.A, III.B.1.

These blind spots have been especially obvious in the Agency's implementation of its responsibilities under Title VI of the Civil Rights Act. Title VI prohibits racial discrimination by recipients of federal funding. Its ability to reach most state environmental regulatory programs and its prohibitions of practices with discriminatory effects via the implementing regulations have given it outsized importance for efforts to achieve environmental justice. Yet for decades, the Agency's Title VI program has been ineffective and dysfunctional. In almost three decades of operation and after receiving more than 400 Title VI complaints filed by community groups and individuals, the EPA has made several preliminary (*prima facie*) findings of violations of Title VI.[11] It has never made a final (conclusive) determination of discrimination.[12] Looking at these numbers, a reasonable observer might be led to believe that environmental racism and discrimination do not exist in the United States.[13]

It is important to acknowledge that the current administration has taken promising and substantial steps on environmental justice issues generally and civil rights enforcement specifically that overlap with some of the proposals of this Article.[14] In fact, President Biden's steps to elevate racial equity concerns and environmental justice across federal agencies as well as the EPA's related efforts have signaled a significant policy shift from the prior administration and evidence of learning from past missteps.[15]

While such initial progress and promising steps have reinvigorated attention to the Agency's longstanding challenges, there are reasons to remain concerned. First, future presidential administrations may be less sympathetic and could seek to reverse many of the newly instituted policies. And even if future administrations "merely" abandon promising policies, the question remains how deeply the new top-level policies and changes in Agency discourse will penetrate. In other words, how long will substantive change in institutional culture and programmatic reform persist

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[11] *See infra* note 96.

[12] *See infra* notes 96–97 and accompanying text. The two cases were settled after the preliminary (*prima facie*) findings. For the Agency's Title VI investigation process, see Part II.B.

[13] Even as recently as 2020, EPA's Office of Inspector General described continuing deficiencies in the Agency's Title VI enforcement program. *Cf.* JULIE NARIMATSU, KEVIN GOOD, GABBY FEKETE, JAMES HATFIELD & RENEE MCGHEE-LENART, IMPROVED EPA OVERSIGHT OF FUNDING RECIPIENTS' TITLE VI PROGRAMS COULD PREVENT DISCRIMINATION, U.S. ENV'T PROT. AGENCY, OFF. OF INSPECTOR GEN., 10–16 (2020), https://www.epaoig.gov/sites/default/files/2020-09/documents/_epaoig_20200928-20-e-0333.pdf [https://perma.cc/8PCQ-4FK6].

[14] *See* discussion *infra* Parts I.B (regarding the current efforts of the EPA), IV.A.1 (regarding Compliance Reviews).

[15] *See* discussion *infra* Part III.A. There are lots of indications that efforts to embed a commitment to racial equity and environmental justice within EPA and the environmental advocacy community more generally are starting to take hold. Yet, institutional change within federal agencies takes time. A senior career EPA staffer once shared with me in confidence that, paraphrased, "Presidential Administrations and political appointees come and go, but agency staff stay."

beyond the Biden administration, especially without substantive legislative and regulatory changes. The EPA's long history of starts and stops in addressing environmental justice issues, including civil rights enforcement, suggest caution with respect to expectations of durability and the depth of change in agency culture. In the end, akin to steering an aircraft carrier, changing course will have to deal with the inertia of issues that are deeply embedded in the Agency's institutional culture, structure, and programs.

Equally important, the Article also identifies concerns that the Biden administration has yet to turn its attention to. In that sense, the Biden administration's ongoing reform initiatives suggest a rare opportunity for broader change that can be informed by the discussion here.

The Article's basic argument is that the EPA's traditional efforts to look past race—an institutional culture of color blindness[16]—has not only blinded it to the continuing salience of race, but also to new manifestation of environmental racism. In appearance and content, the problems are not only of "old wine in new bottles," but also "new wine in old bottles." The EPA's failure to remedy racial disparities in environmental quality has left affected communities of color much like the proverbial canary in the coal mine—as the most vulnerable communities, their plight is indicative of broader problems in EPA's work on distributional equity and other non-race specific environmental justice issues. Within EPA's Title VI program, the three most serious manifestations of these troubles are: (1) its response to community claims of discrimination by state officials; (2) its assessment of the harms imposed by pollution and environmental risks; and (3) its response to claims of compounded environmental harms, including intangibles. Taken together, these three issues have been among the most important causes of EPA's Title VI program failures.

Part I of the Article provides an overview of environmental discrimination and why the lack of attention to racial discrimination concerns continue to matter. Part II describes EPA's antidiscrimination enforcement program under Title VI of the Civil Rights Act, its failures, and the established narratives of the causes of those failures. Part III describes the three blind spots in EPA's understanding of how discrimination has manifested itself in its regulatory oversight work and the consequences. Finally, Part IV suggests options for remedying those regulatory blind spots in terms of specific policy changes. It also suggests structural changes within the Agency and long-term initiatives that will address the broader goal of environmental justice.

The terminology in this Article utilizes "environmental discrimination" to refer to both intentional discriminatory actions as well as behaviors and practices that have the effect of discriminating. "Environmental racism" is used to describe discrimination in its pervasive or systemic aspects, especially structural inequalities

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[16] For a critical exploration of color-blindness and race-consciousness, see Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind*," 44 STAN. L. REV. 1 (1991), and Ian F. Haney López, "*A Nation of Minorities": Race, Ethnicity, and Reactionary Colorblindness*, 59 STAN. L. REV. 985 (2007).

and discrimination that are embedded in the ways that government, civil society, and industry address environmental issues, including the unequal effects of race-neutral programs and policies. Finally, "environmental justice" and "environmental equity" are used interchangeably, though "environmental equity" tends to focus on visible, measurable disparities, whereas "environmental justice" is used as an umbrella term to capture a broader range of unfairness experienced by marginalized communities with respect to environmental conditions, including issues of corrective justice, distributional justice, procedural fairness, and even social justice.[17]

I. THE PROBLEM OF ENVIRONMENTAL RACISM

This Part considers the following questions: What do we know about environmental discrimination and racial disparities? Given the great strides that modern environmental law has made in addressing pollution and other environmental problems, are such issues still relevant? Why does race continue to matter in thinking about and remedying environmental disparities and inequities?

A. Racial Disparities in Environmental Protection

As the EPA has entered its sixth decade, the media and academic studies of environmental issues remain filled with reports of serious pollution and environmental health issues affecting racial minority populations and the poor. Such conditions are striking given the federal government's long record of success cleaning up smog-filled urban air, restoring to fishable and swimmable condition once-burning rivers, decontaminating hundreds of dangerous hazardous waste sites across the nation, drastically reducing acid rain, and eliminating the use of stratospheric ozone layer-destroying chlorofluorocarbons ("CFCs").

For example, in 2015, Michigan state officials ignored water treatment failures in the municipal water system of Flint, a city of less than 100,000 with a large population of poor and minority residents.[18] The contaminated drinking water

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[17] Traditionally, academics have theorized environmental justice as falling into four forms of justice: distributional equity, procedural justice, corrective justice, and social justice. *See, e.g.*, Robert R. Kuehn, *A Taxonomy of Environmental Justice*, 30 ENVT'L. L. REP. 10681, 10683–93 (2000). The most common descriptions of the first three are as follows: (1) distributive justice calling for the fair distribution of exposure to pollutants and other environmental stressors, access to environmental amenities, such as urban green spaces, and health risks; (2) corrective justice calling for remediation of environmental burdens experienced by minority communities due to past discrimination, such as lack of access to municipal sewer and drinking water services during times of Jim Crow or due to past redlining and other housing discrimination practices; and (3) procedural justice calling for equal access to participation in environmental regulatory processes, including in public hearings free of language barriers. *See id.*

[18] *See* MICH. C.R. COMM'N, THE FLINT WATER CRISIS: SYSTEMIC RACISM THROUGH THE LENS OF FLINT 84–85 (2017), https://www.michigan.gov/mdcr/-/media/Project/Website

caused lead poisoning in many of the city's residents, most seriously affecting children who will suffer long-term brain development harms and experience life-long learning impediments, behavior problems, and lowered IQ.[19] Not five years later, news media reported that the municipal drinking water in another Michigan city, Benton Harbor, with an eighty-five percent African American population, had even higher levels of lead contamination than the City of Flint. As Benton Harbor residents complained for years about tap water that was brown, fizzed, and had odors, the affluent neighboring city of St. Joseph, a similar-sized town with an approximately eighty-five percent White population, had no such problems.[20]

Other media stories and research studies have brought attention to rural, predominately Black communities such as Lowndes County, Alabama and Centreville, Illinois whose sanitary wastewater conditions resemble the conditions of third-world countries.[21] Lacking a sanitation infrastructure of sewers or septic tanks has left Lowndes residents with raw sewage accumulating in residents' backyards and nearby woods, sometimes even backing up into resident's homes. The result has been an overpowering stench and acute health risks to residents due to viruses and parasites in the wastewater. One study even suspected potential links to endemic hookworm infections in the area.[22] Years of community complaints produced no change, leading the U.S. Department of Justice to initiate an

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s/mdcr/mcrc/reports/2017/flint-crisis-report-edited.pdf?rev=db527d0e6c404254892c84c90 7988934&hash=4FE5D80919D374DC4D28E60B0E2F7678 [https://perma.cc/FC5N-SJZ3]; Merrit Kennedy, *Lead-Laced Water in Flint: A Step-by-Step Look at the Makings of a Crisis*, NATIONAL PUBLIC RADIO: THE TWO-WAY 3 (Apr. 20, 2016, 6:39 PM), https://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 [https://perma.cc/3UQL-SUKG]; *see* NAT'L CTR. FOR ENV'T HEALTH, DIV. OF ENV'T HEALTH SCI. & PRAC., *Health Effects of Lead Exposure,* CTRS. FOR DISEASE CONTROL & PREVENTION (Sept. 2, 2022), https://www.cdc.gov/nceh/lead/prevention/health-effects.htm [https://perma.cc/3FFL-FWXN].

[19] Kennedy, *supra* note 18, at 2; *see also* MICH. C.R. COMM'N, *supra* note 18, at 24, 68, 84–85.

[20] Lutz & McCormick, *supra* note 2.

[21] Smith, *supra* note 1; Catharine Smith, *'If White People Were Still Here, This Wouldn't Happen': The Majority-Black Town Flooded with Sewage,* THE GUARDIAN (Feb. 11, 2021, 1:00 PM), https://www.theguardian.com/us-news/2021/feb/11/centreville-illinois-flooding-sewage-overflow [https://perma.cc/HSR6-JFT9]. A May 2019 study by the Alabama Center for Rural Enterprise and Columbia University found that sanitary wastewater issues affected communities across the country, especially rural communities, Native American reservations, and in Puerto Rico. CATHERINE COLEMAN FLOWERS, JOANN KAMUF WARD, & INGA WINKLER, FLUSHED AND FORGOTTEN: SANITATION AND WASTEWATER IN RURAL COMMUNITIES IN THE UNITED STATES, ALA. CTR. FOR RURAL ENTER. 7 (2019), https://www.humanrightscolumbia.org/sites/default/files/Flushed%20and %20Forgotten%20-%20FINAL%20%281%29.pdf [https://perma.cc/UQW8-794Y].

[22] Smith, *supra* note 1; Kaplan, *supra* note 1; *see also* Dipali Pathak, *New Partnership Takes on Hookworm Infection in Rural Alabama*, BAYLOR COLL. OF MEDICINE (Jan. 13, 2021), https://www.bcm.edu/news/new-partnership-takes-on-hookworm-infection-in-rural-alabama [https://perma.cc/XT38-EBRF].

investigation into whether the County had violated federal civil rights laws in allowing such conditions to persist.[23]

These types of serious pollution events and health issues can be found across the country in communities made up of racial minorities, working class residents, and the poor. They are neither unusual nor new and involve issues ranging from drinking water and sanitation to air pollutants and toxic chemicals. However, such environmental inequities have become part of the broader public's understanding of environmental issues only since 1982, when the Warren County, North Carolina, protests against the siting of a hazardous waste facility in a predominately African American community gave rise to the modern environmental justice movement.[24]

Over the following decade, research confirmed the suspected racial disparities in regard to hazardous waste facility siting. A 1983 U.S. General Accounting Office ("GAO") study found that three of the four largest off-site hazardous waste facilities in EPA's Region IV, an eight-state area of the southeastern United States including North Carolina, were concentrated in communities that were overwhelmingly African American.[25] In 1987, the United Church of Christ's Commission for Racial Justice published the landmark *Toxic Wastes and Race in the US* report which determined that the racial make-up of a community was a better predictor of the location of commercial hazardous waste facilities than socio-economic status.[26] Since then, research studies have documented racial disparities in a variety of contexts. For example, a 2007 follow-up study reported that "*race continues to be a significant and robust predictor of commercial hazardous waste facility locations*

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[23] *See* David Nakamura & Dino Grandoni, *Justice Dept. to Investigate Rural Alabama County with Inadequate Sewage Systems,* WASH. POST (Nov. 9, 2021, 2:55 PM), https://www.washingtonpost.com/national-security/alabama-sewer-justice-investigation/2021/11/09/4a86bdce-4182-11ec-a3aa-0255edc02eb7_story.html [https://perma.cc/L3FR-MVQV].

[24] At the time, the protests were unsuccessful, and state officials allowed more than 6,000 truckloads of highly toxic and carcinogenic polychlorinated biphenyl (or "PCB") contaminated wastes to be deposited there even though the groundwater table was shallow and served as a local drinking water supply. It was not until 2003 that the hazardous waste was removed, and the site cleaned up. Renee Skelton & Vernice Miller, *The Environmental Justice Movement*, NAT'L RESOURCE DEFENSE COUNCIL (Mar. 17, 2016), https://www.nrdc.org/stories/environmental-justice-movement [https://perma.cc/Q86H-A4YX].

[25] U.S. GOV'T. ACCOUNTABILITY OFF., RCED-83-168, SITING OF HAZARDOUS WASTE LANDFILLS AND THEIR CORRELATION WITH RACIAL AND ECONOMIC STATUS OF SURROUNDING COMMUNITIES (1983).

[26] COMM'N FOR RACIAL JUST., UNITED CHURCH OF CHRIST, TOXIC WASTES AND RACE IN THE UNITED STATES: A NATIONAL REPORT ON THE RACIAL AND SOCIOECONOMIC CHARACTERISTICS OF COMMUNITIES WITH HAZARDOUS WASTE SITES (1987). In its key findings, the study determined that "three of every five African and Hispanic Americans lived in communities with uncontrolled toxic waste sites" and that "race proved to be the most significant among variables tested in association with the location of commercial hazardous waste facilities." *Id.* at xiv–xiii.

when socioeconomic factors are taken into account."[27] And a 2021 study published in *Science Advances* showed that "people of color breathe more particulate air pollution on average, a finding that holds across income levels and regions of the US."[28]

B. EPA's Environmental Justice Program

The public and the federal government increased their attention to these environmental issues after the 1982 Warren County protests. In 1990, EPA Administrator William Reilly created the EPA Office of Environmental Equity, later re-named the Office of Environmental Justice. In 1993, EPA established the National Environmental Justice Advisory Council, followed in 1994 by issuance of Executive Order 12,898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations."[29] Executive Order 12,898 created an interagency working group on environmental justice ("EJ") and called on all federal agencies to consider environmental justice issues in their operations.

Unfortunately, partisan polarization over environmental policy has stymied the EPA's long-term efforts on environmental justice issues. Subsequent presidents, however, have affirmed and expanded on the EPA's commitment to environmental

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[27] ROBERT D. BULLARD, PAUL MOHAI, ROBIN SAHA & BEVERLY WRIGHT, TOXIC WASTE AND RACE AT TWENTY: 1987–2007 xi (2007); *see also, e.g.*, Marianne Lavelle & Marcia Coyle, *Unequal Protection: The Racial Divide in Environmental Law: A Special Investigation*, 15 NAT'L L.J. S1, S2 (1992) (examining federal enforcement actions at Superfund toxic waste sites found racial disparities in the assessment of enforcement penalties assessed).

[28] *Study Finds Exposure to Air Pollution Higher for People of Color Regardless of Region or Income*, U.S. ENV'T PROT. AGENCY (Sept. 20, 2021), https://www.epa.gov/sciencematters/study-finds-exposure-air-pollution-higher-people-color-regardless-region-or-income [https://perma.cc/FBK3-57WK]; *see also* Christopher W. Tessum, David A. Paolella, Sarah E. Chambliss, Joshua S. Apte, Jason D. Hill & Julian D. Marshall, *PM2.5 Polluters Disproportionately and Systemically Affect People of Color in the United States*, 7 SCI. ADVANCES, no. 18, 2021, at 1 ("Here, we model anthropogenic sources of PM2.5 exposure resolved by race and ethnicity and show that nearly all major emission source sectors disproportionately affect people of color (POC)."); *Disparities in the Impact of Air Pollution*, AM. LUNG ASS'N, (Apr. 17, 2023), https://www.lung.org/clean-air/outdoors/who-is-at-risk/disparities [https://perma.cc/P4DN-XFKU] ("Poorer people and some racial and ethnic groups are among those who often face higher exposure to pollutants and who may experience greater responses to such pollution."); David J.X. Gonzalez, Anthony Nardone, Andrew V. Nguyen, Rachel Morello-Frosch & Joan A. Casey, *Historic Redlining and the Siting of Oil and Gas Wells in the United States*, 33 J. EXPOSURE SCI. & ENV'T. EPIDEMIOLOGY 76, 76 (2022) (finding disparate density of oil and gas wells in historically red-lined communities); Dylan Syoboda, *Research: More Oil and Gas Wells in Redlined Neighborhoods*, BERKELEY PUB. HEALTH (Apr. 13, 2022), https://publichealth.berkeley.edu/news-media/research-highlights/research-more-oil-and-gas-wells-in-redlined-neighborhoods/ [https://perma.cc/U3M7-3RNA].

[29] Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 16, 1994).

justice.[30] For example, during the Obama years, the Agency initiated planning efforts, such as *EJ 2014*[31] and the *EJ 2020 Action Agenda for 2016–2020*,[32] both designed to provide strategic direction to the EPA's overall EJ efforts. In 2015, the EPA released EJSCREEN,[33] a public online EJ mapping and screening tool for identifying communities disproportionately impacted by pollution and other environmental risks, as well as its *Guidance on Considering Environmental Justice During the Development of Regulatory Actions*.[34]

The Biden Administration has also signaled the importance of environmental justice issues to its broader domestic policy agenda by Presidential Executive Orders 13,895[35] and 14,008,[36] establishment of the high-level White House Environmental Justice Advisory Council, and other actions on issues of concern to environmental justice activists.[37] Later, President Biden followed up with environmental justice

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[30] *See, e.g.*, Memorandum from Lisa P. Jackson, Administrator to All EPA Employees (Jan. 12, 2010), https://archive.epa.gov/epapages/newsroom_archive/newsreleases/bb39e443097b5df5852576a9006a5a86.html [https://perma.cc/M4SN-NSAY] (calling for the Agency to "include environmental justice principles in all of our decisions").

[31] For a so-called roadmap of the Agency's environmental justice programming, see U.S. ENV'T PROT. AGENCY, PLAN EJ 2014 (Jan. 3, 2023), https://www.epa.gov/environmentaljustice/plan-ej-2014 [https://perma.cc/8RKS-KQPV].

[32] *See* CLIFFORD VILLA, NADIA AHMAD, REBECCA BRATSPIES, ROGER LIN, CLIFFORD RECHTSCHAFFEN, EILEEN GAUNA & CATHERINE O'NEILL, ENVIRONMENTAL JUSTICE: LAW, POLICY, AND REGULATION 419–22 (3d ed. 2020).

[33] *How Was EJScreen Developed?*, U.S. ENV'T PROT. AGENCY (Jan. 30, 2023), https://www.epa.gov/ejscreen/how-was-ejscreen-developed [https://perma.cc/B7WG-AYM7]. For additional details on EJSCREEN, see VILLA ET AL. *supra* note 32.

[34] U.S. ENV'T PROT. AGENCY, GUIDANCE ON CONSIDERING ENVIRONMENTAL JUSTICE DURING THE DEVELOPMENT OF REGULATORY ACTIONS (2015), https://www.epa.gov/sites/default/files/2015-06/documents/considering-ej-in-rulemaking-guide-final.pdf [https://perma.cc/MM9C-8DWR].

[35] Exec. Order No. 13,985, 86 Fed. Reg. 7009 (Jan. 25, 2021).

[36] Exec. Order No. 14,008, 86 Fed. Reg. 7619, 7622 (Feb. 1, 2021) (Noting, specifically, the need to elevate equity and justice concerns as a top priority as part of revitalizing the US economy and addressing climate change).

[37] *See, e.g.*, Coral Davenport, *EPA to Block Pesticide Tied to Neurological Harm in Children*, N.Y. TIMES (Aug. 18, 2021), https://www.nytimes.com/2021/08/18/climate/pesticides-epa-chlorpyrifos.html?searchResultPosition=4 [https://perma.cc/MSP6-XLVW] (reversing Trump Administration decision to continue permitting Chlorpyrifos registration, controversial for its neurological risks to children and farmworkers); *see also* Agya K. Aning, *The Biden Administration's Embrace of Environmental Justice Has Made Wary Activists Willing to Believe*, INSIDE CLIMATE NEWS (Aug. 1, 2021), https://insideclimatenews.org/news/01082021/biden-environmental-justice/ [https://perma.cc/MS6D-KTUM] (noting that Biden's executive order, "Tackling the Climate Crisis at Home and Abroad," requires federal agencies to include environmental justice considerations in their decision-making); Dean Scott, *EPA Plan for Top Environmental Equity Job Faces Long Road Ahead*, BLOOMBERG LAW (July 21, 2021, 4:00 AM), https://news.bloomberglaw.com/environment-and-energy/epa-plan-for-top-environmental-equity-job-faces-long-road-ahead

specific Executive Order 14,096,[38] which significantly expanded on the Clinton-era E.O. 12,898.

Yet, as the EPA came to publicly embrace concern for equity issues in the 1990s, it also deliberately distanced itself from the race-related aspects. In the Agency's 1992 first-of-its kind report on environmental disparities, *Environmental Equity: Reducing Risks for All Communities*, the Agency deliberately sought to avoid terminology focused on race. Instead, it chose to utilize the broader, color-blind terminology of environmental equity and environmental justice. The report asserted that "environmental equity" and "environmental justice" were alternate terms. It explained that it chose "the term environmental equity because it most readily lends itself to scientific risk analysis" and because the "distribution of environmental risk is often measurable and quantifiable," something that "the Agency can act on."[39] It also claimed environmental equity to be all-encompassing and broader than environmental racism because it included "risk burden placed on any population group, as defined by gender, age, income, as well as race."[40]

Of course, the value of a broad conception of environmental injustice as encompassing socio-economic, gender, and other issues was not lost on activists. Since a 1991 movement summit, the environmental justice movement has seen itself as a broad alliance of activists who have sought to bring greater attention to the unfair pollution burdens and other environmental inequities imposed on marginalized communities everywhere.[41] Common ground with activists in the developing world and faith leaders on issues such clandestine hazardous waste exports and calls for climate justice have not only helped the movement build powerful alliances but also enhanced its influence.[42]

Unfortunately, as the Agency's domestic work on environmental justice evolved, the choice of terminology proved to be not just a matter of semantics. Instead of broadening the scope of the program, it reflected a narrowing of the then-newly created Office of Environmental Justice's responsibilities. This became

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[https://perma.cc/6WMU-CNGZ] (noting that the Biden Administration has also proposed the creation of a Senate-confirmed Assistant Administrator for Environmental Justice, elevating the priority and stature given to these issues within the Agency).

[38] Exec. Order No. 14,096, 88 Fed. Reg. 25251, 25261 (Apr. 26, 2023) (noting that like its predecessor, E.O. 12898, this new E.O. does not purport to change any relevant laws and does not "create any right or benefit . . . enforceable at law or in equity.").

[39] U.S. ENV'T PROT. AGENCY, ENVIRONMENTAL EQUITY: REDUCING RISKS FOR ALL COMMUNITIES 2 (1992), https://www.epa.gov/sites/default/files/2015-02/documents/reducing_risk_com_vol2.pdf [https://perma.cc/V7ZR-M47N] [hereinafter EPA, ENVIRONMENTAL EQUITY].

[40] *Id.* at 3.

[41] In 1991, the First National People of Color Environmental Leadership Summit brought together over 300 delegates and 400 observers and supporters and produced the 17 Principles of the Environmental Justice that have formed the foundation of much of the environmental justice movement's work. LUKE W. COLE & SHEILA R. FOSTER, FROM THE GROUND UP: ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT 31–32 (2001).

[42] *See, e.g.*, POPE FRANCIS, LAUDATO SI': ON CARE FOR OUR COMMON HOME (2015).

evident in how the Agency's eventually allocated responsibility to equity and discrimination issues: programs and policy initiatives on non-race related equity issues, were pursued through the Office of Environmental Justice. In contrast, antidiscrimination enforcement responsibilities were segregated and assigned to the Agency's Office of Civil Rights, a program that, at the time, primarily dealt with employment discrimination claims within the EPA. Over the decades since, the Agency has hewed closely to this division in programmatic responsibilities, with the EPA's Office of Environmental Justice generally distancing itself from specific antidiscrimination efforts or race-conscious initiatives and using the term "environmental justice" to describe only non-race-related environmental equity efforts.[43]

In fact, the premise that environmental justice was not about race and that civil rights and race-related issues were somehow separate from all other equity efforts affected even the Agency's perception of appropriate legal authority to address equity issues. Consider a 2001 Environmental Law Institute Research Report prepared with support from EPA funding and presumably created to assist Agency regulators in their work.[44] Even though entitled "Opportunities for Advancing Environmental Justice: An Analysis of U.S. EPA Statutory Authorities,"[45] the 252-page report explicitly stated that its "research did *not* include a review of [the] EPA's authorities under Title VI of the Civil Rights Act of 1964."[46] How ironic it must have been for a person unfamiliar to these issues to peruse a 252-page statutory analysis report on opportunities to advance environmental justice and discover that the most specific statutory authority for the EPA to act on the concerns of communities with respect to environmental disparities was not part of the analysis.[47]

In many respects, reluctance to view environmental quality disparities as a product of racial discrimination and avoidance of race-conscious remedial programs should have been expected. Since its earliest days, the Agency's involvement in antidiscrimination enforcement has been more reluctant than enthusiastic. For example, the Agency's first Administrator, Bill Ruckelshaus, took a narrow view of the role of Title VI civil rights enforcement in the Agency's mission, de-emphasizing antidiscrimination perspectives and remedies.[48]

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[43] The latter (i.e. use of the term environmental justice only to describe non-civil rights-related issues) is a reflection of the author's personal experience interacting with Agency staff over the years.

[44] ENV'T L. INST., OPPORTUNITIES FOR ADVANCING ENVIRONMENTAL JUSTICE: AN ANALYSIS OF U.S. EPA STATUTORY AUTHORITIES (2001) (disclaiming attribution of views to EPA in the acknowledgments).

[45] *Id.*

[46] *Id.* at v (emphasis added).

[47] While the Report refers to EPA's Title VI authority in several parts of the text, it declines to explore that authority. *See id.* at 10, 11, 30, 55, 96, 107, 129.

[48] *See* Lazarus, *supra* note 5 (describing testimony by then-EPA Administrator Bill Ruckelshaus before the U.S. Civil Rights Commission on the relevance of Title VI to the Agency's work and indicating hesitancy to use the statute's authorities aggressively).

Skepticism of environmental discrimination has not been limited to the Agency itself. As concerns about environmental racism gained public attention in the 1980s, those claims were attacked as merely representing another flavor of NIMBY (Not in My Backyard)[49] activism—suggesting that affected communities of color were complaining about petty annoyances.[50] Others asserted that the claimed environmental disparities were not the result of racial discrimination but rather attributable to economic disadvantage—communities were exposed to greater environmental burdens not because of their race, but because they were poor.[51] However, follow-up studies have since then found statistically significant correlations to race.[52] The relationship to race seemed to be underscored when

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According to Prof. Lazarus, Ruckelshaus noted that "absent a 'clear violation' of Title VI, 'the needs of the community' would have to be taken into account 'in the determination of what mandate [pollution control or anti-discrimination] receives priority' in a particular case." *Id.*

[49] NIMBY-ism was originally associated with opposition by middle class or wealthier communities to government construction projects or other facilities, such as a homeless shelter, that might affect their quality of life or lower property values, even when such projects might serve a broader public need or interest. In the environmental justice context, the NIMBY label has oftentimes been used to delegitimize community opposition to a project.

[50] *See, e.g.*, CHRISTOPHER H. FOREMAN, JR., THE PROMISE AND PERIL OF ENVIRONMENTAL JUSTICE 124–26 (1998); Michael S. Greve, *Environmental Justice or Political Opportunism?,* 9 ST. JOHN'S J. LEGAL COMMENT. 475, 479 (1994). Other critiques focused on the methodology of the UCC study. *See, e.g.*, Michael Mascarenhas, Ryken Grattet & Kathleen Mege, *Toxic Waste and Race in Twenty-First Century America: Neighborhood Poverty and Racial Composition in the Siting of Hazardous Waste Facilities*, 12 ENV'T AND SOC'Y: ADVANCES IN RSCH. 108, 112–15 (2021) (chronologizing the methodological debate).

[51] *See, e.g.*, Thomas Lambert & Christopher Boerner, *Environmental Inequity: Economic Causes, Economic Solutions*, 14 YALE J. ON REGUL. 195, 203–12 (1997) (examining waste facility siting in St. Louis, Missouri); *see also* Vicki Been, *Locally Undesirable Land Uses in Minority Neighborhoods: Disproportionate Siting or Market Dynamics?*, 103 YALE L.J. 1383, 1388–89 (1994). The economic discrimination explanation found its strongest articulation in the idea of "market dynamics" theory. Market dynamics posited that waste facilities were not intentionally sited in racial minority communities, but rather that racial minority and poor communities formed around such noxious facilities because land and housing were cheaper there. Of course, the historical legacy of housing segregation would also suggest a causal relationship to past racial discrimination.

[52] *See* BULLARD ET AL., *supra* note 27, at xi ("For Hispanics, African Americans and Asians/Pacific Islanders, statistically significant disparities exist in the majority or vast majority of EPA regions."); Vicki Been & Francis Gupta, *Coming to the Nuisance or Going to the Barrios? A Longitudinal Analysis of Environmental Justice Claims*, 24 ECOLOGY L.Q. 1, 31–35 (1997) ("As the claims of the environmental justice movement suggest, the percentages of African Americans and Hispanics both are significant positive predictors of the presence of a [hazardous waste] facility.").

research by Vicki Been, a Professor at NYU School of Law, suggested that poor neighborhoods actually repelled rather than attracted hazardous waste facilities.[53]

C. The Continuing Relevance of Race

Decades later and in spite of significant progress on race relations and civil rights, the question of whether the observed environmental disparities are correlated with or the result of racial discrimination as opposed to socio-economic status remains important. It is relevant not only for intellectual curiosity and moral reasons, but also significant for maintaining public support for governmental intervention. Ignoring the significance of race and disregarding the persistence of racial discrimination impede understanding of the link between environmental disparities and discrimination. When the cause of environmental inequities is obscured, public support for remedial policy responses is impaired.[54]

It is also significant as a matter of law. Since racial discrimination is illegal in its many forms under the U.S. Constitution, federal statutes, and state civil rights laws (including as discriminatory effects under specific statutes) there are also obvious legal implications. Most importantly for the EPA, it triggers the applicability of Title VI of the Civil Rights Act.

For the EPA's civil rights enforcements efforts, color-blindness has been pernicious for at least two reasons. First, it has affected the Agency's exercise of its enforcement discretion. Within the current legal and structural framework of the EPA's Title VI program, enforcement of the disparate effect regulations rests almost entirely on the good-faith discretion of agency officials.[55] Since administrative law principles accord agencies with a great deal of discretion and deference, determinations of how to investigate and pursue alleged violations are almost completely within the purview of the Agency.[56] If officials are biased toward accepting race-neutral explanations of disparities, are unsympathetic to racial discrimination concerns, or view race conscious measures as illegitimate, Title VI is

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[53] Been & Gupta, *supra* note 52, at 31 (finding that "[c]ontrary to the claim that host neighborhoods currently are disproportionately poor, the percentage of individuals with incomes below the poverty line is a significant but negative predictor: the higher the percentage of the poor, the lower the likelihood that the tract hosts a facility.").

[54] *See, e.g.*, Dylan Bugden, *Environmental Inequality in the American Mind: The Problem of Color-Blind Environmental Racism*, SOC. PROBS., Mar. 2, 2022, at 1.

[55] *See* Alexander v. Sandoval, 532 U.S. 275, 275 (2001) (holding that "there is no private right of action to enforce disparate-impact regulations under Title VI.").

[56] *See, e.g.*, Lincoln v. Vigil, 508 U.S. 182, 191 (1993); Webster v. Doe, 486 U.S. 592, 599 (1988); Heckler v. Chaney, 470 U.S. 821, 831 (1985). Unfortunately, the EPA has provided only limited transparency as to its Title VI investigations and documentation of the substantive principles that have guided the exercise of its enforcement discretion. As noted, the 2000 Revised Title VI Investigation Guidance has not been revisited, and the 2017 Title VI Tool Kit produced only one chapter. *See infra* note 138.

likely to be under-enforced.[57] After all, staff are likely to prefer and choose policy options, regulatory tools, and legal interpretations that are viewed as consistent with their own values.[58]

Second, the Agency's color-blind approach to environmental justice has also impaired the Agency's recognition and understanding of contemporary discrimination, especially in its modern manifestation in environmental risks and cumulative effects. Ignoring the race component of environmental inequities has impeded regulatory understanding of environmental justice problems that are most obvious with respect to communities of color. And it has blinded the EPA to the special ways in which racial discrimination manifests itself within its area of expertise.

When regulators fail to do their duty to protect all persons equally and effectively, it deprives communities of the benefits that environmental laws are designed to achieve. It allows the harmful affirmative acts of polluters to be unleashed, uncontrolled by the law. And while the harms at issue are not unique to communities of color, color-blindness has made the Agency slow or reluctant to pick up on these issues.

The EPA's recent reform efforts, such as the merger of the Office of Environmental Justice with the External Civil Rights Compliance Office, are promising developments in the effort to raise the visibility and policy priority accorded to environmental justice issues.[59] Creation of a dedicated and independent program office will create space for the staff to engage their creativity and commitment to civil rights enforcement with respect to the environment.

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[57] In contrast, enforcement targets are unlikely to suffer such risks because Title VI "over-enforcement,"—when enforcement actions are unreasonable or inappropriate—can usually be challenged through the recipient's right to seek judicial review under the Administrative Procedure Act. *See generally* Administrative Procedure Act, 5 U.S.C. § 706. Under the current system, no such right is available to complaining communities because of *Sandoval*'s holding that there is no private right of action with respect to the disparate-impact standard and because of the Administrative Law principle that individuals cannot generally sue an agency for "non-enforcement." *See* United States. v. Texas, 143 S. Ct. 1964, 1973–74 (2023) (holding that "a plaintiff arguably could obtain review of agency non-enforcement action if an action has consciously and expressly adopted a general policy that is so extreme as to amount to an abdication of its statutory responsibilities." (internal quotations omitted)).

[58] *See* JILL HARRISON, FROM THE INSIDE OUT: THE FIGHT FOR ENVIRONMENTAL JUSTICE WITHIN GOVERNMENT AGENCIES 83–86 (2019) (describing this type of "cultural resistance to environmental justice" as deeply embedded in the identity, values, and assumption of agency staff, relevant not only to shaping perceptions of "how things are, [but also to] how things should be.").

[59] *EPA Launches New National Office Dedicated to Advancing Environmental Justice and Civil Rights*, U.S. ENV'T PROT. AGENCY (Sept. 24, 2022), https://www.epa.gov/news releases/epa-launches-new-national-office-dedicated-advancing-environmental-justice-and-civil [https://perma.cc/Q9ZF-4VK5]. The merger creates a programmatic office that is designed to stand at the same level as other Assistant Administrator-level media and program offices. *Id.*

Nevertheless, it remains to be seen how the Agency's overall Title VI enforcement work will be enhanced by these changes.

II. ANTIDISCRIMINATION ENFORCEMENT UNDER TITLE VI OF THE CIVIL RIGHTS ACT

EPA's antidiscrimination enforcement program has a variety of legal tools at its disposal. Its most important tool has been Title VI, which provides that: "No person in the United States shall, on the grounds of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to the discrimination under any program or activity receiving Federal financial assistance."[60] Together with the EPA's implementing regulations, the statute has served as the Agency's main enforcement authority with respect to environmental discrimination complaints.[61] Unfortunately, the program has been deeply troubled for most of its active operation.

A. The Significance of Title VI

The Civil Rights Act of 1964 was part of a suite of 1960s civil rights era legislation that recognized the persistence of societal discrimination even a century after slavery. Title VI of the statute specifically addressed federal funding and ensured that it would not be used to finance or otherwise abet discrimination on the basis of race, color, or national origin. By leveraging Congress' purse strings to eliminate discriminatory practices, it was also intended as an alternative to the ponderous, time-consuming, and uncertain process of litigation.[62]

Within EPA's environmental justice efforts, Title VI has been important for three reasons. First, the EPA's Title VI implementing regulations have adopted a discriminatory effects standard. The statute itself, specifically Section 601 of Title

[60] 42 U.S.C. § 2000d. Title VI targeted discriminatory practices that were evident at the time, such as denying persons access to federal services due to race, color, or national origin, and clarified that government agencies had unambiguous authority to forbid discriminatory practices in their programs. U.S. DEP'T. OF JUST., TITLE VI LEGAL MANUAL § I, https://www.justice.gov/crt/fcs/T6manual [https://perma.cc/VB4P-6J7S] [hereinafter DOJ TITLE VI LEGAL MANUAL]. Title VI also sought to "insure the uniformity and permanence to the nondiscrimination policy" in all federally funded programs and activities. 110 CONG. REC. 6544 (1964). Authorized under Section 602 and via a series of Presidential Executive Orders, the latest being Exec. Order No. 12,250, 28 C.F.R. 41, app. A (1980), the Department of Justice coordinates and approves agency implementing regulations of Title VI on behalf of the President. DOJ TITLE VI LEGAL MANUAL, *supra* note 60, § III, at 2.

[61] In addition to Title VI of the Civil Rights Act of 1964, other relevant civil rights authorities include Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Section 13 of the Federal Water Pollution Control Act Amendments of 1972, which prohibits discrimination based on sex under programs or activities receiving financial assistance under the Clean Water Act.

[62] DOJ TITLE VI LEGAL MANUAL, *supra* note 60, § II, at 2.

VI, has been interpreted to prohibit only intentional discrimination. However, Section 602 explicitly authorizes and directs federal agencies to effectuate the statute's anti-discrimination objectives through agency rules and regulations.[63] Many agencies, including the EPA, have promulgated regulations that prohibit the use of "criteria or methods" having the *effect of discriminating*.[64] Those regulations specify that:

> (b) A recipient shall not use criteria or methods of administering its program or activity which have the effect of subjecting individuals to discrimination because of their race, color, national origin, or sex, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program or activity with respect to individuals of a particular race, color, national origin, or sex.
>
> (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 or activity 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.[65]

Because the discriminatory effect standard stands alongside and applies in addition to the statutory discriminatory intent standard, it effectively makes it easier to prove a Title VI discrimination claim.[66] That is important in the environmental justice context, where activists have encountered serious difficulties with proof of discriminatory intent. Demonstrating illegal motivation has been difficult for a variety of reasons. Regulatory decision-making is complex and involves a multitude

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[63] 42 U.S.C. § 2000d-1.

[64] Specific Prohibitions, 40 C.F.R. § 7.35 (1984); *see* DOJ TITLE VI LEGAL MANUAL, *supra* note 60, § VII, at 4; *see* Alexander v. Choate, 469 U.S. 287, 292–94 (1985); Guardians Ass'n v. Civ. Serv. Comm'n, 463 U.S. 582, 643 (1983) (Stevens, J., dissenting) (citing Lau v. Nichols, 414 U.S. 563, 568 (1974) (Stewart, J., concurring)); Fullilove v. Klutznick, 448 U.S. 448, 479 (1980) (showing that discriminatory effect regulations have repeatedly been affirmed by the United States Supreme Court).

[65] Specific Prohibitions, 40 C.F.R § 7.35; *see also* Applicants, 40 C.F.R. § 7.80 (1984) ("Applicants for EPA assistance shall submit an assurance with their applications stating that, with respect to their programs or activities that receive EPA assistance, they will comply with the requirements of this part.").

[66] The standard acknowledges that discrimination can result "from policies and practices that are neutral on their face but have the effect of discriminating." Memorandum from the Attorney General, U.S. Dep't of Just., Use of the Disparate Impact Standard in Administrative Regulations Under Title VI (July 14, 1994), https://www.justice.gov/archives/ag/attorney-general-july-14-1994-memorandum-use-disparate-impact-standard-administrative-regulations [https://perma.cc/XS5X-6J7P] (stating that the standard acknowledges that discrimination can result "from policies and practices that are neutral on their face but have the effect of discriminating").

of considerations. And the effects of past discrimination, such as the legacy of housing segregation, continue to exert their effects in the present. Cases brought under such theories have thus mostly been unsuccessful.[67] In contrast, the discriminatory effects standard of the Title VI regulations avoids the requirement for illegal motivation and thus lowers the bar for action on racial disparities.[68]

Second, Title VI imposes a set of *legal prohibitions* on discrimination, enforceable against federal funds recipients with punitive sanctions. Those include not only traditional judicial remedies such as injunctive relief but also the option of terminating or denying federal funding.[69] In contrast, almost all other federal government initiatives on environmental justice over the past three decades have consisted of voluntary and discretionary agency efforts, non-binding policy initiatives, or unenforceable Executive Orders.[70]

Third, the reach of Title VI is wide-ranging. Because the EPA's grant programs bring in billions of dollars in funding every year to state agencies and nonprofits,[71]

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[67] *See, e.g.*, R.I.S.E., Inc. v. Kay, 768 F. Supp. 1144, 1149–50 (E.D. Va. 1991) (finding that plaintiffs did not present sufficient evidence to meet standard of intentional discrimination); E. Bibb Twiggs Neighborhood Ass'n v. Macon-Bibb Cnty. Plan. & Zoning Comm'n, 706 F. Supp. 880, 887 (M.D. Ga. 1989) (finding in favor of defendants that location of landfill was not improperly motivated by race); Bean v. Sw. Waste Mgmt. Corp. 482 F. Supp. 673, 681 (S.D. Tex. 1979), aff'd, 782 F.2d 1038 (5th Cir. 1986) (denying motion for preliminary injunction based on statistical evidence presented; plaintiffs failed to establish substantial likelihood of success on the merits). *But see* Miller v. City of Dallas, 2002 WL 230834, at *6–10 (N.D. Tex., Feb. 14, 2002) (denying a motion to dismiss intentional discrimination claim regarding flood protection, zoning, industrial nuisances, landfill practices, and streets and drainage); *but see also* Banks v. McIntosh County, 530 F. Supp. 3d 1335, 1366–81 (S.D. Ga., 2021) (denying motion to dismiss intentional discrimination claim regarding disparate municipal services, including trash pick-up).

[68] Discriminatory effects evidence is also relevant to proving intentional discrimination itself.

[69] 42 U.S.C. § 2000d-1. Such remedies are triggered only if "compliance cannot be secured by voluntary means." Moreover, federal funding cannot be terminated or denied without thirty days prior notification to the relevant U.S. House and Senate committees. *Id.*

[70] *See, e.g.*, Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 11, 1994) (calling on each federal agency to "make achieving environmental justice part of its mission by identifying and addressing it, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations[.]"). In keeping with other Executive Orders, E.O. 12,898 is unenforceable in the courts. While the Order has never been formally revoked, the passage of time and comings-and-goings of Presidential Administrations has shown how haphazard its implementation has been. In fact, Republican Administrations have largely ignored it.

[71] Prior to 2020, annual funding ran at about $4 billion. *See* NARIMATSU ET AL., *supra* note 13, at 1. *But see* Infrastructure Investment and Jobs Act of 2021, Pub. L. No. 117–58, § 11101, 135 Stat. 430 (2021); Inflation Reduction Act of 2022, Pub. L. No. 117–169, 136 Stat. 1818 (Aug. 16, 2022), (appropriating billions more for EPA projects, including more than $50 billion for clean water projects and many billions for climate related projects). *See, e.g.*, *Fact Sheet: EPA & the Bipartisan Infrastructure Law*, U.S. ENV'T PROT. AGENCY (Nov.

the funding nexus of federal funding extends prohibitions on discrimination to many state and local regulators.[72] When a private organization or public body receives federal funding, the entire institution is deemed to be subject to the Title VI strictures, rather than only the particular portion of the institution that uses the funds.[73] The effect is to allow the EPA to impose non-discrimination requirements on the operations of a wide range of state environmental regulatory programs, including many activities that the federal environmental laws might not cover independently.[74]

B. The Travails of the EPA's Title VI Enforcement Program

When the attention of environmental justice activists turned to the EPA's Title VI program at the beginning of the Clinton administration, expectations ran high. In the following three decades, the EPA's Title VI program proved itself to be one of the greatest sources of frustration and disappointment to activists.[75] The program has

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15, 2022), https://www.epa.gov/infrastructure/fact-sheet-epa-bipartisan-infrastructure-law [https://perma.cc/CB57-KXSW]; *see also EPA Funding Announcements from the Bipartisan Infrastructure Law and the Inflation Reduction Act*, U.S. ENV'T PROT. AGENCY (Aug. 4, 2023), https://www.epa.gov/invest/epa-funding-announcements-bipartisan-infrastructure-law-and-inflation-reduction-act [https://perma.cc/H25S-Q5EW].

[72] According to DOJ regulations, a recipient is defined as "any State . . . or political subdivision, any public or private agency, institution, or organization, or other entity, or any individual, in any State, to whom Federal financial assistance is extended, directly or through another recipient, including any successor, assign, or transferee thereof, but such term does not include any ultimate beneficiary." 28 C.F.R. § 42.102(f). Financial assistance constitutes "use or rental of federal land or property at below market value, federal training, a loan of federal personnel, subsidies, and other arrangements with the intention of providing assistance. Federal financial assistance does not encompass contracts of guarantee or insurance, regulated programs, licenses, procurement contracts by the federal government at market value, or programs that provide direct benefits." DOJ TITLE VI LEGAL MANUAL, *supra* note 60, § V, at 5.

[73] With respect to state and local government entities that federal funding recipients, "program or activity" is deemed to be: (1) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or (2) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government. 42 U.S.C. § 2000d-4a(1). Generally, the terms "program or activity" are interpreted broadly, though construction is narrower with respect to private entities. DOJ TITLE VI LEGAL MANUAL, *supra* note 60, § V, at 21–22.

[74] Some states have become actively engaged in addressing concerns about environmental justice. For example, California has enacted a state equivalent to Title VI. *See* CAL. GOV'T CODE § 11135 (prohibiting discrimination on the basis race and other criteria by state-funded programs and activities).

[75] *See, e.g.*, Kristen Lombardi, Talia Buford & Ronnie Greene, *Environmental Racism Persists, and the EPA Is One Reason Why*, THE CTR. FOR PUB. INTEGRITY (Aug. 3, 2015), https://publicintegrity.org/environment/environmental-racism-persists-and-the-epa-is-one-

been *remarkably* unsuccessful.[76] Until recent years, complaint investigations proceeded at a snail's pace and, with only a few exceptions, have largely failed to identify actionable instances of violations.[77]

The EPA's Title VI implementing regulations are long-standing, originally promulgated in 1973 and revised in 1984.[78] However, the Agency failed to substantively act on them for decades.[79] As public concern about environmental justice issues grew in the 1980s, activists started to press the Agency to make substantive use of the discriminatory effects regulations. Beginning in 1993, complaints alleging violations of Title VI by state and local regulators began to arrive in the EPA's offices.[80] Little happened until the 1998 issuance of an Interim Guidance document describing how the Agency would resolve such complaints.[81] Controversy immediately ensued, triggered in large part by the adoption of the "rebuttable presumption," a policy that created a significant barrier for complainants to prevail on a Title VI claim.[82]

After convening a federal advisory committee to review the *Interim Guidance*,[83] the Agency published a *Draft Revised Guidance* in June 2000.[84] Unfortunately, that did little to quell the controversy. In any event, with the change to a Republican administration, work on the Guidance essentially went dormant. As of this writing, no final Guidance has ever been issued. However, in the final days of the Obama administration, January 2017, the Agency published a separate

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reason-why/ [https://perma.cc/4NBW-W9QT] (quoting community activist's statement that "[u]nder the EPA's civil-rights division . . . nothing is done.").

[76] The Biden Administration EPA's reform efforts have been substantive and promising, though the long-term outcomes remain to be seen.

[77] *See* discussion *infra*, notes 85–94.

[78] While some regulatory changes were proposed in 2015, EPA withdrew them after significant adverse public reaction. *See* Nondiscrimination in Programs or Activities Receiving Federal Assistance from the Environmental Protection Agency, 80 Fed. Reg. 77284 (proposed Dec. 14, 2015); *see also* Nondiscrimination in Programs or Activities Receiving Federal Assistance from the Environmental Protection Agency, 82 Fed. Reg. 2294 (proposed Jan. 9, 2017).

[79] *See* discussion *supra* note 48, regarding Ruckelshaus position on Title VI.

[80] *See* Luke W. Cole, *"Wrong on the Facts, Wrong on the Law": Civil Rights Advocates Excoriate EPA's Most Recent Title VI Misstep*, 29 ENV'T L. REP. 10775, 10775 (1999).

[81] *See* U.S. ENV'T PROT. AGENCY, INTERIM GUIDANCE FOR INVESTIGATING TITLE VI ADMINISTRATIVE COMPLAINTS CHALLENGING PERMIT (1998).

[82] *See* discussion of the rebuttable presumption *infra* Part III.B.

[83] U.S. ENV'T PROT. AGENCY, REPORT OF THE TITLE VI IMPLEMENTATION ADVISORY COMMITTEE: NEXT STEPS FOR EPA, STATE, AND LOCAL ENVIRONMENTAL JUSTICE PROGRAMS (1999).

[84] Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs (Draft Recipient Guidance) and Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits (Draft Revised Investigation Guidance), 65 Fed. Reg. 39650 (June 27, 2000) [hereinafter Draft Title VI Recipient and Revised Investigation Guidance].

document, the first chapter of a *Title VI Toolkit*, which covered some of the same issues as the *2000 Draft Revised Guidance*.[85]

Most recently, in its work to revisit some of these issues, the Biden administration issued a document entitled "Interim Environmental Justice and Civil Rights in Permitting Frequently Asked Questions (FAQs)" document in August 2022 that revised some of the considerations going into the Title investigative process.[86]

The EPA's first two-and-a-half-decade track record of Title VI enforcement has not been a happy one. Over the course of two decades (1999–2019) a variety of government-sponsored and independent studies have investigated and critiqued the EPA's Title VI program. These included an Agency-commissioned consultants' report,[87] an Agency Inspector General's report,[88] at least three reports by the U.S. Commission on Civil Rights,[89] and a comprehensive analysis of cases by the Center for Public Integrity.[90]

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[85] U.S. ENV'T PROT. AGENCY, EXTERNAL CIVIL RIGHTS COMPLIANCE OFFICE COMPLIANCE TOOLKIT, ch. 1 (Jan. 18, 2017), https://www.epa.gov/sites/default/files/2017-01/documents/toolkit-chapter1-transmittal_letter-faqs.pdf [https://perma.cc/8W6L-EM9Z] [hereinafter EPA, TOOLKIT]. In 2013, the Agency expanded the set of staff involved in civil rights enforcement work by establishing deputy civil rights officials in all programs and regional offices. *See* U.S. ENV'T PROT. AGENCY, CASE RESOLUTION MANUAL 52 (Jan. 2017), https://www.epa.gov/sites/default/files/2017-01/documents/final_epa_ogc_ecrco_crm_january_11_2017.pdf [https://perma.cc/2TTL-G65D] [hereinafter EPA, CASE RESOLUTION MANUAL].

[86] U.S. ENV'T PROT. AGENCY, ENVIRONMENTAL JUSTICE AND CIVIL RIGHTS IN PERMITTING FREQUENTLY ASKED QUESTIONS, Interim (Aug. 2022), https://www.epa.gov/system/files/documents/2022-08/EJ%20and%20CR%20in%20PERMITTING%20FAQs%20508%20compliant.pdf [https://perma.cc/Q684-Z92J] [hereinafter EPA, FREQUENTLY ASKED QUESTIONS].

[87] *See* DELOITTE, FINAL REPORT: EVALUATION OF THE EPA OFFICE OF CIVIL RIGHTS (2011), https://archive.epa.gov/epahome/ocr-statement/web/pdf/epa-ocr_20110321_finalreport.pdf [https://perma.cc/F6BU-XYQA] (detailing a variety of deficiencies of the Office of Civil Rights, including issues related to staff training, competency, and supervision).

[88] NARIMATSU ET AL., *supra* note 13.

[89] *See* U.S. COMM'N ON C.R., NOT IN MY BACKYARD: EXECUTIVE ORDER 12,898 AND TITLE VI AS TOOLS FOR ACHIEVING ENVIRONMENTAL JUSTICE (2003), https://www.usccr.gov/files/pubs/envjust/ej0104.pdf [https://perma.cc/JL4A-MTW5]; *see* U.S. COMM'N ON C.R., ENVIRONMENTAL JUSTICE: EXAMINING THE ENVIRONMENTAL PROTECTION AGENCY'S COMPLIANCE AND ENFORCEMENT OF TITLE VI AND EXECUTIVE ORDER 12,898 (2016), https://www.usccr.gov/files/pubs/2016/Statutory_Enforcement_Report2016.pdf [https://perma.cc/VL4A-8PLF] [hereinafter U.S. COMM'N ON C.R., ENVIRONMENTAL JUSTICE]; U.S. COMM'N ON C.R., ARE RIGHTS A REALITY? EVALUATING FEDERAL CIVIL RIGHTS. ENFORCEMENT: 2019 STATUTORY REPORT 385 (2019), https://www.usccr.gov/files/pubs/2019/11-21-Are-Rights-a-Reality.pdf [https://perma.cc7AEG-8H7W] [hereinafter U.S. COMM'N ON C.R., ARE RIGHTS A REALITY?].

[90] *See* Yue Qiu & Talia Buford, *Decades of Inaction*, CTR. FOR PUB. INTEGRITY (Aug. 3, 2015), https://publicintegrity.org/environment/decades-of-inaction/ [https://perma.cc/959F-46UW].

Even though the EPA has received more than four hundred complaints between 1992 and 2019,[91] these reports have shown that the Agency's case investigations during the first two decades were plagued by inordinate delays, non-compliance with the Agency's self-imposed deadlines,[92] few on-the-merits resolutions and even fewer decisions in favor of complainants, and failure to involve community stakeholders in complaint settlements. The Ninth Circuit Court of Appeals noted in 2009 that long delays in processing Title VI complaints were not "isolated" but rather part of a "consistent pattern of delay by the EPA."[93] According to the Center for Public Integrity, of some 264 Title VI complaints filed with the EPA between 1996 and 2013, sixty-three cases took between two to five years to resolve or were

[91] U.S. COMM'N ON C.R., ARE RIGHTS A REALITY?, *supra* note 89, at 395–96 (noting that the EPA has received 31, 25, and 15 complaints during 2016, 2017, and 2018 respectively and more than 350 complaints from 1993–2016).

[92] *See* U.S. COMM'N ON C.R., ARE RIGHTS A REALITY?, *supra* note 89, at 398. *See also* 40 C.F.R. § 7.120(c); 40 C.F.R. § 7.115 (c)(1) (stating that under its own regulations, the Agency is required to (1) acknowledge receipt of a complaint within five days, (2) "review the complaint for acceptance, rejection, or referral to the appropriate Federal agency" within twenty days of the acknowledgment, and (3) complete the complaint investigation and make preliminary findings and recommendations within 180 days of acceptance); 40 C.F.R. § 7.115(d) (stating that a preliminary finding triggers the right of the funding recipient, i.e., the complaint target, to respond and contest the findings before OCR finalizes and makes a formal determination of noncompliance).

[93] Rosemere Neighborhood Ass'n v. EPA, 581 F.3d 1169, 1175 (9th Cir. 2009). In fact, when the Rosemere Neighborhood Association filed its June 2005 lawsuit to compel action on its Title VI retaliation complaint against the City of Vancouver, Washington, the Title VI complaint had been pending for 18 months without a decision on whether EPA would investigate. *Id.* at 1171. Soon after the lawsuit was filed, EPA accepted the Title VI complaint for investigation, and the federal court litigation was dismissed for mootness. *Id.* at 1171–72. After another 18 months elapsed without any conclusion of the investigation, and long after the 180-day deadline had passed, Rosemere sued EPA again. *Id.* at 1172. That prompted the Agency to complete its investigation, but it declined to find impermissible retaliation. *Id.* The Ninth Circuit noted that "Rosemere's experience before the EPA appears . . . typical of those who appeal to OCR to remedy civil rights violation" and "discovery has shown that the EPA failed to process a single complaint from 2006 or 2007 in accordance with its regulatory deadlines." *Id.* at 1175. Even a consultant's report commissioned by EPA itself acknowledged the delays as a concern. *See generally* DELOITTE, *supra* note 87, at 1 (noting a consistent pattern of delays by the EPA in processing Title VI complaints).

A 2015 Center for Public Integrity report that reviewed 265 complaints filed with EPA's Office of Civil Rights between 1996 and mid-2013 found the following: (1) where the case was dismissed as moot, "EPA took on average, 254 days – excluding weekends and holidays" to make a jurisdictional decision, and (2) on average "350 days to decide whether to investigate a case." In some cases, "the [Office of Civil Rights] took so long . . . that investigators had to dismiss the allegations as 'moot.'" In another instance, "a Title VI complainant had to wait 13 years for the Office of Civil Rights to respond only for the Office of Civil Rights to request 'additional information.'" U.S. COMM'N ON C.R., ENVIRONMENTAL JUSTICE, *supra* note 89, at 3233 (quoting Lombardi et al., *supra* note 75).

still pending, while another twenty-five cases took more than five years to resolve or were still pending at the time.[94]

For the time being, the delay problem appears to have been substantially abated,[95] though a second substantive concern has remained unresolved—the dearth of Title VI investigations that have actually resulted in findings of discrimination.[96] Over the course of the Agency's almost three decades experience with hundreds of Title VI complaints, the EPA has never made a formal finding of a Title VI violation and only several preliminary findings of Title VI violations.[97]

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[94] Qiu & Buford, *supra* note 90. Among the longest pending cases was a Title VI complaint against California state agencies over the operation of a hazardous waste facility in Kettleman City, in California's Central Valley. Filed in December 1994, EPA investigation took seventeen years to complete. Padres Hacia Una Vida Mejor v. Jackson, 922 F. Supp. 2d 1057, 1060 (E.D. Cal. 2013), *aff'd sub nom.* Padres Hacia Una Vida Mejor v. McCarthy, 614 F. App'x 895 (9th Cir. 2015). So far, the longest investigation delay is associated with the Genesee Power Station Title VI complaint against the Michigan Dept. of Environmental Quality, with the complaint initially filed in December 1992 and the investigation not completed until January 2017, some twenty-four years later. Letter from Lilian S. Dorka, Dir., U.S. EPA External C.R. Compliance Off., Off. of Gen. Couns., to Father Phil Schmitter (Jan. 19, 2017), https://www.documentcloud.org/documents/3410925-FINAL-Letter-to-Genesee-Case-Complainant-Father.html [https://perma.cc/2NYK-WZY9].

[95] U.S. ENV'T PROT. AGENCY, AT A GLANCE: IMPROVED EPA OVERSIGHT OF FUNDING RECIPIENTS' TITLE VI PROGRAMS COULD PREVENT DISCRIMINATION (2020), https://www.epaoig.gov/sites/default/files/2020-09/documents/_epaoig_20200928-20-e-0333_glance.pdf [https://perma.cc/4PTH-HNQJ] [hereinafter EPA, AT A GLANCE] (noting agency was able to clear a backlog of "61 cases from fiscal years 2017 through 2019").

[96] *See* Qiu & Buford, *supra* note 90. Of 264 Title VI complaints filed with EPA between 1996 and 2013, approximately 163 (more than sixty percent) were dismissed without an investigation. *Id.*

[97] Though EPA did make a preliminary finding of discrimination in the 2011 Angelita C case regarding California state pesticide regulations, a settlement with California's Department of Toxic Substances Control meant that EPA took no further formal action. *See, e.g.*, Letter from Rafael DeLeon, Dir., U.S. EPA Off. of C.R., to Christopher Reardon, Acting Dir., Cal. Dep't of Pesticide Regul., (Apr. 22, 2011), https://www.epa.gov/sites/default/files/2016-04/documents/title6-c42211-preliminary-finding.pdf [https://perma.cc/2JFS-5F2N]. In a separate Title VI complaint against the Michigan Department of Environmental Quality regarding the Genesee Power Plant, the Agency made its first finding of racial discrimination in the treatment of African Americans in public hearings. Qiu & Buford, *supra* note 90, at 149. In spite of the discrimination finding, however, EPA closed the complaint investigation because it was deemed best to pursue the concerns in another then-pending Title VI complaint proceeding against the Michigan DEQ. *See* Letter from Lilian Dorka to Father Phil Schmitter, *supra* note 94, at 2. In a separate matter, with a letter also issued in the final days of the Obama Administration, EPA's ECRCO expressed its "deep concern about the possibility that African Americans, Latinos, and Native Americans have been subjected to discrimination as a result of NC DEQ's operation of the Swine Waste General Permit program." Letter from Lilian S. Dorka, Dir., EPA External C.R., Compliance Off., to

These issues—both long delays in the processing of Title VI complaints as well as lack of positive outcomes—did not go unnoticed by the Agency's leadership over the years. Over the past decade, the Agency has made substantial efforts to understand the causes and to find remedies.[98] For example, in December of 2016, the Agency moved the Title VI staff and its responsibility from its Office of Civil Rights into a newly-created "External Civil Rights Compliance Office" ("ECRCO") located within the Office of General Counsel.[99] And in January 2017, in the final days of the Obama administration, EPA's ECRCO released three documents: (1) a Strategic Plan to address Title VI case backlogs;[100] (2) a case resolution manual designed to speed processing of Title VI complaints;[101] and (3) Chapter 1 of a "Compliance Toolkit" clarifying existing law and policy, including the disparate impact standards under its Title VI regulations.[102] Nevertheless, a 2020 Office of Inspector General Report found that "ECRCO has not fully implemented an

William G. Ross, Acting Secretary, N.C. Dep't of Env't. Quality at 2 (Jan. 12, 2017), https://s3.documentcloud.org/documents/3381929/NCDEQ-Letter-of-Concern-from-EPA.pdf [https://perma.cc/G56P-SPHU]. At the time, EPA sought informal resolution of the Title VI complaint. *Id.*

Activists have also interpreted a settlement in a Title VI claim against the New Mexico Environmental Department as amounting to a preliminary finding of discrimination in 2017. *See* Letter from Lilian S. Dorka, Dir., EPA External C.R. Compliance Off., to Butch Tongate, Secretary-Designate, N.M. Env't Dep't at 1 (Jan. 19, 2017), https://www.epa.gov/sites/default/files/2017-01/documents/final-resolution-letter-and-agreement-triassic-park-recipinet-1-19-2017.pdf [https://perma.cc/N5YN-K64Q]; *see also* U.S. COMM'N ON C.R., ARE RIGHTS A REALITY?, *supra* note 89, at 399–400. In recent years, there have also been partial findings with respect to the Missouri Department of Natural Resources and with respect to the Bay Area Air Quality Management District. *See* Letter from Lilian S. Dorka, Dir., EPA External C.R. Compliance Off., to Carol S. Comer, Dir. Mo. Dep't Nat. Res. (Mar. 30, 2021), https://www.epa.gov/sites/default/files/2021-03/documents/2021.03.30_partial_preliminary_findings_letter_for_administrative_complaint_no._01rno-20-r7.pdf [https://perma.cc/D4VB-R2UY]; Letter from Lilian S. Dorka, Dir., EPA External C.R. Compliance Off., to Jack P. Broadbent, Chief Exec. Officer/Air Pollution Control Officer of Bay Area Air Quality Mgmt. Dist. (June 21, 2021), https://www.epa.gov/system/files/documents/2021-07/2021.06.21-baaqmd-final-preliminary-findings-letter-recipient-signed.pdf [https://perma.cc/SB4R-VX7B].

[98] For reports, *see supra* note 87.

[99] *See* NARIMATSU ET AL., *supra* note 13, at 2 n.1; *id.* at 5 ("[S]taffing in ECRCO has remained relatively steady at 11 to 12 full-time equivalents from fiscal years 2017 to 2019.").

[100] U.S. ENV'T PROT. AGENCY, EXTERNAL CIVIL RIGHTS COMPLIANCE OFFICE STRATEGIC PLAN: FISCAL YEAR 2015–2020 (Jan. 2017), https://19january2017snapshot.epa.gov/sites/production/files/2017-01/documents/final_strategic_plan_ecrco_january_10_2017.pdf [https://perma.cc/9UGD-MFUB].

[101] EPA, CASE RESOLUTION MANUAL, *supra* note 85, at 52.

[102] EPA, TOOLKIT, *supra* note 85, at 721.

oversight system to provide reasonable assurance that organizations receiving EPA funding are properly implementing Title VI."[103]

C. Established Narratives of the Title VI Enforcement Failures

Why has Title VI been so ineffective in vindicating community concerns about environmental racism, especially given the EPA's repeated public commitments to environmental justice? Over the years, a number of explanations have been advanced, raising various concerns about the Agency's Title VI enforcement program. Unfortunately, a fundamental problem has not been resolved—after more than 400 Title VI complaints, EPA has only made a handful of findings of *prima facie* violations of Title VI and never a final determination of discrimination.

Among the most well-established narratives are inadequacy-of-means explanations, suggesting that lack of success is due to insufficient legal authority, analytical tools, and resources.[104] For example, with respect to Title VI enforcement, the inadequacy of legal authority and limitations within existing antidiscrimination jurisprudence have been raised frequently as serious impediments. Academic journal articles point to the obstacle that the discriminatory intent requirement poses for proving claims under Title VI.[105] Additionally, since the 2001 US Supreme Court decision in *Alexander v. Sandoval*,[106] the Agency's discriminatory effects regulations can no longer be directly enforced by private individuals through a

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[103] *See* EPA, AT A GLANCE, *supra* note 95. However, as noted below, the Agency has committed to implementing the IG's recommendations, including a pre-award review process. Letter from Melissa Hoffer, Acting Gen. Couns., Marianne Engelman-Lado, Deputy Gen. Couns. for Env't Initiatives & Lilian S. Dorka, Dir., External C.R. Compliance Off., to Renee McGhee-Lenart, Acting Dir., Off. of Audit and Evaluation, EPA Off. of Inspector Gen. (Sept. 20, 2021), https://www.epa.gov/system/files/documents/2021-10/_epaoig_20-e-0333_agency_response2.pdf. [https://perma.cc/7W28-NMN4].

[104] HARRISON, *supra* note 58, at 80. In a recent study of the attitudes and perceptions of government staff on environmental justice generally, Professor Jill Harrison has grouped such means-limitation explanations in what she has referred to as the "standard narrative." They include (1) insufficient resources to address environmental justice issues, (2) insufficient legal authority and tools, and (3) inadequate analytical tools as key obstacles to more effective implementation of EJ goals. Her study instead points to agency staff themselves and their attitudes, i.e., individual recalcitrance as opposed to objective constraints, as limiting factors/impediments. *Id.*

[105] However, a number of legal analyses have suggested that a variety of legal tools are available to advance environmental justice more generally. At least since the late 1990s, federal environmental regulators have been aware of a number of residual legal authorities, so-called omnibus authorities, in the major federal environmental statutes that could be used in pollution permitting. *See generally* Richard J. Lazarus & Stephanie Tai, *Integrating Environmental Justice into EPA Permitting Authority*, 26 ECOLOGY L. Q. 617 642–47(1999). *See also* ENV'T L. INST., *supra* note 44, at 6. In 2011, the EPA's Office of General Counsel issued a lengthy memorandum formally delineating a variety of legal provisions that could be used by EPA program office to implement EJ considerations in their work.

[106] Alexander v. Sandoval, 532 U.S. 275, 275 (2001).

private right of action. Inadequacy of analytical tools to parse and document disparate environmental effects is also noted as a more general impediment to aggressive regulatory actions. For example, better cumulative impact assessment tools might improve analysis of the full range of stressors on communities.[107] Because communities raising environmental justice concerns are often exposed to multiple pollution sources and environmental burdens, such tools could help uncover and quantify unequal burdens.[108]

Yet the Agency does already have a lot of tools at its disposal, both legal and analytical. *Sandoval* did not specifically foreclose actions under Section 1983[109] nor did it foreclose EPA from going forward with its own enforcement actions. And with respect to analytical tools, agency staff themselves have shared the sense that there "is a lot we can do with what we know now."[110]

Another set of explanatory narratives focuses on the inadequacy of resources, especially staffing.[111] Allocation of agency resources to address EJ issues has never been as plentiful as desired by advocates. However, the EPA did create the Office of Environmental Justice in the 1990s as a dedicated advocate for pushing environmental justice priority into the organization's mainstream. At the same time, environmental justice has risen to the top of the Agency's priorities in the Obama and Biden administrations. In 2013, as part of an effort to develop a "model civil rights program," the EPA Administrator, Lisa Jackson, expanded the set of staff involved in civil rights enforcement work by establishing deputy civil rights officials, or "DCROs," in all programs and regional offices to assist with the Agency's civil rights enforcement program.[112] While nobody could reasonably

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[107] Cumulative effects analysis essentially examines how the compounded or aggregated impacts of various small environmental burdens and risks can aggregate into a larger or more significant effect.

[108] In its E.O. 13985 Equity Action Plan, EPA has identified development of a "comprehensive framework for considering cumulative impacts" as one of 6 Agency priorities. U.S. ENV'T PROT. AGENCY, E.O. 13985 EQUITY ACTION PLAN: U.S. ENVIRONMENTAL PROTECTION AGENCY 3 (Apr. 2022), https://www.epa.gov/system/files/documents/2022-04/epa_equityactionplan_april2022_508.pdf [https://perma.cc/9DG8-EQ9Z] [hereinafter EPA, E.O. 13985 EQUITY ACTION PLAN].

[109] However, actions under Section 1983 have not been successful so far. *See, e.g.*, South Camden Citizens in Action v. N. J. Dep't of Env't Prot., 254 F. Supp. 2d 486 (D.N.J. 2003) (granting Defendant's motion to dismiss intentional discrimination claim brought under 42 U.S.C. § 1983).

[110] HARRISON, *supra* note 58, at 76 (quoting an environmental justice staff member discussing analytical tools currently available to the environmental justice community). Unfortunately, inadequate information regarding cumulative effects has been cited by the Agency itself as a basis for rejecting Title VI disparate effect claims. *See* discussion *infra* Part III.C.

[111] *See, e.g.*, U.S. COMM'N ON C.R., ENVIRONMENTAL JUSTICE, *supra* note 89, at 92.

[112] *See* EPA, CASE RESOLUTION MANUAL, *supra* note 85, at 52.

declare victory in the struggle for adequate resources, these steps have been significant.[113]

Commentators also suggest that the Agency has failed to elevate Title VI as a policy priority or impress upon Agency staff to take such concerns seriously.[114] This high-level perspective on the problem is apt in pointing out EPA's historical disregard of discrimination issues and soft-pedaling of its statutory obligations to enforce Title VI, including at the highest levels of the Agency in the first decades of its existence.[115] Research by Professor Jill Harrison regarding Agency staff attitudes has also shown ingrained recalcitrance to fully recognizing environmental justice goals as important Agency policy priorities.[116]

While this description recognizes the most fundamental aspect of the problem, it is also of limited value for operationalizing a solution. After all, on past occasions, the Agency has publicly listed environmental justice as one of its top priorities.[117] Short of suggesting that those priorities were a sham, it raises the question why such prioritization was not effective in spurring aggressive enforcement of Title VI. Understanding why the Agency has not figured out how to prioritize enforcement of Title VI and improve outcomes more effectively is critical to effectuating change.[118]

Finally, there are concerns about the persistence of racial bias within the Agency. For example, Professor Jill Harrison's study suggested that racial prejudice persists within the Agency, including with respect to environmental justice-related programming and policies.[119] Without diminishing the concern that such findings should raise, however, such observations should be unsurprising in some respects. While it is likely that environmental agency employees may skew more progressive, their attitudes, values, and perceptions can also be expected to reflect those of the general public, which remains divided on many controversial issues, including race.

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[113] Undoubtedly, greater staff resources and funding would be helpful, especially as the Biden Administration is deploying them with respect to Compliance Reviews (as discussed further below) to proactively improve compliance. However, it does not explain (and does not address) the substantive concerns of how Title VI complaints have been resolved over the last several decades.

[114] *See, e.g.*, Marianne Engelman Lado, *No More Excuses: Building a New Vision of Civil Rights Enforcement in the Context of Environmental Justice*, 22 UNIV. PA. J. LAW & SOC. CHANGE 281 (2019).

[115] *See* discussion *supra* note 48 and accompanying text.

[116] *See* HARRISON, *supra* note 58, at 83–112.

[117] *See, e.g.*, Memorandum from Lisa P. Jackson to All EPA Employees, *supra* note 30 ("We must include environmental justice principles in all of our decisions."); *see also* Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 11, 1994).

[118] Furthermore, ongoing partisan hostility to EPA and its regulatory responsibilities have stymied its environmental programs in a number of areas, ranging from climate change measures to air pollution control to toxics regulation. Marginalized and vulnerable communities need solutions to these broader social and environmental problems just as well. A deeper understanding of why the Title VI program has largely failed so far can help to balance those priorities. *See generally* Lado, *supra* note 114.

[119] *See* HARRISON, *supra* note 58, at 99–102.

More importantly, instances of openly expressed racial prejudice, however surprising, are the exception rather than the norm.[120]

However, the role of implicit and structurally embedded biases remains less explored. This Article posits that the effect of structural biases, especially as they have distracted and averted attention away from discrimination harms important to communities of color, has not been given sufficient attention.

III. THE BLIND SPOTS IN EPA'S TITLE VI PROGRAM

The Agency's past decisions to sideline considerations of race as a key aspect of environmental justice problems has produced blind spots with respect to civil rights enforcement. First, they have frustrated the aggressive exercise of enforcement discretion to pursue Title VI concerns, effectively short-circuiting careful scrutiny of discrimination allegations. Second, they have blinded the Agency to contemporary forms of environmental discrimination and the negative effects on the environment and health of minority communities.

This Part provides three illustrations for these blind spots and argues that the Agency's institutional culture of ignoring the continuing relevance of race is responsible for three specific Title VI programmatic failures: (1) the Agency has consistently ignored serious concern about funding recipients' compliance with Title VI; (2) it has missed how discrimination has evolved and dismissed the harms that pollution risks have imposed on vulnerable communities; and (3) it has allowed its commitment to science and technical analysis to blind it to the importance of intangibles and the effects of compounded environmental harms on the overall environmental quality experienced by communities of color. In other words, the Agency has been blind to the continuing effects of past discrimination and the persistence of racial discrimination in old and new forms.

As noted above, the EPA under the Biden administration has made significant progress in enhancing compliance monitoring with respect to Title VI, including through the issuance of policy guidance regarding compliance audits of funding recipients and making Compliance Reviews a strategic priority. In that sense, the EPA's policy on the very first of the blind spots has changed significantly since the development of this Article. And while the Agency's present practice has already

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[120] This is implied by Harrison's study, where such instances of prejudice come as a surprise, especially in light of increased institutional representation within the senior ranks of EPA, most visibly at the top. Racial and ethnic diversity in the leadership rank and membership of the major national environmental organization was lacking in the past, as a 1990 letter by EJ activists to ten of the leading US environmental organizations noted. Letter from Southwest Organizing Project to Jay D. Hair, President of National Wildlife Federation (Mar. 16, 1990), https://www.ejnet.org/ej/swop.pdf [https://perma.cc/B9CT-XAFE]. While the racial make-up of senior leadership roles continues to skew towards white (and economically well-off) individuals, reports also show significant improvements. *See, e.g.*, GREEN 2.0, 2021 NGO & FOUNDATION TRANSPARENCY REPORT CARD (2021), https://diversegreen.org/wp-content/uploads/2021/11/2021-ngo-foundation-transparency-report-card.pdf [https://perma.cc/7QKE-ES2L].

adopted the suggestions posed in subsection III.A.1 as an important policy remedy, there is also not yet a track record of consistent practice. Until these policies become embedded within the Agency's practice, the description in Section III.A remains useful for providing an understanding of why the issue is important to an effective Title VI program.

A. Blind Trust in the Partnership with States: The Exercise of Enforcement Discretion

Avoidance of race has weakened EPA's commitment to aggressive Title VI oversight and desensitized it to concerns created by its close cooperative relationship with states. It has acted as if discrimination concerns raise no heightened concerns. Right from the start, when EPA's Title VI program began accepting complaints about environmental discrimination, activists suggested that the close federal-state relationship created by the prevailing system of cooperative environmental federalism might impede aggressive enforcement of Title VI.[121] For decades, ignoring such concerns contributed to the Agency's failure to use compliance tools, particularly so-called Compliance Reviews, that are commonplace in the civil rights enforcement programs of other federal agencies.

Within the Biden Administration, the Agency has taken promising steps to recognize and address the need to engage in more aggressive oversight of Title VI compliance. Unfortunately, there is also a long history of unsuccessful reform initiatives and even efforts to stall or ignore policy reform recommendations.

1. Oversight and Accountability Within Cooperative Federalism

Modern environmental laws expect the federal government to work closely with state regulators in achieving federal environmental objectives, a system that is oftentimes referred to as cooperative environmental federalism. EPA itself has even noted that "states should hold the primary responsibility for the operation of regulatory and enforcement programs" and that it "has a long-standing responsibility to enhance state capacity."[122] However, the attendant challenge of ensuring state

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[121] *See* Cole, *supra* note 80, at 10776.

[122] U.S. ENV'T PROT. AGENCY, REPORT OF THE TASK FORCE TO ENHANCE STATE CAPACITY: STRENGTHENING ENVIRONMENTAL MANAGEMENT IN THE UNITED STATES 2 (1993), https://19january2017snapshot.epa.gov/sites/production/files/2015-12/documents/strengthening_enviro_mgmt_in_us.pdf [https://perma.cc/6G35-VVNC]. The modern federal environmental regulatory system sought to centralize primary responsibility for ensuring environmental quality in the federal government, especially by authorizing direct regulation of polluters and authorizing federal enforcement of the new environmental laws. However, Congress did not abandon its commitment to cooperative federalism in the new environmental statutes, recognizing that state and federal regulators shared a common objective with respect to protecting the environment and public health. *See generally* David L. Markell, *The Role of Deterrence-Based Enforcement in a Reinvented State/Federal*

accountability for compliance with federal laws and standards is not unique to the EPA. Given the U.S. system of divided powers, federal-state cooperation is a necessity for achievement of public goals.[123] However, there are also significant distinguishing characteristics. When state programs fail to do their part, the EPA "remains ultimately accountable for effective administration of these laws and for accomplishing their purposes."[124]

For example, in regulating pollution under the Clean Air Act, the EPA expects state officials to prepare State Implementation Plans ("SIPs") that are designed to achieve federal air quality standards through the state's own regulatory authorities.[125] SIPs rely on and deploy a state's own laws and powers, including land use controls, traffic management measures, and other tools that are traditionally within the purview of local authority. When state officials fail (or sometimes refuse) to prepare and implement state plans that comply with the EPA requirements, the EPA's statutory obligation to achieve environmental regulatory objectives does not vanish. Federal regulators must then use their own legal powers and resources to implement the statutory requirements through a so-called "FIP," or federal implementation plan.[126] Given the complex nature of environmental regulation, the resource demands of implementation and enforcement of federal environmental standards, and the inherent limits of the federal government's legal authority in land use and other areas traditional reserved for local government regulation, "going it alone" is generally undesirable for federal officials.

To be sure, federal officials are by no means subservient to state environmental regulators. "Senior EPA officials and others" have described "EPA oversight of delegated state performance . . . as being of 'central importance' to the effective administration of the environmental laws."[127] As in any successful partnership and

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Relationship: The Divide Between Theory and Reality, 24 HARV. ENV'T L. REV. 1, 30 n.118 (2000) (describing the supporting literature).

[123] There is also a substantive environmental rationale for cooperation. The causes and effects of many serious environmental problems, ranging from air and water pollution to waste management are local in nature and call for the application of local knowledge to address them effectively.

[124] Markell, *supra* note 122, at 32.

[125] 42 U.S.C. §§ 7407(a), 7410(a).

[126] 42 U.S.C. §7410(c). For a general overview of state implementation of the Clean Air Act's National Ambient Air Quality Standards, *see, e.g.*, ROBERT V. PERCIVAL, CHRISTOPHER H. SCHROEDER, ALAN S. MILLER & JAMES P. LEAPE, ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 503–511 (9th ed. 2022).

[127] Markell, *supra* note 122, at 34. A 1995 Report described the EPA oversight of federally approved state environmental programs as "at the heart of federal-state conflict by its nature." ENVT'L L. INST., FEDERAL OVERSIGHT OF AUTHORIZED STATE ENVIRONMENTAL PROGRAMS: REFORMING THE SYSTEM 1 (1995), https://www.eli.org/sites/default/files/eli-pubs/federal-oversight-auth-state-env-programs-1995_0.pdf [https://perma.cc/YB2R-UPWT]. Even in the early days of EPA, enforcement officials noted that a "highly sensitive facet of the enforcement program has been maintenance of cooperative relationships with officials of state pollution control agencies." U.S. ENV'T PROT. AGENCY, OFF. ENF'T & GEN.

cooperative endeavor, expectations of mutual good will and good graces are high on both sides. Even if reluctance of federal officials to take more aggressive positions on Title VI enforcement may not be driven solely by such perceptions, it would be foolish to pretend that mutual reliance concerns do not matter.

At the same time, Congress was never so naïve as to assume that state policies would always be aligned with federal objectives. Built into the system are front-end mechanisms requiring federal scrutiny before state programs are approved and powers for federal officials to step in when there are state enforcement failures.[128] That is all to say that aggressive oversight of state compliance with Title VI is not inconsistent with the federal government's approach to cooperation with states under the environmental laws.

2. The Peril of Blind Trust: The Failure to Deploy Compliance Reviews as Oversight Tools

Yet, the Agency has ignored the serious peril that its close working relationship with states poses to the exercise of its Title VI oversight responsibility. Since the Agency received its first Title VI complaints in the early 1990s, there has been evidence of repeated discriminatory practices, policies, and malfeasance by state officials with respect to communities of color and low-income populations.[129] In fact, over the years, EPA has encountered evidence of intentional discrimination by state programs related to language and public participation issues as well as issues of repeated state non-compliance with Title VI.[130]

What is remarkable about these instances of state regulatory failures is that they did not previously trigger a formal EPA review of Title VI compliance broadly. A

COUNS., THE FIRST TWO YEARS: A REVIEW OF EPA'S ENFORCEMENT PROGRAMS 4 (1973), https://nepis.epa.gov/Exe/ZyPDF.cgi/9101IMT0.PDF?Dockey=9101IMT0.PDF [https://perma.cc/WEM4-6ZR7].

[128] *See, e.g.*, Clean Water Act, 33 U.S.C. § 1319(g)(6) (anticipating that federal officials might "overfile" a state's administrative enforcement efforts that are deemed inadequate. Environmental citizen suits, which allow private individuals to step into the shoes of government enforcers, are another accountability mechanism to ensure state compliance).

[129] *See* U.S. COMM'N ON C.R., ARE RIGHTS A REALITY?, *supra* note 89, at 398–99. For a timeline of events of the water-contamination crisis in Flint, Michigan, see Kennedy *supra* note 18. *See also* Boler v. Earley, 865 F.3d 391 (6th Cir. 2017), *cert. denied*, 138 S.Ct. 1294 (2018).

[130] *Compare* Letter from Lilian S. Dorka, Dir., External C.R. Compliance Off., to Lance LeFleur, Dir., Ala. Dep't of Env't Mgmt. 3 (Apr. 28, 2017), https://www.epa.gov/sites/default/files/2017-05/documents/06r-03-r4_closure_recipient_redacted.pdf [https://perma.cc/J5QW-3WHE] [hereinafter Letter from Lilian S. Dorka to Lance LeFleur Apr. 28] (regarding a 2003 Investigative Report that the Alabama Department of Environmental Management's Solid Waste Program could "lead to violations of EPA's Title VI regulations in the future"), *with* Letter from Rafael DeLeon, Dir., EPA, to Lance LeFleur, Dir., Ala. Dep't of Env't Quality 12 (Jan. 25, 2013), https://www.documentcloud.org/documents/2162473-epa_06r-03-r4.html [https://perma.cc/HP3B-D4D9] (regarding a 2013-filed Title VI complaint regarding the Stone's Throw Landfill raising almost identical concerns).

2020 Report of the Inspector General's Office noted such concerns among the persistent weaknesses of the EPA's Title VI enforcement program.[131] The Agency had failed to engage in systematic compliance reviews of state agency recipients' antidiscrimination programs. In fact, "many recipients d[id] not have Title VI safeguards," even though applicants for EPA funding are required to provide assurances that they will comply with civil rights statutes and agency regulations.[132] And while the remedy for such non-compliance includes delay or denial of funding, "ECRCO has never denied funding or held up an award due to Title VI concerns."[133]

Most importantly, until recently, the EPA has not used a readily available oversight tool that is common among federal agencies: Compliance Reviews. Compliance Reviews have been described as audits that review "the policies and procedures of a recipient," examine the recipient's ongoing "compliance with Title VI and other federal civil-rights laws," and produce recommendations for improved compliance.[134] They "differ from complaint investigations in that [the federal agency] has discretion in selecting the institutions it will review."[135] Because of the large number of funding recipients that each federal agency must supervise, compliance reviews allow for "spot checks" of selected recipients and let the agency "identify and remedy discrimination that may not be addressed through complaint investigations."[136]

Such compliance reviews have been part of Title VI enforcement programs at other federal agencies,[137] but they have not been implemented by the EPA until recently. This inaction is especially striking given that such reviews were identified as program components of EPA's 2017 *Title VI Case Resolution Manual* and were identified by the 2020 Office of Inspector General Report as an important concern.

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[131] *See* U.S. COMM'N ON C.R., ARE RIGHTS A REALITY?, *supra* note 89, at 398–99.

[132] NARIMATSU ET AL., *supra* note 13, at 12.

[133] *Id.*

[134] VANITA GUPTA, U.S. DEP'T OF JUST., MEMORANDUM ON THE DEPARTMENT'S IMPLEMENTATION AND ADMINSTRATIVE ENFORCEMENT OF TITLE VI AND THE SAFE STREETS ACT (2022), https://www.ojp.gov/sites/g/files/xyckuh241/files/media/document/ocr_titlevi.pdf [https://perma.cc/Y5X2-SMXR].

[135] OFF. OF C.R., U.S. DEP'T OF EDUC., *Education and Title VI* (Apr. 24, 2023), https://www2.ed.gov/about/offices/list/ocr/docs/hq43e4.html [https://perma.cc/UQS6-LU3Y].

[136] *Id.*; *see also Title VI Compliance*, FED. TRANSIT ADMIN. (Aug. 28, 2015), https://www.transit.dot.gov/regulations-and-guidance/civil-rights-ada/title-vi-compliance [https://perma.cc/9RVU-Q8HG] (explaining in addition to fulfilling an agency's oversight responsibilities, Compliance Reviews have also been used to "provide technical assistance and make recommendations regarding corrective actions, as deemed necessary and appropriate."); *Title VI Compliance Review Final Reports*, FED. TRANSIT ADMIN. (Sept. 17, 2021), https://www.transit.dot.gov/regulations-and-guidance/civil-rights-ada/title-vi-compliance-review-final-reports [https://perma.cc/N79C-C6X4] (stating the number of compliance review reports that the FTA OCR produces each year has fluctuated significantly, ranging from 1 in 2013 to 11 in 2011).

[137] *See, e.g.*, GUPTA, *supra* note 134; *Title VI Compliance Review Final Reports*, *supra* note 136.

It is encouraging that the Biden Administration has signaled greater scrutiny of recipient Title VI compliance by planning to initiate a significant number of recipient program compliance reviews as part of its *2022–2026 Strategic Plan*.[138] Of course, time will tell how these plans will be implemented.

B. Turning a Blind Eye to the Evolving Harms of Discrimination: The Effects of Incremental Environmental Risks

The Agency's reluctance to grapple with environmental discrimination issues has also produced a blind spot with respect to the changing nature of discrimination harms. In addition to traditional pollution harms such as illness and physical injuries, other relevant well-recognized harms in tort law include emotional distress, decreased property values, and nuisance concerns such as noise, odors, and vermin that may impact nearby communities through the siting and operation of polluting facilities and waste sites. However, impacted communities have also complained about environmental risks that increased exposure to pollution, such as waste disposal.

In the past, the EPA has not recognized such community concerns—whether raised as traditional tort or nuisance-type injuries or as risk concerns—as constituting an "adverse effect" (a cognizable injury) for purposes of Title VI.[139] Without violations of environmental regulatory standards or claims of environmental or health injuries that can be readily perceived or quantified, such complaints have been routinely dismissed.[140] Much like a missing damages element in a common law tort claim, the absence of an adverse effect negates a Title VI discriminatory effect claim. As a practical matter, this position has proven to be the death knell for almost all disparate effects complaints.[141]

It seems fair to suggest that the Agency's approach to Title VI enforcement is, at a minimum, confused. A recent guidance document by the Biden administration EPA suggests that the Agency is ready to recognize "odor, noise, and decrease in

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[138] U.S. ENV'T PROT. AGENCY, FY 2022–2026 EPA STRATEGIC PLAN 37 (2022), https://www.epa.gov/system/files/documents/2022-03/fy-2022-2026-epa-strategic-plan.pdf [https://perma.cc/89N7-G5K7] ("By September 30, 2026, initiate 45 proactive post-award civil rights compliance reviews to address discrimination issues in environmentally overburdened and underserved communities. By September 30, 2026, complete 305 audits to ensure EPA financial assistance recipients are complying with nondiscrimination program procedural requirements.").

[139] While traditional tort harms, such as emotional distress, decreased property values, and nuisance injuries, may not readily fit within the Agency's perceived regulatory expertise, there has never been a publicly articulated rationale for the Agency's ignoring them in its Title VI analysis. This issue is also discussed in Part III.C *infra*.

[140] *See, e.g.*, Part III.C.2, discussing 2013 Arrowhead Municipal Landfill Title VI complaint.

[141] *See supra* notes 93–94.

property values," in addition to harmful health effects, going forward.[142] However, the Agency has yet to recognize the harms imposed on communities from environmental risks associated with increased exposure to pollution and other forms of environmental degradation.

The Agency's traditional disregard of increased risk concerns by communities is in many respects as ironic as it is misguided. The EPA's regulatory mission has long focused on the management and reduction of environmental risks as a means to prevent latent and long-term health and environmental harms, such as cancer and ecological damage, that cumulate invisibly and manifest themselves only after some period of time.[143] Yet, the Agency's Title VI policy posture adhered to for decades has not deemed unmanifested risk by itself (without visible or concrete harm) as sufficient to constitute an "adverse effect," triggering further investigation into a community's Title VI complaints.

1. Precaution and the Problem of Environmental Risks for Vulnerable Communities

When Congress created the modern environmental laws in the 1970s, it sought to address not only failures of states to provide effective sub-national regulatory solutions, but also to respond to the shortcomings of the common law in managing pollution, especially with respect to proof of causation and the latent effects of pollution on the environment and public health. The resulting statutory scheme invested resources and authority in the newly created EPA to develop technical and scientific expertise and to design precautionary strategies to manage risks and harms.

Over the years, the environmental justice movement has shown that economic inequality and other social inequities can magnify the harms of environmental risks that would otherwise be deemed small or insignificant. First, even if the effect of other social inequities, whether unemployment, lack of access to good healthcare, blighted neighborhoods, etc., are not in themselves environmental stressors, they can create or contribute to conditions that increase exposure to pollution and other stressors. For example, poverty is known to induce more subsistence fishing, which can expose fishers to higher rates of exposure to toxic chemicals such as

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[142] EPA, FREQUENTLY ASKED QUESTIONS, *supra* note 86, at 12. However, it remains to be seen how this will be applied in specific Title VI investigations.

[143] *See, e.g.*, *PFAS Explained*, U.S. ENV'T PROT. AGENCY (Apr. 10, 2023), https://www.epa.gov/pfas/pfas-explained [https://perma.cc/64MZ-33TA] (explaining the EPA recently turned its attention to the risks of PFAS (Per- and Polyfluoroalkyl Substances), a set of widely used and long-lasting chemicals that break down only very slowly in the environment). These chemicals "are found in the blood of people and animals all over the world and are present at low levels in a variety of food products and in the environment." *Id*. PFAS "may be linked to harmful health effects in humans and animals." *Id*.; *see also EPA Administrator Regan Establishes New Council on PFAS*, U.S. ENV'T PROT. AGENCY (Apr. 27, 2021), https://www.epa.gov/newsreleases/epa-administrator-regan-establishes-new-council-pfas [https://perma.cc/RQQ4-ZM2E].

polychlorinated biphenyls, or PCBs, and heavy metals that are known to accumulate in fish.[144]

Second, economic and other social inequities can also make communities more susceptible to and affect the resilience of communities to overcome pollution, toxics, and other environmental risks. Even if pollution and environmental degradation itself does not discriminate on the basis of race, the effects oftentimes do.

For example, it is widely recognized that the poor are more vulnerable to the effects of global climate change. Their ability to adapt to the consequences of climate change—such as heat waves, droughts, floods, and other natural disasters—is impaired by their economic condition. The COVID-19 pandemic has also concretely illustrated the effect of enhanced health vulnerability from prior pollution exposures, including disparate air pollution exposure of people of color.[145] According to a Harvard Public Health School study, the effects of COVID-19 infections were more severe when super-imposed on long-term exposure to fine particle air pollution: an increase of one microgram/cubic meter of fine particle air pollution (or PM2.5) resulted in an eleven percent increase in COVID-19 mortality.[146] In other words, prior pollution exposure increases the vulnerability to future stressors or additional risks.

Apart from natural disasters and pandemic diseases, future dangers can also come from risks with a human origin, especially risks arising out of simple proximity to industrial facilities. For example, when Hurricane Harvey hit Houston, Texas, in August 2017, it caused flooding and a loss of power at the Arkema chemical plant. The resulting loss of refrigeration of volatile and flammable chemicals led to a series of plant explosions and release of toxic fumes, necessitating the evacuation of the surrounding community.[147] Additionally, news media also reported that the federal "government [had] received reports of three spills at one of Houston's dirtiest Superfund toxic waste sites."[148]

Similarly, when Hurricane Ida hit the Louisiana coast in September 2021, it caused varying degrees of damage to local petrochemical facilities and chemical

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[144] *See* Catherine A. O'Neill, *Variable Justice: Environmental Standards, Contaminated Fish, and "Acceptable" Risk to Native Peoples*, 19 STAN. ENV'T. L.J. 3, 7–11 (2000).

[145] *See supra* note 28 and accompanying text.

[146] X. Wu, R.C. Nethery, M.B. Sabath, D. Braun & F. Dominici, *Air Pollution and COVID-19 Mortality in the United States: Strengths and Limitations of an Ecological Regression Analysis*, 6 SCI. ADVANCES, no. 45, 2020 at 1, https://www.science.org/doi/10.1126/sciadv.abd4049 [https://perma.cc/D8F8-RXSW]; *see also* Lisa Friedman, *New Research Links Air Pollution to Higher Coronavirus Death Rates*, N.Y. TIMES (Apr. 17, 2020), https://www.nytimes.com/2020/04/07/climate/air-pollution-coronavirus-covid.html?searchResultPosition=1 [https://perma.cc/AK7A-5E4H].

[147] Julie Turkewitz, Henry Fountain & Hiroko Tabuchi, *New Hazard in Storm Zone: Chemical Blasts and 'Noxious' Smoke*, N.Y. TIMES (Aug. 31, 2017), https://www.nytimes.com/2017/08/31/us/texas-chemical-plant-explosion-arkema.html [https://perma.cc/DMU4-4CPM].

[148] Biesecker & Bajack, *supra* note 3.

plants. The widespread flooding and power outages made it impossible for plant personnel to access and redress malfunctions, resulting in similar releases of flammable and toxic feedstock chemicals and other pollutants into the environment.[149]

Then there are also pollution releases that are simply unpermitted or otherwise illegally emitted from industrial facilities. The problem seems to be particularly egregious during preparations for and during natural disasters, when pollution monitoring equipment may be shut-off or become inoperable because of disaster conditions. For example, preparation for the landfall of Hurricane Laura in 2020 triggered significant excess air pollution releases by chemical factories and oil refineries in the Houston area, which have been difficult to measure because of monitoring equipment failures.[150]

Predicting the probability of future hazards that could compound preexisting risk exposures is difficult. So far, the EPA has not been able to develop a complete understanding of how such risks and stressors affect communities of color, leaving them comparatively less protected than other communities.[151] However, such events and contingencies are clearly not unforeseeable.[152]

2. The Price of Turning a Blind Eye: Overlooking New Forms of Environmental Discrimination and Harms

The issue of risk is of special importance for triggering a violation of the Title VI discrimination effects regulations. To establish a "prima facie" case of discriminatory impact, not only must there be evidence of racial disparities, but there must also be a showing that the effects of the policy or practice is sufficiently

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[149] *See* Hiroko Tabuchi, *Lack of Power Hinders Assessment of Toxic Pollution Caused by Ida*, N.Y. TIMES (Sept. 8, 2021), https://www.nytimes.com/2021/09/01/climate/hurricane-ida-toxic-pollution.html [https://perma.cc/5G35-6KRN].

[150] Rebecca Hersher, *Millions of Pounds of Extra Pollution Were Released Before Hurricane Laura's Landfall*, NAT'L PUB. RADIO (Aug. 28, 2020, 11:39 AM), https://www.npr.org/sections/health-shots/2020/08/28/906822940/millions-of-pounds-of-extra-pollution-were-released-before-laura-made-landfall [https://perma.cc/DP3N-JPCX]; *see also* Matt Tresaugue, *Why Accurate Reporting of Air Pollution After Hurricane Harvey Matters*, ENVT'L DEF. FUND: CLIMATE 411 (Aug. 23, 2018), http://blogs.edf.org/climate411/2018/08/23/why-accurate-reporting-of-air-pollution-after-hurricane-harvey-matters/ [https://perma.cc/4CLP-NMNC].

[151] It has also been suggested that cumulative risk assessment could ultimately provide an answer to the question what environmental standards are in fact sufficiently protective of human health. *See, e.g.*, Charles Lee, *Confronting Disproportionate Impacts and Systemic Racism in Environmental Policy*, 51 ENVT'L L. REP. 10207, 10210 (2021).

[152] Or to rephrase a double negative, they can be reasonably foreseen in the same way that Helen Palsgraf in the famous *Palsgraf v. Long Island R.R.* case was a reasonably foreseeable victim during a station explosion because of her physical proximity. Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 105 (N.Y. App. Div. 1928).

injurious to be deemed an adverse impact, in other words, that there be "adversity" or harm.[153]

The EPA's interpretation of what qualifies as "adversity/harm" has largely followed the approaches of other federal agencies, since Title VI case law has not explicitly articulated what constitutes adversity.[154] The Agency thus evaluates "whether the policy or practice 'harms' a particular group of people enough to be actionable, [i.e.] . . . whether the alleged consequences are sufficiently adverse or harmful."[155] The types of effects that other federal agencies have deemed as qualifying include:

- Fewer or inferior services or benefits
- Affecting the distribution of burdens and negative effects
- Creating threatened or imminent harm
- Creating a mix of costs and benefits, with effects that are difficult to quantify[156]

For the EPA, the key question in the Title VI context has been whether exposure to pollution and other environmental stressors that create risk but *do not* produce

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[153] The issue arises under the disparate effects of federal agencies generally and has been derived by courts from Title VII jurisprudence. *See, e.g.*, N.Y. Urb. League, Inc. v. New York, 71 F.3d 1031, 1036 (2d Cir. 1995). Fair Housing Act disparate impacts claims have followed a similar analytical structure. The prevailing three-part test requires that: (1) is there a *prima facie* showing of a disparate effect that disproportionately affects individuals based on their race, color or national origin; (2) is there a substantial legitimate justification for the policy or practice; and (3) is there an alternative option that would still achieve the legitimate objective but have a lesser discriminatory effect. *See generally* DOJ TITLE VI LEGAL MANUAL, *supra* note 60, § VII, at 6–7. For the first part of the test, the *prima facie* disparate effect requirement, EPA guidance requires its staff to: (1) identify the specific policy or practice at issue; (2) establish adversity/harm; (3) establish disparity; and (4) establish causation. EPA, TOOLKIT, *supra* note 85, at 8. This formulation tracks verbatim the Justice Department's Title VI Manual, intended to guide Title VI implementation of all federal agencies. DOJ TITLE VI LEGAL MANUAL, *supra* note 60, § VII, at 9. Notably, this requirement excludes positive racial disparities as a basis for Title VI complaints, i.e., disparities that favor the racial minority complainant.

[154] In general, "courts frequently assume that the impacts alleged [in litigation] were sufficiently adverse." DOJ TITLE VI LEGAL MANUAL, *supra* note 60, § VII, at 12.

[155] *Id.* (emphasis added).

[156] *See, e.g.*, DOJ TITLE VI LEGAL MANUAL, *supra* note 60, § VII, at 13–16; *see also* FED. TRANSIT ADMIN., CIRCULAR 4702.1B, TITLE VI REQUIREMENTS AND GUIDELINES FOR FEDERAL TRANSIT ADMINISTRATION RECIPIENTS CHAP IV-13 (Oct. 1, 2012), https://www.transit.dot.gov/sites/fta.dot.gov/files/docs/FTA_Title_VI_FINAL.pdf [https://perma.cc/GH9H-H2DB] (stating adverse effects with respect to "major changes in transit services" include "reductions in service (e.g., elimination of route, shortlining a route, rerouting an existing route, increase in headways). . . . [Even a]dditions to service may also result in disparate impacts, especially if they come at the expense of reductions in service on other routes.").

imminent harms or cause other identifiable health effects in the affected communities satisfy the adversity/harm requirement. Can such risks *per se* constitute an "adverse effect" and trigger a prima facie disparate effects violation of Title VI? Beginning with its controversial 1998 decision in the *Select Steel* complaint, the EPA's answer has generally been "no" to that question.[157]

The position was initially based on what is now referred to as the "rebuttable presumption," developed in the *Select Steel* case and subsequent guidance documents.[158] The premise was that health-based environmental standards were designed to be protective of public health, and thus pollution exposures that stayed within those limits would not cause any health or environmental harms or create an adverse impact.[159] The presumption however could be overcome by "evidence that significant adverse impacts may occur."[160] The upshot of the rebuttable presumption was this: allegations of pollution exposure that did *not* result in a violation of applicable environmental standards could *also not by themselves* constitute an adverse impact, unless there was some showing of potential human health harms.[161]

The *Select Steel* decision and the "rebuttable presumption" were severely criticized at the time because it ignored concerns about "toxic hot spots, . . . the fact that significant health effects can occur at exposure to air pollution levels below NAAQS, [and] accidents and upset conditions at plants."[162] EPA formally stepped

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[157] Letter from Ann E. Goode, Dir., Office of C.R., EPA to Fr. Phil Schmitter, Co-Dir., St. Francis Prayer Center, Sr. Joanne Chiaverini, Co-Dir., St. Francis Prayer Center & Russell Harding, Director, Mich. Dep't of Env't Quality (1998), https://www.yumpu.com/en/document/read/11654633/select-steel-decision-memorandum-and-report-us-environmental [https://perma.cc/JPA9-Y96F]. EJ activists raised concerns about the air quality impacts of a proposed steel recycling mini-mill in Genesee, Michigan would disparately impact a minority community. EPA construed the complaint as alleging that the facility would impose additional pollution burdens on residents but would not otherwise violate applicable health-based air quality standards, here the National Ambient Air Quality Standards, or NAAQS. *But see* Cole, *supra* note 80, at 10777 (1999) (arguing that this was incorrect).

[158] Draft Title VI Recipient and Revised Investigation Guidance, 65 Fed. Reg. 39650, 39680–81 (June 27, 2000). Under the "rebuttable presumption," Title VI complaints that raised air pollution concerns, but where the "area in question is attaining the [NAAQS], the air quality in the surrounding community will generally be considered presumptively protective." *Id.*

[159] EPA noted that the incremental pollution emissions from the proposed facility would not cause an adverse effect within the meaning of Title VI because the "health-based standard [had] been set at a level . . . presumptively sufficient to protect public health and [because they allowed] for an adequate margin of safety for the population within the area." Letter from Ann E. Goode to Fr. Phil Schmitter, *supra* note 157, at 3.

[160] *Id.*

[161] As in common law tort analysis, illegality is not necessary to give rise to a legal wrong.

[162] Cole, *supra* note 80, at 10778. Cole raised additional concerns about health-based standards being developed through a political process and the "norm[ing]" of standards to healthy white males. *Id.* In other words, compliance with applicable environmental standards and permit conditions does not in itself ensure that the surrounding environment is in fact healthful.

away from the rebuttable presumption and the premise of health-protective environmental standards in 2013.[163] However, the Agency's most recent interpretation has not changed the underlying substantive analytical requirement for identifying adversity. Unless there is a showing of regulatory non-compliance, the Agency continues to look for evidence of identifiable and concrete injuries, maintaining that "[a]dversity exists if a fact specific inquiry determines that the nature, size, or likelihood of the impact is sufficient to make it an actionable harm."[164] In practice, this has meant that where additional pollution exposure stays within regulatory standard and no concrete injury is visible or identifiable, there can be no actionable harm—regardless of any additional risk that may come with the added pollution.[165]

The EPA's analytical approach to adverse disparate impacts is unfortunate. By inquiring whether "the nature, size, or likelihood of the impact is sufficient to make it an actionable harm,"[166] the EPA effectively asks whether immediate or imminent harmful effect is likely to result. In other words, the Agency focuses not on risk but rather on manifested harms and well-established adverse health consequences that will likely occur. It is a throw-back to outdated common law notions that ignores modern thinking about environmental risk and precaution. It ignores not only the

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[163] Draft Policy Papers Released for Public Comment: Title VI of the Civil Rights Act of 1964: Adversity and Compliance with Environmental Health-Based Thresholds, and Role of Complainants and Recipients in the Title VI Complaints and Resolution Process, 78 Fed. Reg. 24,739, 24,741 (Apr. 26, 2013) [hereinafter Draft Title VI Adversity and Compliance]; EPA, TOOLKIT, *supra* note 85, at 19 n.52; "FAQs" app. at 3. However, the Agency has continued to maintain that "[e]nvironmental health-based thresholds are set at levels intended to be protective of public health," though "presuming compliance with civil rights laws wherever there is compliance with environmental health-based thresholds may not give sufficient consideration to other factors that could also adversely impact human health." *Id.* Such a broadened analysis could also consider the "health conditions in the complainants' community[] and the emissions of other NAAQS- [National Ambient Air Quality Standards] and non-NAAQS regulated facilities in the area." S. Camden Citizens in Action v. N.J. Dep't of Envt'l Prot., 145 F. Supp. 2d 446, 487 (D.N.J. 2001), *opinion modified and supplemented*, 145 F. Supp. 2d 505 (D.N.J. 2001).

[164] EPA, TOOLKIT, *supra* note 85, at 8 n.41. *Cf.* Draft Title VI Recipient and Revised Investigation Guidance, 65 Fed. Reg. 39650, 39680–81 (June 27, 2000) (stating that to overcome rebuttable presumption regarding air quality standard for inhalation of airborne lead, investigators should look for evidence such as "high levels of lead in paint, soil, or water").

[165] As one illustration of the search for evidence of specific violations of law or of visible harms, consider the Agency dismissal of disparate effect claim regarding a waste transfer facility permit issued by the Arizona Department of Environmental Quality. It explained its dismissal by noting that "there were no unauthorized operations or exposure to unauthorized or uncontrolled emissions during the appeals process, nor is there any evidence of spills or other harm as the result of facility operations." Letter from Karen D. Higginbotham, Acting Dir., EPA, to Jaqueline E. Schafer, Dir., Ariz. Dep't of Env't 3 (June 24, 2003), https://www.documentcloud.org/documents/2162694-epa_19r-99-r9.html [https://perma.cc/W4E3-E77X].

[166] EPA, TOOLKIT, *supra* note 85, at 8 n.41.

fundamental idea of precaution—that waiting until harm arrives is unwise and ineffective—but also that there are harms that such exposures and risks create *in the present*.[167] Because preexisting pollution exposures or new risks create an elevated baseline of exposure/risk, where super-imposition of additional exposures or risks in the future could create new or additional harm, that increase of the baseline is a harm that should be cognizable under Title VI.

The role and legal significance of risk as the probability of physical harm, injury, or adverse effect to a legal interest has been acknowledged by courts in a variety of contexts, including as part of medical malpractice loss of a chance cases[168] and Article III[169] and prudential standing doctrine.[170] Commentators have even suggested that increased risk by itself could be a basis for tort recovery. For example, a position articulated by Dayna Matthew—Dean of George Washington University Law School—in a Congressional Black Caucus Foundation report,[171] suggested that *any* form of risk is in itself an adverse effect for Title VI purposes.

When *de minimis* increases in risk attributable to pollution and other environmental causes are indistinguishable from background variations in risk, it may not be possible to meaningfully evaluate their adverse effects. However, non-*de minimis* risks—risks that rise above background levels in terms of magnitude or that are of a different nature—create a present harm for the following reason: they *increase the susceptibility of the affected persons to other environmental stressors and risks*. Such non-*de minimis* increases in risk make their victims more vulnerable *now* to environmental stressors and risk that might arise in the future because they can combine to produce actual effects.[172] In other words, even when higher levels of

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[167] Among the characteristics of many environmental harms is that the origins may be dispersed among many (and thus culprits difficult to identify), that the harms may be latent and/or widely dispersed (and thus victims may be difficult to identify), and that a lot of environmental and public health harm are irreversible.

[168] *See, e.g.*, Cahoon v. Cummings, 734 N.E.2d 535, 544 (Ind. 2000); *see also* RESTATEMENT (SECOND) OF TORTS §323 (AM. L. INST. 1965).

[169] *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 580–81 (1992) (Kennedy, J., concurring).

[170] *See* Ass'n of Data Processing Serv. Org., Inc. v. Camp, 397 U.S. 150, 154 (1970).

[171] *See generally* Dayna Bowen Matthew, *How the New Administration Could Bring a New Day to the EPA's Title VI Enforcement*, CONG. BLACK CAUCUS FOUND. 3 (2017), https://www.cbcfinc.org/wp-content/uploads/2017/01/EPATitleVIReport.pdf [https://perma.cc/Z69L-5J7K].

[172] Vulnerability has been described as "the degree to which a population or an individual is unable to anticipate, cope with, resist and recover from the impacts of disasters[, and] is a function of susceptibility and resilience." WHO, ENVIRONMENTAL HEALTH IN EMERGENCIES AND DISASTERS: A PRACTICAL GUIDE 5 (B. Wisner & J. Adams eds., 2002), https://apps.who.int/iris/bitstream/handle/10665/42561/9241545410_eng.pdf [https://perma.cc/Z5XP-X9RG]. For an illustration in the context of safe drinking water access by minority and low-income communities, see KRISTI PULLEN FEDINICK, STEVE TAYLOR & MICHELE ROBERTS, WATERED DOWN JUSTICE, NAT'L RES. DEFENSE COUNCIL (2019), https://www.nrdc.org/sites/default/files/watered-down-justice-report.pdf. [https://perma.cc/

pollution or other stressors do not produce actual manifested health effects at the time of analysis, a non-*de minimis* risk nevertheless imposes a present harm.

The issue might appear novel to some; however, it is well recognized in law. For an illustration of the nature of increased vulnerability as a present harm, consider the role of insurance. Insurance is the result of markets putting a price on the cost of uncertainty and risk—the potential loss of money by business as well as losses to private individuals in the form of accidental loss of life, unexpected illness or injury, or even travel interruption. Insurance mitigates such risks by shifting the risk of future loss to the insurance carrier. However, insurance also provides a benefit in the present. In addition to psychological peace of mind, insurance provides financial stability for the policyholder, reducing or eliminating the need for a rainy-day-fund, freeing resources that can be allocated to more efficient uses, and increasing resilience, or the capacity to absorb other risk and unexpected contingencies.[173]

Thus, even if the potential contingency never materializes in the future, it would be false to say that the insurance policy holder did not receive something valuable in return for the policy premium. The insurance coverage has reduced the risk exposure or vulnerability *in the present* of the policy holder.

By analogy, disparities in pollution exposure and other environmental risk enhance the vulnerability and reduce the resilience of vulnerable communities. In an ideal world, impacted communities or individuals would manage such additional risks by setting aside resources to guard against the risks; unfortunately, the very conditions that lead the community to be disadvantaged ordinarily do not provide them with such additional resources. These effects of enhanced risks create a *present* injury that should satisfy the adversity/harm requirement within the disparate impact analysis of Title VI.[174]

The issue has arisen repeatedly in disparate effects claims regarding polluting plants and waste facilities.[175] Even when additional air pollution exposure from a

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8YYU-CH5G]. Such additional risk can also combine with pre-existing risks or environmental conditions to create visible harmful effects in the present.

[173] *See, e.g.*, ERIC GRANT, THE SOCIAL AND ECONOMIC VALUE OF INSURANCE: A GENEVA ASSOCIATION PAPER 15–18 (2012) (suggesting that risk mitigation can encourage entrepreneurial activity), https://www.genevaassociation.org/sites/default/files/research-topics-document-type/pdf_public//ga2012-the_social_and_economic_value_of_insurance.pdf. [https://perma.cc/5SG3-MBGW]; *see also* ANNA ROSE ALEXANDER, CITY ON FIRE 112 (2016) (stating that insurance provides "the confidence to invest and the freedom to take business risks"). Resilience is a concept that has become well-accepted as a key component of the ability of communities to respond to and adopt to adverse effects of climate change.

[174] Recognition of non-*de minimis* risks as adverse impacts under Title VI is consistent with EPA's own unique statutory mission to act in a precautionary manner and to prevent harm, not just redress it after the fact.

[175] For example, compliance with applicable regulations and lack of other current effects by the Heritage waste facility in Arizona did not negate the enhanced vulnerability of the surrounding community to the effects of future non-compliance and facility accidents associated with the operating permit grant. *See* Letter from Karen D. Higginbotham to Jaqueline E. Schafer, *supra* note 165. Likewise, methane exceedances at a landfill, such as

new industrial facility may not be above benchmarks indicating adversity, they are likely to make the community more susceptible to future exposures that could combine with the existing ones to cause adverse effects.[176]

The controversy about increased risk as an adverse effect has dogged the EPA for decades. Even if many aspects of the EPA's antidiscrimination program may be complex, there is a simplicity to this issue that even laypersons can readily grasp. To determine whether a risk increment or additional pollution exposure is a harm for Title VI purposes, the Agency should ask a straight-forward question: Is the affected community or person worse off? The answer to most non-*de minimis* increases in risk is likely to be yes.

C. Blinded by Science: Ignoring What Can't be Measured with Scientific Tools "She blinded me with science . . . Science!"[177]

Finally, reluctance to recognize the continuing salience of race has produced a third blind spot in EPA's approach to Title VI: its disregard of concerns that cannot be readily measured and the failure to address compounded environmental risks, usually referred to as cumulative effects. Most importantly, it has led EPA to ignore regulatory language that prohibits not only specific discriminatory practices but also protects communities of color from being denied the benefits of a recipient's program or activity.[178]

Unlike other Title VI enforcement failings, the issue of compounded effects, or cumulative impacts, is a concern that the EPA has been grappling with across its programmatic work. And while the context may look familiar with respect to community discrimination complaints or environmental nuisance-type harms, the issues have presented a broader challenge to its understanding of risk.

1. Science Culture as a Shield Against Social Justice Concerns

The EPA has long taken pride in its technical expertise and scientific identity. It has described itself as having "the largest scientific staff of any federal agency besides NASA"[179] and as

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at the Tallassee Waste Disposal Center in Alabama, increased the vulnerability of the surrounding community to future accidents. *See* Letter from Lilian S. Dorka to Lance LeFleur Apr. 28, *supra* note 130, at 3.

[176] *See generally* Letter from Lilian S. Dorka, Dir., U.S. EPA ECRCO to Heidi Grether, Dir., Mich. Dep't Env't Quality 23 (Jan. 19, 2017), https://www.epa.gov/sites/default/files/2017-01/documents/final-genesee-complaint-letter-to-director-grether-1-19-2017.pdf [https://perma.cc/NTG5-6VFD].

[177] THOMAS DOLBY, SHE BLINDED ME WITH SCIENCE (Harvest Records 1982).

[178] Specific Prohibition, 40 C.F.R. § 7.35; *see also* discussion *infra* notes 200–203 and accompanying text.

[179] Lisa P. Jackson, Adm'r, U.S. ENV'T PROT. AGENCY, MADISON MEDAL LECTURE AT PRINCETON UNIVERSITY, A LABORATORY OF ONE'S OWN (Feb. 25, 2012),

> one of the world's leading environmental and human health research organizations. Science provides the foundation for Agency policies, actions, and decisions made on behalf of the American people. . . . [T]he Agency's stringent scientific peer review processes are designed to ensure that all EPA decisions are founded on credible science and data.[180]

The Agency's commitment to science and scientific analysis is deeply embedded in its statutory scheme, including its mission to protect public health and the environment. Congressional statutes, agency regulations, and Executive Branch policies, have embedded scientific and technical perspectives deeply within the Agency's programs and processes. Many statutes require cost-benefit analysis and risk assessment and oftentimes call for modeling of complicated physical processes of air and water pollution dispersal and assessment of the potential effects of chemicals and pollutants on human health, other organisms, and the ecological systems. Moreover, since the 1980s, EPA's regulatory actions, like those of all other federal agencies, are subject to a regulatory impact analysis by the White House Office of Management and Budget, which has traditionally focused on economic cost-benefits assessment. Combined with frequent judicial challenges to the Agency's regulatory actions, staff are accustomed to proceeding with care and only upon careful consideration of adequate grounds regarding the costs of agency action. In other words, there are significant incentives to ensure that regulatory actions don't extend beyond what can be justified by such analyses.

Unfortunately, this strong commitment to science and scientific analysis has also undermined the Agency's commitment to environmental justice. When EPA de-emphasized environmental racism in adopting an environmental equity framework in 1992, it argued that doing so would be more comprehensive and more readily allow "scientific risk analysis" of issues that would "often [be] measurable and quantifiable."[181] Yet, the upshot has been the opposite, narrowing the Agency's analytical framework. It has caused the Agency to reflexively frame complaints in terms of its existing regulatory programs, excluding issues and impacts that cannot readily be quantified or measured. As many Title VI decision letters show, including those discussed in the next section, Agency staff routinely ignore concerns that cannot be readily measured through scientific methods or where scientific analysis is not readily available, no matter how patently obvious the harm.

Jill Harrison has described that the associated staff attitudes have even led to views that policies and measures to protect racial minority, low-income, and other marginalized communities as simply inconsistent with the organization's environmental protection mission.[182] As environmental specialists who are

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https://archive.epa.gov/epapages/newsroom_archive/speeches/7e0b0e0434a91708852579c8006941ef.html [https://perma.cc/F54D-4BGA].

[180] *Role of Science at EPA*, U.S. ENV'T PROT. AGENCY (Jan. 18, 2017), https://www.epa.gov/research/role-science-epa [https://perma.cc/VW93-A8K2].

[181] EPA, ENVIRONMENTAL EQUITY, *supra* note 39, at 2.

[182] *See* HARRISON, *supra* note 58, at 83–112.

conversant primarily, and maybe even exclusively, with technical analysis, such staff view environmental justice "as conflicting with the Agency's identity."[183] In the words of one, the "agency does ecology not sociology."[184] The sentiment then in the past has legitimized and reinforced the sense that EJ and social justice concerns are issues outside of the Agency's mission.

2. Missing the Forest for the Trees: The Problem of Ignoring Compounded Environmental Harms and Intangibles

Reflexive rejection of what cannot be measured with the Agency's scientific analysis tools or analyzed through its existing regulatory framework has been a serious problem in the Agency's Title VI investigations. When the Agency has encountered impacts that cannot readily be measured or analyzed by scientific methods, it has simply ignored them or reframed them to suit its existing tools and capabilities, regardless of whether that reframing accurately reflects the complainant's concerns. The issue has been especially acute with respect to environmental stressors that may be quite significant in everyday life, such as noise, odors, dust, or even traffic, but that are not regulated under the federal environmental statutes.[185] Often, they are much more than mere everyday annoyances and can seriously degrade the welfare of the surrounding community, even potentially posing health threats.[186]

To illustrate the predicament created by the Agency's investigative focus on measurable effects, take the Agency's handling of the 2013 Arrowhead Municipal

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[183] HARRISON, *supra* note 58, at 85. Others believed in the imperative of maintaining bureaucratic neutrality with respect to the interests of polluters on one side and EJ communities on the other. Yet, others openly dismissed any notion that environmental inequalities existed. *Id.* at 87.

[184] HARRISON, *supra* note 58, at 86.

[185] While noise used to be regulated by the EPA under the Noise Control Act of 1972, the Executive Branch chose to discontinue (with subsequent congressional acquiescence) the environmental noise research and regulatory programs conducted by the EPA's Office of Noise Abatement and Control in the 1980s. *See* Sidney A. Shapiro, *Lessons from a Public Policy Failure: EPA and Noise Abatement*, 19 ECOLOGY L. Q. 1, 1–2 (1992).

[186] Even when the Agency does have an applicable analytical framework to identify measurable indicators, there are "practical constraints [on Title VI] complaint investigations" arising out of the Agency's limited resources. Due to limitations on "the Agency's existing technical capabilities and [on] the availability of credible, reliable [scientific research] data" supporting community concerns, EPA can ordinarily only "gather pre-existing technical data" than "generat[e] new data." Draft Title VI Adversity and Compliance, 78 Fed. Reg. 24,739, 24,742 (Apr. 26, 2013). In real life, Title VI complainants are ordinarily grass-roots community organizations or activists with few resources, little technical expertise, and usually without regular legal representation that is expert in environmental law. The very reason why activists turn to Agency's Title VI enforcement program is to seek assistance from the Agency's resources and expertise. The implications are serious. When the available evidence does not meet the requirements for a Title VI prima facie case, EPA "ordinarily dismiss[es] the allegation." *Id.*

Landfill Title VI complaint. The case specifically illustrates how deeply the Agency has lost itself in technical analyses of specific pollution risks, regulatory compliance, and pollution modeling, even when the impacts may be patently obvious. At the time of the complaint, Arrowhead was the largest landfill in Alabama, covering an area of 1,000 acres and licensed to receive up to 15,000 tons of garbage each day. The Title VI disparate impact complaint specifically challenged the September 2011 renewal of the operating permit and a 2012 expansion permission that had allowed an almost doubling of the active disposal operations area from 256 acres to 425 acres.[187]

The complaint raised health-related concerns about air pollution—including acrid smells, dust, and profound odors[188]—contamination of the public water system and private wells,[189] flies and birds as disease vectors,[190] as well as non-health related issues concerning a local cemetery, roaming wildlife, and diminution of property values.[191] Many of the concerns raised by community members were not harms of the type ordinarily regulated under EPA statutes. However, they were undoubtedly conditions that seriously affected the lives and environmental quality of community members.

After an exhaustive review of engineering, environmental and health studies, and information available for each alleged disparate adverse effect, EPA found "insufficient evidence to establish a prima facie case of adverse disparate impact discrimination."[192] In coming to that conclusion, the Agency did not generate its own data or analysis.

However, a closer review of the odor concerns illustrates how analyzing the alleged harms through the lens of the Agency's regulatory programs and responsibilities diverted attention from an appropriate discrimination analysis.[193] After rejecting an air emission modeling study prepared by a consultant for the complainants, including the consultant's correlation of study data to alleged health impacts and other community harms, the Agency examined the landfill's air emission status and found that it was in compliance.[194]

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[187] Letter from Lilian S. Dorka, Dir., External C.R. Compliance Off., to Lance LeFleur, Dir. Ala. Dep't of Env't Quality 6 (Mar. 1, 2018), https://www.epa.gov/sites/default/files/2018-03/documents/2018.03.01_lefleur_l_re_letter_of_closure_of_administrative_complaint_fi.pdf [https://perma.cc/RP55-JPGA] [hereinafter Letter from Lilian S. Dorka to Lance LeFleur Mar. 1].

[188] *Id.* at 7 ("[D]eclarations . . . describe the smell as 'heavy, stinky, horrible, powerful, foul, like ammonia, acrid, stench of rotten eggs, etc'").

[189] *Id.* at 10.

[190] *Id.* at 14.

[191] *Id.* at 16–18.

[192] *Id.* at 6.

[193] A careful review of the "messy" details and reasoning of the decision is beyond the patience of most readers, and I skip such a description here.

[194] Letter from Lilian S. Dorka to Lance LeFleur Mar. 1, *supra* note 187, at 7–8. After the air quality compliance status of the facility, applicable regulations, and emission

The decision document reveals that Agency investigators made no actual findings as to the severe odor allegations and origin, even though odor issues arise independent of compliance with the emission standards in question.[195] The omission is surprising since its investigators conducted a site visit and thus would have been able to verify for themselves whether the odors were as serious as alleged.[196] Odor has long been recognized by the courts as potentially giving rise to common law nuisance claims.[197] In other words, severe odors can constitute an actionable legal harm. By omitting assessment of the odor severity, as experienced during the site visit, the Agency avoided the question whether it would constitute an adverse impact for Title VI purposes.

The Agency's analysis of the complaint's allegations that "acrid odor from the Landfill" interfere with the community's use of the local cemeteries is even more puzzling.[198] The Agency responded that the cemetery location was outside of the Arrowhead Landfill boundaries and thus would not be affected by the permitting actions at issue.[199] Of course, neither air pollutants nor odors stop at property lines. If one imagines community members having to endure stench, flies, and other vermin from the nearby landfill while paying respects at the graves of lost loved ones and contrasts that image with the placement of many cemetery locations on hill-tops, scenic areas, or other beautiful places (consider Arlington Cemetery in Virginia as an example), the contrast could not be starker. Ignoring that indignity suggests as much about the Agency's blindness to things that cannot be measured as its concern for the dignity and well-being of communities of color.

The EPA's hyper-specific search for measurable indicators and quantitative analysis of adverse effects has not only meant that it gives far too little attention to the environmental outcomes experienced by the communities that are the beneficiaries of Title VI protections. Equally of concern is its disregard of regulatory language prohibiting the use of criteria or methods having the "effect of defeating or substantially impairing accomplishment of the objectives of [a] program or activity" or denying protected groups the benefits of a program or activity.[200] This

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monitoring requirements, EPA concluded that Arrowhead was in compliance with PM10 particulate air pollution emission requirements, but that monitoring or requirements regarding any other air emissions were inapplicable. *Id.* at 8–9. Even though the decision letter notes that regulatory compliance does not equate with compliance with Title VI, omission of any assessment of odor severity and the failure to inquire into the conditions beyond the information that is readily available does just that. *Id.* at 9–10.

[195] While the Agency also found that odor mitigation measures (gas vent flares) were in operation, there was a curious silence as to whether the mitigation measures were effective in redressing the odor concerns. *Id.* at 9.

[196] *Id.* at 10. Given the immense size of the landfill, it is hard to imagine how the severity of the odor and its origin would not be immediately apparent to any visitor.

[197] *See, e.g.*, Spur Indus. Inc. v. Del E. Webb Dev. Co, 494 P.2d 700 (Ariz. 1972).

[198] *See generally* Letter from Lilian S. Dorka to Lance LeFleur Mar. 1, *supra* note 187, at 16–17.

[199] Letter from Lilian S. Dorka to Lance LeFleur Mar. 1, *supra* note 187, at 17.

[200] Specific Prohibitions, 40 C.F.R. § 7.35(b)–(c).

regulatory provision, referred to here as the "denial-of-benefits" standard, guarantees non-discrimination not only with respect to specific aspects of a program or discrete activities but also with respect to the *overall outcomes and benefits*.[201] If a funding recipient's regulatory program is designed to achieve healthy air, water, or land for most communities, but leaves out communities of color from those benefits, the overall negative outcome experienced by a community constitutes a denial of the benefits of environmental regulatory programs—assurance of a healthy environment.[202]

Ultimately, the denial-of-benefit standard effectuates the premise embedded in environmental laws—that ensuring a healthy environment is critical for all. It requires that communities of color not be accorded second-class citizenship with respect to overall program benefits. If the objective of a regulatory program or activity is to protect public health, then the recipient is obligated to achieve such outcomes for all communities.[203]

In this light, the Arrowhead Landfill decision is a real head-scratcher. While the Agency was careful to address the specific disparate effects allegations one-by-one, the Agency never described or explained whether the entirety of the alleged impacts might be significant in the aggregate—the active disposal area size of the facility, the daily amount of trash disposed there, and its overall geographical extent. The omission is stunning from a couple of perspectives.

First, the original Title VI complaint filed on behalf of the affected community was quite clear in raising concerns not only about specific issues but also in pointing out the sheer size of the landfill facility by including a local map and a state government chart indicating that the landfill was the largest in the state.[204]

The 2011 Arrowhead permit renewal allowed landfill disposal activities on approximately 256 acres, approximately 193 football fields, while the 2012 permit modification increased the disposal area by sixty-six percent to 425 acres, about 322 football fields. When the Arrowhead Title VI complaint was filed in 2013, and still

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[201] There is undoubtedly overlap with the discriminatory effects portions of the regulations. Unfortunately, there appears to be no case law or agency guidance, and research into the origins of this regulatory language did not reveal any documentary explanation or context.

[202] For an analogy, consider the effects of a schedule reduction with respect to a bus route serving a minority community. For a community that relies solely on a single bus line as public transportation, even a small reduction in the frequency of service can have a serious impact. For a community that is serviced by several bus lines, a commuter rail, and other low-cost shuttle services, the overall impact of the schedule reduction may be minimal.

[203] Just as with the discriminatory effect standard, a recipient could still defeat a *prima facie* showing by demonstrating a substantial legitimate justification and/or the unavailability of an alternative option with a less discriminatory effect. *Cf.* U.S. DEP'T OF JUST., C.R. DIV., TITLE VII LEGAL MANUAL § VII, https://www.justice.gov/crt/fcs/T6Manual7#A [https://perma.cc/3MTD-9Q6N] (last visited Aug. 28, 2023).

[204] *See* Letter from David A. Ludder to Vicki Simons, Dir., Off. of C. R., U.S. EPA, 6, 8 figs. 1 & 2 (May 30, 2013), https://www.documentcloud.org/documents/2162620-epa_12r-13-r4.html [https://perma.cc/V5KF-MU5L] (portions of the document redacted, likely due to privacy concerns).

pending as of October 2021, the Arrowhead Landfill was permitted to take in up to 15,000 tons of trash per day, including waste from thirty-three other states such as Michigan, Texas, and New York.[205] Assuming a garbage truck capacity of eight tons of trash,[206] that would mean almost 1,900 truck-loads of garbage *each day*. As of December 2020, Arrowhead was the state's second-largest landfill, based on permitted daily waste disposal volume.[207] Implying that the expansion of the disposal area by 169 acres, a sixty-six percent increase, to 425 acres would have no significant effects appears to deny the practical reality of such facilities in terms of their sheer size and all that inevitably comes with them with respect to odor, truck traffic, vermin, and other concerns.[208]

Second, even if the facility follows all applicable regulatory requirements, compliance does not equate with *zero environmental impacts*. Ironically, even Alabama's Solid Waste Code recognized as much, stating that "landfill disposal of solid waste, even under the most ideal conditions, has the potential to create long-term pollution and environmental degradation."[209] Thus, lack of adverse effects associated with individual environmental impacts would not necessarily indicate a lack of significance or harm in the aggregate. In addition to direct impacts of odor and vermin, such facilities increase the vulnerability of the surrounding to community to unexpected future natural disaster and unknown risks. Hurricanes and flooding in Texas and Louisiana have also illustrated the real risk (and the inevitability) of potential future instances of non-compliance by the landfill operators.[210]

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[205] ALA. DEP'T OF ENV'T MGMT., PERMITTED MUNICIPAL SOLID WASTE LANDFILLS IN THE STATE OF ALABAMA 7 (2020), http://www.adem.alabama.gov/programs/land/landforms/MSWLFMasterList20.pdf [https://perma.cc/8PQF-LS8C]. In 2013, when the Title VI complaint was filed, the Arrowhead landfill was the state's largest. *See* Letter from David A. Ludder to Vicki Simons, *supra* note 204, at 8 fig. 2.

[206] *See, e.g.*, *What You Should Know About the 4 Major Types of Garbage Trucks*, ROUTE READY (Oct. 10, 2019), https://routereadytrucks.com/blogs/know-4-major-types-garbage-trucks/ [https://perma.cc/B32S-77RY].

[207] *See* ALA. DEP'T OF ENV'T MGMT., *supra* note 205.

[208] Consider an analogy to environmental impact assessments under the National Environmental Policy Act ("NEPA"), a useful reference point. Even if the impacts of the individual concerns raised by the Arrowhead Title VI complaint did not rise to significance for NEPA purposes, an insignificance determination with respect to the aggregate or cumulative impact of the 169-acre (sixty-six percent) expansion of the Arrowhead landfill would not seem credible. *See generally* U.S. ENV'T PROT. AGENCY, *National Environmental Policy Act Review Process* (Oct. 5, 2022), https://www.epa.gov/nepa/national-environmental-policy-act-review-process#ea [https://perma.cc/4LSF-AV9R].

[209] *See* ALA. CODE § 22-27-40(8).

[210] For example, if improperly managed, methane build-up can cause catastrophic landfill explosions. *See, e.g.*, Öneryildiz v. Turkey [GC] App. No. 48939/99, ECHR 2004-XII, Judgment (Eur. Ct. H. R., Grand Chamber) (Nov. 30, 2004) (landfill methane explosion killed thirty-nine people who lived around the landfill), (*excerpted in* COMPARATIVE AND GLOBAL ENVIRONMENTAL LAW 762–64 (Tseming Yang et al. eds., 2019)).

The Alabama Solid Waste Code itself makes the aggregate effect on the surrounding community relevant. Under the Code, the purpose for the "orderly management of solid wastes" is to "protect the public health and the state's environmental quality and to serve the public."[211] Given Arrowhead Landfill's size and scope, there is a substantial question whether these objectives have been defeated and whether the African American residents have been deprived of the benefit of the solid waste management program.[212]

Regardless of whether a quantitative evaluation of cumulative impacts is possible with currently available analytical tools, the sheer size of the landfill and its expected overall negative effects on the surrounding community should have been obvious from the beginning, without any sophisticated technical analysis.[213] Where the potential aggregate impact is so patently obvious, EPA's complaint investigation process should have inquired more deeply into the scope of the state's regulatory program, protections afforded to other communities, and justification for the disparities by the state agency recipient.

In the end, concerns about the aggregate effect of facilities like the Arrowhead Landfill are about much more than the specific effects of pollution, nuisance effects, or other harms to the surrounding community. Such a Title VI complaint asserts that, cumulatively, the risks and harms of the facilities create conditions that present a serious environmental burden and are unhealthy. Such communities have not been afforded the benefit of living in a healthy environment, ultimately the objective of the public health protections of environmental laws.

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In 1992, promoting color-blindness within the EPA's regulatory work may have been a well-intentioned effort to move beyond the racial discrimination of the past. It would also have been a convenient means to avoid the prevailing difficult

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[211] ALA. CODE § 22-27-41 ("The purpose of this article is to protect the public health and the state's environmental quality and to serve the public by recognizing the responsibilities of units of local government for the orderly management of solid wastes generated within their jurisdictions, and to require that decisions about the management of solid wastes shall be based on comprehensive local, regional and state planning. The terms and obligations of this article shall be liberally construed to achieve remedies intended.").

[212] *See* Specific Prohibitions, 40 C.F.R. § 7.35(b)–(c) (noting that the purpose or effect of programs and locations cannot be discriminatory). Neglect of this aspect of the regulation is not unique to the Arrowhead Landfill case but appears to be part of the Agency's general Title VI practice. *See, e.g.*, EPA, TOOLKIT, *supra* note 85, at 89. Moreover, under its long-established practice, it is the Agency's responsibility to fully investigate and determine applicable violations (including of this standard). EPA, CASE RESOLUTION MANUAL, *supra* note 85, at 17 (discussing the role of complainants and recipients).

[213] *See* discussion *infra* Part III.C.2. The Agency has recognized that cumulative impacts of pollution exposure and environmental stressors from a variety of sources can affect communities and is relevant to the disparate effects analysis. Moreover, the 2020 Office Inspector General Report identified cumulative impact guidance as a critical priority for EPA's Title VI program. *See* NARIMATSU ET AL., *supra* note 13, at 15–17.

politics of race. Unfortunately, it has also undermined the effective enforcement of the EPA's Title VI regulations for three reasons.

First, ignoring the persistence of racial discrimination and the salience of race has allowed for unwarranted trust in state compliance with the Title VI antidiscrimination obligations. Second, it has led the Agency to ignore small increments of risk, even when small non-*de minimis* increments of pollution increase the vulnerability of communities to future pollution exposures or other health risks. Such enhanced vulnerability or susceptibility makes a person worse off and thus constitutes harm that should be accepted as an adverse effect within the Agency's Title VI disparate impact analysis. And third, it has legitimated the use of the EPA's commitment to scientific risk analysis as a shield against social justice concerns and compounded environmental harms to communities of color.

IV. DOING BETTER FOR TITLE VI COMPLAINANTS AND OTHER VULNERABLE COMMUNITIES

Recognizing the specific negative effects of the Agency's failure to take seriously the persistence of racial discrimination suggests at least three obvious program reforms. However, structural reform will be necessary to make the Agency overall much more responsive—not only to minority communities but to other vulnerable communities as well—and to align its operations much more closely with its responsibility to improve the environment for everyone.

A. Policy Choices with Immediate Programmatic Effect

For an antidiscrimination program to be effective, careful attention to how discrimination has evolved and how communities of color are more vulnerable to harm by existing regulatory approaches is indispensable. Three specific programmatic or policy reforms follow directly from the previous discussion. These reforms are likely to impose only a limited additional burden on Agency resources. They are also likely to have significant effect in addressing some of the longest-standing concerns about the Title VI program.

1. Compliance Reviews to Forestall Non-Compliance[214]

Compliance reviews of funding recipients are among the most easily implemented programmatic reforms to ensure more effective oversight. Even though the EPA has taken a number of steps to enhance oversight in the past,[215]

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[214] *See* discussion *supra* Part III.A.

[215] *See, e.g.*, NARIMATSU ET AL., *supra* note 13, at 5 (noting Agency Order 4700 established "deputy civil rights officials, or DCROs, in all its program and regional offices to assist ECRCO and provide oversight for the implementation of the civil rights program within their respective region or office consistent with national policy and guidance."); *id*. at 6 (citing a 2018 Cooperative Federalism initiative pilot with states in EPA's Region I states

unfortunately the EPA's ECRCO never "fully implemented an oversight system to identify and correct weaknesses in EPA funding recipients' Title VI programs," such as "proactively conduct[ing] compliance reviews" of Title VI adherence before community complaints are filed and investigated and collecting "information from funding recipients to target programs with weaknesses for review outside of the investigation process."[216]

This change would align the EPA with the practices of many other federal agencies and could significantly assist the EPA in preemptively addressing problems before they give rise to Title VI complaints.[217] In September 2021, the EPA's Office of General Counsel committed to taking measures to address those recommendations to implement compliance reviews.[218] Since then, the Agency has taken significant steps to articulate criteria and processes for Compliance Reviews, prioritizing them as an important tool for promoting Title VI compliance. Hopefully, these policy changes will be durable and become embedded into the routine processes of the Title VI program.[219]

(New England) to "provide technical assistance and outreach to funding recipients" in order to build "effective civil rights programs that other states could model."); *id.* ("ECRO developed a 'procedural safeguards' checklist, which contains what the office considers foundational elements of a nondiscrimination program.").

[216] NARIMATSU ET AL., *supra* note 13, at 10; *see also id.* at 12–14 (recommending that information collected during the initial funding application process, as part of Form 4700-4, should be used to target compliance reviews and that additional guidance and training of recipient staff would be helpful, especially in regard to permitting and cumulative impact issues); *see id.* (implying the EPA, as a post-complaint counterpart to compliance reviews, will need to engage in more robust monitoring of Title VI complaints settlement agreements between funding recipients and complaining communities).

[217] *See* discussion *infra* Part IV.B.3.

[218] Letter from Melissa Hoffer et al. to Renee McGhee Lenhart, *supra* note 103.

[219] *See generally* EXTERNAL C.R. COMPLIANCE OFF., U.S. EPA, PROCESS AND CRITERIA FOR PRIORITIZING AND SELECTING AFFIRMATIVE COMPLIANCE REVIEWS (Jan. 2022), https://www.epa.gov/system/files/documents/2022-01/01-06-20-ecrco-process-for-prioritizing-and-selecting-affirmative-compliance-reviews.pdf [https://perma.cc/J5LN-TERW]. *See also* EXTERNAL C.R. COMPLIANCE OFF., U.S. ENV'T PROT. AGENCY, PROCESS AND CRITERIA FOR SELECTING FORM 4700-4 FOR AUDIT (2023), https://www.epa.gov/system/files/documents/2023-04/Post-award%20audit%20process%20-FINAL%2012.21.22_.pdf [https://perma.cc/DA2G-422Z]. The Agency also initiated a Compliance Review of the Colorado Department of Public Health and Environment. Letter from Lilian S. Dorka, External C.R. Compliaance Off., Off. of Gen. Couns., to Jill Hunsaker Ryan, Executive Dir., Col. Dep't of Pub. Health and Env't & Shaun McGrath, Dir. of Env't Programs, Col. Dep't of Pub. Health and Env't. (Mar. 18, 2022), https://www.epa.gov/system/files/documents/2022-03/2022.3.18-cdphe-affirmative-compliance-review-final-initiation-letter_0.pdf [https://perma.cc/A6HY-NHVG].

2. Non-De Minimis Health Risks as Per Se Adverse Impacts[220]

A second programmatic reform measure that could be readily adopted is acceptance of non-*de minimis* increases in pollution exposure and health risks as a *per se* adverse effect for purposes of the Title VI disparate effect regulations. Even without any immediately visible or quantifiable effect or other imminent concrete consequences, such increased risk enhances the vulnerability of communities and individuals to the effects of future exposure to pollution and other environmental stressors. Non-*de minimis* increased risks are thus harms in the present that should satisfy the adversity/harm requirement of the Title VI disparate effect regulations.

3. Enforcing the Denial of Benefits/Defeating Program Objectives Standard[221]

Finally, as a third reform measure, the Agency should take steps to apply the regulatory language that prohibits the recipient's use of "criteria or methods . . . that have the effect of *defeating or substantially impairing accomplishment of the objectives of the program or activity*" or denying protected groups the benefits of a program or activity.[222] In other words, the Agency should look beyond specific impacts and consider the overall effects on a minority community.

Improved cumulative effects methodologies and tools could assist with the application of this standard. In fact, the Agency has declared development of better approaches to cumulative effects analysis a strategic priority.[223] However, the Agency should resist the urge to ignore impacts that cannot be readily quantified, especially not at the *prima facie* or preliminary findings stage, when the overall aggregate effects or impacts of an action or facility are obvious or where common law claims have recognized their legal significance.

B. Long-Term Change Through Structural Reform of Programs

In order to make Title VI an effective tool to address environmental racism, however, deeper and structural reforms will be necessary. These include bringing a stronger enforcement perspective to the program by shifting it into the Office of Enforcement and Compliance Assurance, creating an adjudicative process for Title VI claims, and recognizing that environmental discrimination claims are not the result of fortuity but usually symptoms of community-wide deficiencies in environmental quality.

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[220] *See* discussion *supra* Part III.B.
[221] *See* discussion *supra* Part III.C.
[222] Specific Prohibitions, 40 C.F.R. 7.35(b)–(c) (emphasis added).
[223] *See* EPA, E.O. 13985 EQUITY ACTION PLAN, *supra* note 108.

1. Shifting Title VI Enforcement into the Office of Enforcement and Compliance Assurance

The failure of EPA's Title VI program demonstrates that efforts to make environmental protection more equitable must focus as much on enforcement of applicable and existing legal standards as the design of regulations, policy initiatives, and voluntary efforts. To elevate attention to antidiscrimination enforcement to the same level accorded to enforcement of its environmental statutes, EPA should shift Title VI enforcement responsibilities (previously residing in the Office of General Counsel and now in the newly-created Office of Environmental Justice and External Civil Rights) to the Office of Enforcement and Compliance Assistance.[224] Such a step would not only provide greater independence to Title VI enforcement personnel, but it would also elevate the enforcement and compliance objectives of the Title VI program.[225]

The idea is not novel. The 2011 Deloitte Report suggested that such a merger would take advantage of the "organizational legal competence required to assess cases and the outreach to the states and EPA programs."[226] It would also promote a more "arms-length" interaction between the EPA and funding recipients and help Title VI staff adopt a stronger commitment to a culture of enforcement.[227]

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[224] Based on the model of the EEOC, Marianne Engelman Lado has suggested the creation of an independent federal agency solely devoted to enforcement of Title VI. Lado, *supra* note 114, at 329–30.

[225] Then-Administrator Ruckelshaus recognized in 1983 that enforcement personnel can be more effective when supervised independently from other environmental regulatory and programmatic function by (re-)establishing the Office of Enforcement and Compliance Monitoring as an independent organization within the EPA after its staff had been merged into the various program office under his predecessor Anne Gorsuch. *See, e.g.*, U.S. ENV'T PROT. AGENCY, MAJOR ACTIONS AND DECISIONS, MAY 1983–1984, https://nepis.epa.gov/Exe/ZyPDF.cgi/9100IV76.PDF?Dockey=9100IV76.pdf [https://perma.cc/9KMR-P9TH] (noting the establishment of OECA on Sept. 16, 1983); *see generally* JOEL A. MINTZ, ENFORCEMENT AT THE EPA: HIGH STAKES AND HARD CHOICES 41–61 (rev. ed. 2012) (outlining the change in EPA enforcement from 1981 to 1983).

[226] DELOITTE, *supra* note 87, at 24. However, the report also noted potential downsides, such as dilution of "core knowledge," "singular focus on civil rights," and "diluted access to resources." *Id.*

[227] One additional benefit would be to align the function of EPA's former Office of Environmental Justice ("OEJ") more closely with that of OECA if the Title VI enforcement staff and functions were merged into OEJ. Prior to September 2022, OEJ was formally located within OECA; however, OEJ did not have any specific enforcement role and mostly confined its activities to designing and carrying out various policy initiatives. Such a merger would also reveal a hidden challenge for the Agency—the congruence of what EPA might demand of state regulators under the requirements of Title VI and EPA's own activities and regulatory commitments under the federal environmental laws alone, since Title VI does not apply to EPA.

2. Creation of an Adjudicative Process for Title VI Claims

Another measure to alter the dynamics of how Title VI claims are dealt with would be the creation of an adjudicative process for Title VI claims, including appeal rights.[228] In addition to recognizing the special harm that EJ communities have been exposed to, it would give them a formal voice in a process that directly affects their welfare. Ultimately, allowing communities a role in correcting errors and misunderstandings as well as advocating for legal interpretations that may be more favorable to complainants would open the investigative process to communities and enhance transparency.

Creation of new agency adjudicative processes might seem daunting and would have significant Agency resource implications, including increasing the workload of the Agency's administrative law judges. On a practical level, however, much of the EPA's Title VI investigative process has always been exceptionally formal and mimicked adjudicative processes.[229] The Agency has regularly insisted on making jurisdictional determinations based not only on the substantive requirements such as a federal funding nexus, but also agency-created timing limits.[230] Moreover, detailed inquiry into the conditions and facts underlying the complaint, including interviews if the complainants, funding recipient staff, and others has always been part of the investigative process. The product is usually a report that for practical purposes already is the equivalent of a set of findings of fact. In other words, the Agency is already partway toward such an adjudicative system.

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[228] Appeal rights have repeatedly been suggested by activists as well as the U.S. Civil Rights Commission. *See, e.g.*, U.S. COMM'N ON C.R., NOT IN MY BACKYARD, *supra* note 89, at 168 (noting that the Department of Education Office of Civil Rights allows for appeals of findings or dismissals based on errors related to factual findings, legal analysis, or applicable legal standards). *How the Office of Civil Rights Handles Complaints*: *OCR Complaint Processing Procedures*, OFF. C.R., U.S. DEP'T. OF EDUC. (July 2022), https://www2.ed.gov/about/offices/list/ocr/complaints-how.html [https://perma.cc/ABY4-DS3E]. In a way, appeal rights would empower communities to be involved in the resolution of their claims, giving them back some of the "agency" in their lives that was "taken away" when the US Supreme Court determined that there was no private right of action under the Title VI regulations. *See* Alexander v. Sandoval, 532 U.S. 275, 275 (2001). Funding recipients have always had administrative appeal rights within these Agency processes, including ultimately judicial review.

[229] *See, e.g.*, Draft Title VI Recipient and Revised Investigation Guidance, 65 Fed. Reg. 39650, 39687 (June 27, 2000) (depicting the formal and adjudicative Title VI complaint process via flow chart).

[230] *Id.*

3. Recognizing the Present Reality of Inequalities in Environmental Quality—Reconceiving "Environmental Sacrifice" Zones as "Non-attainment" Zones for Environmental Justice[231]

Finally, even though federal environmental law has successfully restored environmental quality for much of the country, many communities of color have been left out of that success.

Title VI complaints raise concerns about these broader questions—whether their communities are suitable for living a healthy and happy life, raising healthy children, and being employed in a safe and healthy workplace. The environmental inequities that many vulnerable communities are exposed to are thus not limited to exceedances of a single pollutant or a specific environmental concern, but oftentimes involve environmental conditions that are across-the-board worse than those of most non-minority communities. EPA's Title VI analytical framework has created a well-intentioned but misguided singular focus on specific acts of discrimination and inequalities when the focus should be on the much broader problem of disparities in the overall environmental conditions that are salient on a day-to-day basis. Engaging in a pollutant-by-pollutant strategy to address environmental inequities in such a limited fashion is bound to fail in remedying such broader environmental quality issues.

Ultimately, achieving a level of environmental quality that is conducive to healthy communities and a well-functioning ecological system for all, especially vulnerable communities, will require the EPA to reconceive the goals of environmental regulation.

Much of that problem is embodied in the Agency's original definition of environmental justice. Under its definition, environmental justice's call for "fair treatment" means that no one "should bear a disproportionate share of the negative environmental consequences."[232] Where communities of color or low-income are

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[231] I am grateful to Professor Gina Warren for suggesting the non-attainment area analogy.

[232] *Learn About Environmental Justice*, U.S. ENV'T PROT. AGENCY (Sept. 6, 2022), https://www.epa.gov/environmentaljustice/learn-about-environmental-justice [https://perma.cc/B3KX-ANTX] ("*Environmental justice (EJ)* is the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation and enforcement of environmental laws, regulations and policies. *Fair treatment* means no group of people should bear a disproportionate share of the negative environmental consequences resulting from industrial, governmental and commercial operations or policies."). A more recent update of the definition, designed by the White House Environmental Justice Advisory Council, for use in the original 1994 Environmental Justice Executive Order 12,898, utilizes a broader definition, referring to "just treatment" with respect to "the development, implementation, enforcement, and evaluation of laws, regulations, programs, policies, practices, and activities, that affect human health and the environment." The terminology encompasses more, but it leaves unclear whether this implies a shift from the Agency's prior focus on harm prevention alone toward an affirmative commitment to improving environmental quality. WHITE HOUSE

saddled with pre-existing social, health, and economic disadvantages and environmental stressors that have made them worse off than others, imposition of an additional "equal share" of pollution burdens on such communities does not seem like fair treatment. It is the overall outcome that ultimately matters most, ensuring that these communities have access to a healthy environment. For low-income and communities of color to obtain environmental justice requires affirmative assurance of just regulatory outcomes that provide healthy environments in which they live, work, and play. Where that is not the case—such as communities that are sometimes referred to as "environmental sacrifice zones"[233]—affirmative agency intervention is necessary. Regulatory recognition and action on such conditions experienced by minority and other vulnerable communities is ultimately a key requirement for long term change.

Undoubtedly, an expectation of the EPA that all communities receive not only a fair share of regulatory attention, but also be assured of a healthy environment, is still an aspiration in present times. The first step, however, the ability to identify communities that need and deserve such attention has already been realized. Presently available tools already allow the EPA to identify communities, to borrow a term from the Clean Air Act, that are in environmental justice "non-attainment zones." Bringing such communities into "attainment" should be one of the overriding objectives for the Agency.

C. Toward Modernization of the Normative Framework of Federal Environmental Law

For long-term solutions and substantive commitment to environmental justice, however, the system will require fundamental change. Congress should update the federal environmental law system in order not only to address pressing contemporary issues such as climate change but also to reevaluate the Agency normative commitments that are embedded in the environmental regulatory framework. Most critically, the EPA will need to adopt a substantive commitment to a right to a healthy environment as a key objective for its regulatory work and goal of achieving environmental justice.

American-trained environmental lawyers and professionals might reflexively view such a rights-oriented perspective as both unsupported in law and policy as well as impractical. However, such a proposition already finds manifestation in a number of state constitutions and statutes that have adopted a right to a healthy environment. It is increasingly accepted worldwide, especially as reflected in the developing trend of law across the world, significant academic writings, judicial

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ENV'T JUST. ADVISORY COUNCIL, FINAL RECOMMENDATIONS: JUSTICE40 CLIMATE AND ECONOMIC JUSTICE SCREENING TOOL & EXECUTIVE ORDER 12898 REVISIONS 79 (2021), https://www.epa.gov/sites/default/files/2021-05/documents/whiteh2.pdf [https://perma.cc/7HDZ-TSGW].

[233] *See, e.g.*, Robert D. Bullard, *The Threat of Environmental Racism*, NAT. RES. & ENV'T 23, 23, 25 (1993).

opinions, and international instruments.[234] It is not possible to explain the proposition in detail here. But it is useful to briefly describe the value of such a normative reframing for EPA's work and what it would mean for vulnerable communities.

Accepting such an entitlement would formally acknowledge that a healthy environment is vital for communities to live and thrive, both in a psychological and spiritual sense as well as from a physical health perspective. As a requirement for basic human needs, reliance on the environment for human health and well-being purposes should take precedence over its role as a raw material and as input into the current economic system. It would also highlight that a healthy environment is not just an abstract public good, designed to further industrial or other economic purposes, but is a life necessity for *every single person*—that it is a human right.

Equally important, acknowledging an entitlement to a healthy environment would provide a substantive reference point, the ultimate touchstone, for what kind of inequality matters and when communities have been denied the benefits of environmental regulatory programs. For Title VI purposes, it would provide substantive normative content to the question of unequal treatment and what type of disparate impacts should trigger discrimination concerns.[235] Recognizing a right to a healthy environment would thus articulate a substantively meaningful reference point for equality analysis.[236]

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[234] In 2021, the American Bar Association also adopted Resolution 513, calling for the recognition of a right to a clean and healthy environment in laws and policies. *See* ABA, RESOLUTION NO. 513, SECTION OF ENVIRONMENT, ENERGY, AND RESOURCES SECTION OF CIVIL RIGHTS AND SOCIAL JUSTICE CENTER FOR HUMAN RIGHTS: REPORT TO THE HOUSE OF DELEGATES (2021), https://www.americanbar.org/content/dam/aba/administrative/news/2021/08/annual-meeting-resolutions/513.pdf [https://perma.cc/G88K-PJUM]. For another exploration of the relationship between environmental justice and human rights, see John H. Knox & Nicole Tronolone, *Environmental Justice as Environmental Human Rights* (Feb. 10, 2023), https://ssrn.com/abstract=4353718 [https://perma.cc/Y64J-6375].

[235] It would also provide a direct substantive response to the possibility that regulatory standards could be lowered to the lowest applicable regulatory standards in order to achieve equality.

[236] Some years ago, in a prior inquiry into Title VI, I wrestled with the tension between the modern federal environmental law system's collective action, "Tragedy of the Commons," paradigm of regulation in contrast to the civil rights perspective that many environmental justice advocates bring to the issues. *See generally* Tseming Yang, *Melding Civil Rights and Environmentalism: Finding Environmental Justice's Place in Environmental Regulation*, 26 HARV. ENV'T L. REV. 1 (2002). The lack of a robust normative framework with respect to individual entitlements to environmental quality explains much of that tension. Over the years, research and discourse on international human rights and environmental law have clarified not only their close interdependence but have also prompted the emergence of new environmental legal norms, such as the right to water and the right to a healthy environment.

CONCLUSION

The Black Lives Matter movement has revitalized the call for special attention to the burdens imposed on Black communities by the contemporary reality of racial disparities and discrimination. That same attention is needed for the EPA's Title VI program to be effective in addressing the problem of environmental racism and its contemporary manifestation. In the end, choosing to put environmental justice and the needs of vulnerable and marginalized communities first is not only the call of the environmental justice movement. It is just part of the call for *justice*.