

# Civil Rights Compliance: Title VI of the Civil Rights Act of 1964



- ECOS WORKSHOP
  - PART III
  - MAY 20, 2022
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# Workshop Plan

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- Part I: Title VI 101 (March 4) ✓
- Part II: Foundational Civil Rights Program Requirements and Best Practices (March 31) ✓
- Part III: Ensuring Compliance with Anti-Discrimination Requirements -- Application to Permitting & Other Issues (May 20)

# Title VI 101 Agenda

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2:00 Welcome

2:10 Legal Requirements and Best Practices

3:00 Breakout Sessions & Report Out

- 3:00 - 3:20 Breakouts
- 3:20 - 3:45 Report Out & Discussion

3:45 EPA Case Handling Recap

3:55 Closeout/Next Steps

# EPA's External Civil Rights Compliance Program

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Mission: Enforce the Federal Civil Rights Laws, Including Title VI.

The External Civil Rights Compliance Office (ECRCO) within OGC is responsible for carrying out this Agency mission.

# Importance of Implementing Strong Civil Rights Programs

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**In Part II, we discussed the Civil Rights Program Requirements and Best Practices.**

- Procedural requirements
- Procedural safeguards and promising practices

*Civil rights concerns may be addressed proactively by recipients through robust civil rights compliance.*

*By having strong civil rights programs in place, State recipients will be better positioned to handle cases appropriately before EPA is involved.*

# TITLE VI OF THE CIVIL RIGHTS ACT OF 1964



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

42 U.S.C. Section 2000d



## Title VI: 2000d-1

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“Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity... is authorized and directed to effectuate the provisions of [the law]... by issuing rules, regulations, or orders of general applicability....”

# EPA Regulations

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Programs or activities receiving EPA assistance “shall not directly or through contractual, licensing, or other arrangements on the basis of race, color, or national origin...”:

- Subject a person to segregation or separate treatment;
- Deny a person or group the opportunity to participate as members of any planning or advisory body;
- Use criteria or methods of administration “which have the effect of subjecting individuals to discrimination...”;
- Restrict a person in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, aid, or benefit ...;
- “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” among other things.

40 C.F.R. § 7.35



# COMPLIANCE WITH ENV'T'L LAWS ≠ CIVIL RIGHTS LAWS

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- A recipient's compliance with the federal environmental laws in carrying out its permitting programs and decisions does not necessarily mean that the recipient is complying with federal civil rights laws.
- State, local, and other recipients of federal financial assistance have an independent obligation to comply with federal civil rights laws with respect to all of their programs and activities, including environmental permitting programs.
- Enforcement of civil rights laws and the full use of authority and discretion under environmental laws are complementary. Used together, they help to ensure the non-discriminatory protection of human health and the environment.

# Identifying Discrimination Under the Civil Rights Laws, Including Title VI



**Intentional Discrimination**  
(Disparate or Different  
Treatment)

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**Disparate Impact**  
(Discriminatory Effects)

**Retaliation and Intimidation**

# *Alexander v. Sandoval* (U.S. 2001)

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- No private right of action to go to court unless the plaintiffs can demonstrate an intent to discriminate.
- After *Sandoval*, complainants with disparate impact claims file them with the administrative agency that provides the federal financial assistance.

# What is Different Treatment?

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Intentional discrimination (different treatment) can occur when a recipient takes an action (*e.g.*, issuing a permit) that deliberately treats individuals differently or otherwise knowingly causes them harm because of their protected classes.

Evidence of intentional discrimination can be:

- 1) direct, such as a comment by a decision-maker that expresses a discriminatory motive;
- 2) Indirect/ based on circumstantial evidence that leads to an inference that the recipient acted, at least in part, because of their protected classes.

# Different Treatment (cont.)

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What standards are applied to make an inference of discrimination?

## *1. McDonnell-Douglas Framework:\**

- A member/members of a particular protected group
- Who is eligible for the program, activity or service
- Was not accepted into that program or was treated in an adverse manner
- Another individual who was similarly situated but not in the protected group received better treatment.

\*See DOJ Title VI Legal Manual

# Different Treatment (cont.)

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If a prima facie case of disparate treatment is established, then

- 1) recipient then has the burden of producing a legitimate, non-discriminatory reason for the challenged policy or decision. If the recipient articulates such a reason, then
- 2) EPA must then determine if there is evidence that the proffered reason is pretextual, i.e., that the nondiscriminatory reason(s) the defendant gives for its actions are a pretext for discriminatory intent.

# Different Treatment (cont.)

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## Standards (cont.)

2. *Arlington Heights*: many different types of evidence are relevant and assessed on a cumulative basis. This might include:

- Stats showing clear pattern of discriminatory effects
- Historical background of decision (and nexus with invidious discrimination)
- Sequence of events/leg history leading to the decision
- Departures from normal procedures...

# Example: *Miller v. City of Dallas*

## (N.D. TX, Feb. 14, 2002)

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Plaintiffs asserted City discriminated against residents of community of color re: flood protection, zoning, landfill practices, streets and draining, protection from industrial nuisances....

- *Arlington Heights* factors
  - Discriminatory effect (*e.g.*, of lack of levee protection)
  - Historical background: nexus with segregation
  - Sequence of events leading to challenged decisions
  - Departure from substantive standards
  - Conclusion: genuine issue of material fact as to whether the City discriminated against residents on the basis of race with regard to some claims (*e.g.*, flood protection)



# What is Disparate Impact?

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**When a recipient uses criteria or methods of administration (*i.e.*, makes a decision, like a permitting decision) that has the effect of subjecting persons to discrimination.**

**How do you prove a “prima facie” case of disparate impact?**

- 1. Facially neutral policy or practice**
- 2. Causation**
- 3. Adverse effect (harm)**
- 4. Disproportionality**

# **“Adverse Impacts” & Relationship to Environmental Health Standards?**

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# *South Camden v. NJ Dept of Env't*

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- Undisputed that the facility would be in compliance with the then-current NAAQS for PM-10 emissions
- “[I]t is abundantly clear from my review of the EPA materials that the EPA construes the regulations to impose a burden on recipients of EPA funding, such as the NJDEP, to consider the potential adverse, disparate impacts of their permitting decisions which are independent of environmental regulations such as the NAAQS.”

# *Friends of Buckingham* (4<sup>th</sup> Cir. 2020)

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”The Board’s reliance on air quality standards led it to dismiss EJ concerns. Even if all pollutants within the country remain below state and national air quality standards, the Board failed to grapple with the likelihood that those living closest to the the Compressor Station – an overwhelmingly minority population... -- will be affected more than those living in other parts of the same country.... [T]he Board’s failure to consider the disproportionate impact on those closest to the Compressor Station resulted in a flawed analysis.” 947 F.3d at 91-92.

# EPA Toolkit

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“The fact that the area is designated as in attainment with the NAAQS and that the recent permitting record shows that emissions from the facility would not cause a violation of the NAAQS would be insufficient by themselves to find that no adverse impacts are occurring for purposes of Title VI and other federal civil rights laws. EPA’s investigation would seek to ascertain the existence of such adverse impacts (e.g. violations of the NAAQS) in any area regardless of the area’s designation and the prior permitting record. As stated previously, compliance with environmental laws does not necessarily constitute compliance with federal civil rights laws.”

# Adverse Impacts & Consideration of Cumulative Impacts

## ORD Operational Definitions

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- Cumulative Impacts refers to the total burden from chemical and non-chemical stressors and their interactions that affect the health, well-being, and quality of life of an individual, community, or population at a given point in time or over a period of time.
- It is the combination of these effects and any resulting environmental degradation or health effects that are the focus of ORD's cumulative impacts research

### Cumulative Impact Assessment:

- Requires consideration and characterization of total exposures to both chemical and non-chemical stressors, as well as their interactions over time across the affected population.

# Disparate Impact (cont.)

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If a prima facie case of disparate impact is established, then

- 1) Recipient has the burden of showing a substantial legitimate justification for the policy or practice.
- 2) Is there a less discriminatory alternative?
  - ✦ Alternative Decision
  - ✦ Alternative Location
  - ✦ Mitigation

# Best Practices: Permitting and Screening

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- States can adopt a routine process of screening for potential civil rights concerns early in the permitting process. Some best practices include:
  - Does a permit action have the potential to cause or contribute to public health or environmental impacts?
  - Is the racial or ethnic composition of the affected community disproportionate in comparison to the demographics of the jurisdiction (for example, of the permitting authority)?
  - Does the affected community have particularly vulnerabilities to any adverse effects of the proposed permitting action? and
  - Is the affected community already disproportionately bearing public health or environmental burdens.

As discussed in Workshop II, consider how the community characteristics also inform the implementation of public involvement plans and practices.



# Case Study - Breakout Session

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**Background:** True Storage, a Warehouse Company, submitted an application for a wastewater discharge (or wetlands) permit. The company is housed on land that is heavily forested for over 50 years. The company is also planning to have electrical generation which is an air quality consideration. State DEQ is considering the permit application.

- There is an active community-based organization opposed to the issuance of the permit because of concerns about community impacts and air quality issues.
- State DEQ fears a Title VI complaint will be filed if it approves the application.
- Given the high-profile nature of this permit, and considering the likelihood of legal challenges, State DEQ ensures that all policies and procedures are adhered to in considering the permit application.
- The company is aware that State DEQ will seek input from the community because awarding the permit may create noise issues, traffic, and possibility air quality issues. Nonetheless, the company expects State DEQ to evaluate its application based on environmental regulations and policies.

# Breakout Session

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## Discussion Question:

- What steps might State DEQ take to evaluate whether True Storage permit complies with Title VI?
- If there are civil rights concerns, what steps might State DEQ to comply?

# Ensuring Compliance: Key Questions

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In considering the permit application, how might the permitting program approach the five critical questions to evaluate whether activities have an unjustified disparate impact:

- Does the adverse effect, if any, of the policy or practice fall disproportionately on a race, color, or national origin group?
  - ✦ Adverse impact could include health or non-health harms such as quality of life, i.e., noise, odor, traffic, safety, etc.
  - ✦ Disparities are evaluated by comparing the demographics of the affected population with the demographics of the general population or unaffected population
- Is there a causal link between the action, policy, or practice and the adverse impacts?
- If so, is there a substantial legitimate justification for the policy or practice?

# Ensuring Compliance: Key Questions

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Is there an alternative that would achieve the same legitimate objective but with less of a discriminatory impact?

Have you considered mitigating measures?

- There are a range of mitigation measures (e.g., modifying permit terms, use of non-environmental authorities, monitoring, community benefit agreements) or working with the permit applicant for alternative siting.
- If there are no mitigation measures that can address the disparate impacts, the only less discriminatory alternative may be denial of the permit.

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Also, what initial screening process might be helpful at the beginning of the permit review process?

# EPA Case Handling Process: Recap

## EPA Criteria for Evaluating Complaints

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- Four jurisdictional requirements:
  - Whether the complaint is in writing (40 C.F.R. § 7.120);
  - Whether it alleges a discriminatory act(s) that, if true, may violate EPA's nondiscrimination regulation (40 C.F.R. § 7.120) - race, color, national origin (including limited English proficiency), disability, sex, or age; or for intimidation or retaliation (40 C.F.R. § 7.100);
  - Whether it identifies an applicant for, or a recipient of, EPA financial assistance as the entity that committed the alleged discriminatory act (40 C.F.R. § § 7.15, 7.120); and
  - Whether it was received by ECRCO within 180 calendar days of the alleged discriminatory act (40 C.F.R. § 7.120).

# EXAMPLES OF OTHER FACTORS ECRCO CONSIDERS IN EVALUATING COMPLAINTS

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Not grounded  
in fact

Pending  
litigation

Lacks  
sufficient  
detail

Moot

Unripe

# Jurisdictional Determination

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- In General, ECRCO will:
  - Accept
  - Reject
  - Reject and Refer
  - Possibility of Coordination with Another Agency

# Resolution Paths For Complaints Accepted for Investigation

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- Once ECRCO accepts a complaint for investigation,
  - ❑ within 180 calendar days of accepting a complaint for investigation, ECRCO will issue “preliminary findings.”
- Correspondingly, however, ECRCO attempts to resolve complaints informally whenever possible.
- The 180-day time period is tolled:
  - ❑ when the complainant and recipient agree to pursue ADR; or
  - ❑ when the recipient agrees to engage in informal resolution agreement process.



# Resolution

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- Informal Resolution
- ADR Settlement
- Findings and Recommendation, if any
- Voluntary Compliance (after determination)
- Action Pursuant to Finding of Noncompliance
  - Denial, annulment, termination or suspension of assistance
  - Due process rights



# Resources

- [Title VI of the Civil Rights Act of 1964](#)
- EPA Non-Discrimination Regulations
  - [40 C. F. R Part 7](#)
  - [40 C.F.R. Part 5](#)

## [Key EPA Title VI Guidance and Policies](#)

➤ Chapter 1 of Compliance Toolkit and FAQs

- [DOJ Title VI Legal Manual](#)
- [Case Resolution Manual](#)