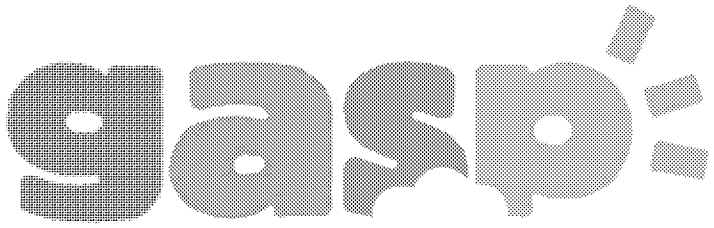

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March 14, 2016

VIA ELECTRONIC MAIL, U.S. MAIL
Jeryl Covington
Helena Wooden-Aguilar
U.S. Environmental Protection Agency
Office of Civil Rights
Mail Code 1201A
1200 Pennsylvania Ave., N.W.
Washington, D.C.

Re: EPA-HQ-OA-2013-0031, FRL-9933-69-0A, Nondiscrimination in Programs or Activities Receiving Federal Assistance from the Environmental Protection Agency

Dear Ms. Covington and Ms. Wooden-Aguilar,

Gasp[1] respectfully submits the following comment to the Environmental Protection Agency's (EPA) Office of Civil Rights (OCR) Notice of Proposed Rulemaking (NPR) and the Interim Case Resolution Manual. We appreciate the opportunity to make these public comments. Gasp hopes that the OCR will take into consideration our recommendations and create a stronger, more responsive program to implement Title VI of the Civil Rights Act of 1964 (Title VI).

I. Purpose

As an advocacy group working in communities suffering from environmental injustices, Gasp urges the EPA's OCR to implement meaningful and responsive guidelines for their program to implement Title VI. Unfortunately, civil rights enforcement has been very unsatisfactory in the environmental justice context. Alabama, the state in which Gasp works, currently has four complaints that have been accepted by the EPA. Because EPA has not adequately protected these communities by investigating in a timely manner and never making a finding of discrimination, it is imperative that EPA's NPR and Case Resolution Manual improve EPA's enforcement of the Civil Rights Act. Accordingly, Gasp will analyze the strengths and

[1]GASP is a non-profit health advocacy organization fighting for healthy air in Alabama. We strive to reduce air pollution through education and advocacy — because Alabamians deserve clean, healthy air. http://www.gaspgroup.org

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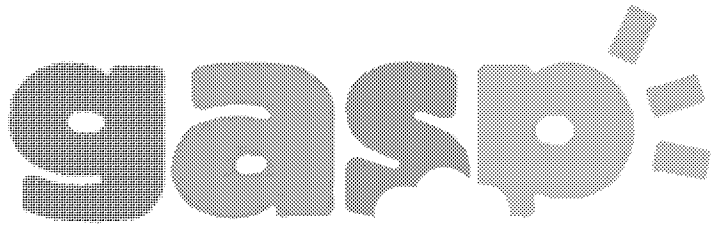

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weaknesses of the NPR and Case Resolution Manual and offer recommendations for improvement.

II. Background

a. Title VI prohibits discrimination on the basis of race, color, or national origin in all programs or activities receiving federal financial assistance.

Title VI of the Civil Rights Act provides that "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.[2]" Under Title VI, EPA has a responsibility to ensure that its funds are not being used to subsidize discrimination based on race, color, or national origin. This prohibition against discrimination under Title VI has been a statutory mandate since 1964 and EPA has had Title VI regulations since 1973. EPA's Office of Civil Rights is responsible for the Agency's administration of Title VI, including investigation of such complaints. Title VI allows individuals to file administrative complaints with the federal departments and agencies that provide financial assistance alleging discrimination based on race, color, or national origin by recipients of federal funds.

b. Discrimination need not be intentional; a disparate impact constitutes discrimination on the basis of race.

The Supreme Court of the United States addressed the concept of disparate impact under Title VII of the Civil Rights Act by reasoning that disparate impact liability furthered the purpose and design of the statute[3]. The Court noted that "Congress directed the thrust of [§ 703(a)(2)] to the *consequences* of employment practices, *not simply the motivation*.[4]" Antidiscrimination laws should be construed to encompass disparate impact claims when their text refers to the consequences of actions and not just to the mindset of actors[5]. A plaintiff bringing a disparate impact claim challenges practices that have a "disproportionately adverse effect on minorities.[6]" The U.S. Supreme Court also reasoned that "[r]ecognition of disparate impact liability under the [Fair Housing Act] also plays a role in uncovering discriminatory intent: It permits plaintiffs to counteract unconscious

[2] 42 U.S.C. § 2000d (1964).
[3] *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971).
[4] Id. at 432 (emphasis added).
[5] *See* Id. and Smith v. City of Jackson, 544 U.S. 228 (2005).
[6] Ricci v. DeStefano, 557 U.S. 557, 577 (2009).

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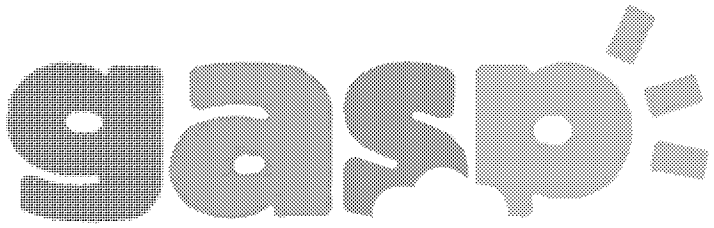

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prejudices and disguised animus that escape easy classification as disparate treatment.[7]" In its Interim Guidance, the EPA acknowledges that frequently "discrimination results from policies or practices that are neutral on their face, but have the effect of discriminating. Facially-neutral policies or practices that result in discriminatory effects violate EPA's Title VI regulations unless it is shown that they are justified and that there is no less discriminatory alternative.[8]"

c. EPA's OCR has historically struggled to implement an effective and responsive Title VI program.

It is generally known that EPA's OCR has failed to provide effective enforcement of Title VI. In 2010, Lisa Jackson, a former EPA administrator, requested that the consulting firm Deloitte perform a review of EPA's OCR. This report highlighted many deficiencies in the OCR and concluded that "[the OCR] has not adequately adjudicated Title VI complaints," and that "OCR seemed to lose sight of its mission and priorities. [9]"

First, EPA's OCR has acted very slowly, if at all, in its Title VI program. From 1993 to 2010, only 6%, fifteen out of 247 complaints, were acknowledged by EPA in the 20 day deadline[10]. The OCR, on average, decides within approximately 350 days whether to investigate a case[11]. In nine cases, the agency delayed decisionmaking an average of 367 days and was forced to dismiss the allegations as moot[12]. "Feedback from [OCR] employees indicated that major delays resulted primarily from the complexity of determining whether cases fall within jurisdiction because there is little or no legal precedence for comparison. [13]" To date, at least seventeen cases are still

[7] Texas Dep't of Housing and Community Affairs v. Inclusive Communities Project, Inc., 576 U.S. __ (2015).
[8] Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits (EPA, Feb. 5, 1998) at 2.
[9] Deloitte Consulting, LLP, Evaluation of the EPA Office of Civil Rights (2011), https://assets.documentcloud.org/documents/723416/epa-ocr-audit.pdf at 1, 2.
[10] Id. at 25.
[11] Lombardi, K., Environmental racism persists, and EPA is one reason why, Aug. 3, 2015, http://www.publicintegrity.org/2015/08/03/17668/environmental-racism-persists-and-epa-one-reason-why
[12] Id.
[13] Deloitte Consulting, LLP, Evaluation of the EPA Office of Civil Rights (2011), https://assets.documentcloud.org/documents/723416/epa-ocr-audit.pdf at 25.

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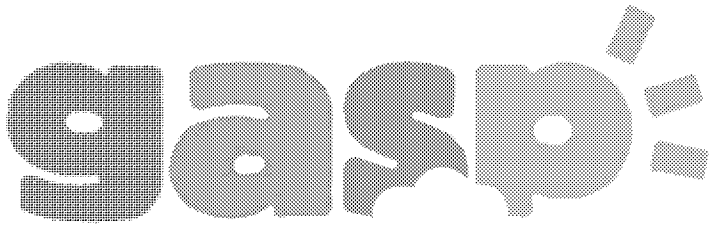

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left unresolved, more than half of which have been unaddressed for over a decade[14].

Second, EPA has a record of failing to hold accountable recipients of EPA funding for actions, policies and practices that violated Title VI and its regulations. In its 22-year history of processing environmental discrimination complaints, the OCR has reviewed nearly 300 complaints filed by minority communities[15]. It has never made a formal finding of a civil rights violation. Only twelve cases have been closed by EPA's OCR. EPA officials have negotiated settlements in nine cases; the rest were resolved among the complainants and the agencies against whom the complaint was filed[16]. The first major case decided by OCR after developing their Interim Guidance, *Select Steel*[17], involved a controversial finding and resulted in EPA recognizing that "involving impacted communities early in the permitting process could have better addressed many of the complainants' issues. Such consultations will better ensure that communities are fairly and equitably treated with respect to the quality of their environment and public health. [18]"

However, not much has changed since *Select Steel* in 1998 or the Deloitte report in 2010. Most complaints are not reviewed for acceptance, rejection or referral within its 20 day deadline. Between 1996 and 2013, the

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[14] Lombardi, K., Environmental racism persists, and EPA is one reason why, Aug. 3, 2015, http://www.publicintegrity.org/2015/08/03/17668/environmental-racism-persists-and-epa-one-reason-why

[15] Id.

[16] Id.

[17] *Select Steel*, a Title VI complaint filed by Father Phil Schmitter and Sister Joanne Chiaverini of the St. Francis Prayer Center in June of 1998 alleging that the proposed steel mill would cause a disparate impact on a group of minority people, was supposed to be EPA's test case for the new Interim Guidance. In October of 1998, OCR determined that there was no discriminatory effect because they found no adverse effect of constructing the new steel facility. EPA reasoned that "if there is no adverse effect from the permitted activity, there can be no finding of a discriminatory effect which would violate Title VI and EPA's implementing regulations." Letter from Anne E. Goode, Director, EPA's Office of Civil Rights, to Father Phil Schmitter & Sister Joanne Chiaverini, Co-Directors, St. Francis Prayer Center, at 2 (Oct. 30, 1998), http://www.epa.gov/region5/steelcvrhtm. Critics have suggested that *Select Steel* signals EPA's unwillingness to embrace enforcing Title VI. *See* Buford T., Steel mill that never was 'casts shadow' on EPA Office of Civil Rights, Dec. 18, 2015, http://www.publicintegrity.org/2015/12/18/19068/steel-mill-never-was-casts-shadow-epa-office-civil-rights.

[18] Worsham, J.B., Disparate Impact Suits Under Title VI, Section 602: Can a Legal Tool Build Environmental Justice, 27 B.C. Envtl. Aff. L. Rev. 631 (2000), http://lawdigitalcommons.bc.edu/ealr/vol27/iss4/3/

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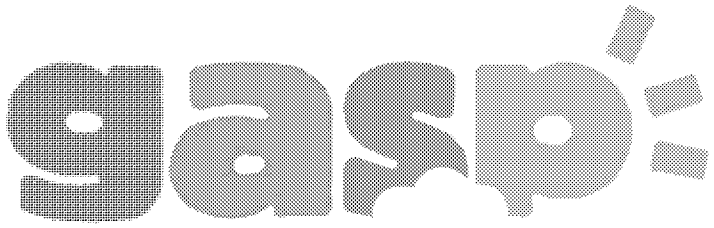

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average time EPA took to reject a complaint is 271 days[19]. The average time that it took EPA to conclude an investigation was over two and three quarters of a year[20]. Undoubtedly, now is the time for the NPR and Case Resolution Manual. However, with the aforementioned poor record of OCR's Title VI program, vast improvements are critical.

d. Alabama is uniquely situated where it currently has four complaints accepted by EPA for investigation.

Currently, the EPA has accepted four complaints from affected communities in Alabama. Although EPA's electronic list is not up to date, of the currently listed accepted complaints, only a handful of states have more than one complaint accepted by EPA[21]. This unique position means that Alabama communities have a vested interest in EPA's OCR implementing a responsive Title VI program that addresses the discrimination communities endure due to actions made by recipients of federal funds.

TABLE 1: ALABAMA COMPLAINTS CURRENTLY ACCEPTED BY EPA

EPA OCR File No.	Complaint Filing Date	Agency receiving EPA funds	Alleged Discriminatory Act	Accepted by EPA for investigation	Status
06R-03-R4	9/1/2013	Alabama Dep't of Envtl. Mgmt.	Granting of permit for Tallassee Waste Disposal Center Landfill	9/1/2003	Pending (4,578 days)[22]

[19] Qiu, Y. & Bradford T., Center for Public Integrity, Environmental justice, denied: Decades of inaction (Aug. 3, 2015), http://www.publicintegrity.org/2015/08/03/17726/decades-inaction

[20] Id.

[21] Alabama is listed as having two, California is listed as having three, Florida is listed as having two and Arizona is listed as having three accepted complaints. Complaints filed with EPA under Title VI of the Civil Rights Act of 1964 (Last updated March 3, 2015), http://www.epa.gov/ocr/complaints-filed-epa-under-title-vi-civil-rights-act-1964.

[22] From the date of this comment, March 14, 2016. This complaint will not be discussed further in this comment because it is the subject of current litigation, and thus the pending status is not wholly relevant to the other three complaints accepted by EPA.

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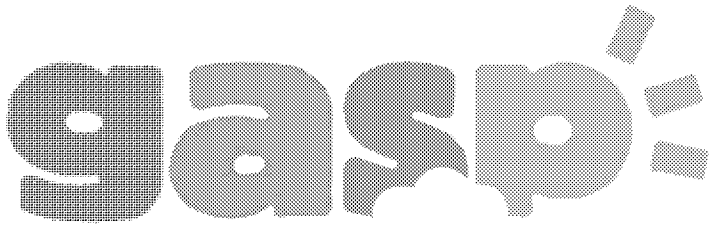

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12R-13-R4	6/3/2013	Alabama Dep't of Envtl. Mgmt.	Reissuance and modification of Solid Waste Disposal Permit No. 53-03	6/27/2013	Pending (941 days)[23]
03R-15-R4	2/6/2015	Jefferson County Dep't of Health	Reissuance of Major Source Operating Permit 4-07-0001-03	3/6/2015	Pending (374 days)[24]
08R-15-R4	3/2/2015	Jefferson County Dep't of Health	Reissuance of Major Source Operating Permit 4-07-0355-03	8/10/2015	Pending (217 days)[25]

The complaint filed against the Alabama Department of Environmental Management (ADEM) alleging that the reissuance and modification of the solid waste disposal permit for the Arrowhead Landfill constituted a discriminatory act addresses a land fill for municipal waste that spans 1,000 acres. The landfill began accepting coal ash in 2009 after the TVA coal ash spill in Kingston, Tennessee[26]. The landfill is located in a majority African-American community[27] and has resulted in property damage and damages to citizens' health and their environment[28].

The two complaints filed against the Jefferson County Department of Health (JCDH) involve Title V permits reissued to ABC Coke and Walter Coke. Gasp is actively involved in the Northern Birmingham and Tarrant communities which are affected by both of these facilities. As of 2002, only nineteen merchant and integrated producer coking plants were operating within the U.S.[29] Coke is the residue from the destructive distillation of coal.

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[23] From the date of this comment, March 14, 2016.
[24] From the date of this comment, March 14, 2016
[25] From the date of this comment, March 14, 2016
[26] Lombardi, K., Welcome to Uniontown: Arrowhead Landfill Battle a Modern Civil Rights Struggle (Aug. 5, 2015), *NBC News*, http://www.nbcnews.com/news/nbcblk/epa-environmental-injustice-uniontown-n402836.
[27] The impacted census blocks (2010 census data) are 87 to 100 percent African-American. Title VI Administrative Complaint File No. 12R-13-R4 (June 2013) at 23 (available at http://www.epa.gov/sites/production/files/2014-05/documents/12r-13-r4_complaint_redacted_0.pdf).
[28] The damages and disparate impacts cited in the Complaint are odors, flies and birds, noise, fugitive dust and property values. *See* Id.
[29] Gallagher M. & Depro B., EPA, Economic Impact Analysis of the Final Coke Ovens NESHAP (Sept. 2002), http://www3.epa.gov/ttnecas1/regdata/EIAs/CokeEIA_Final.pdf at 2-8.

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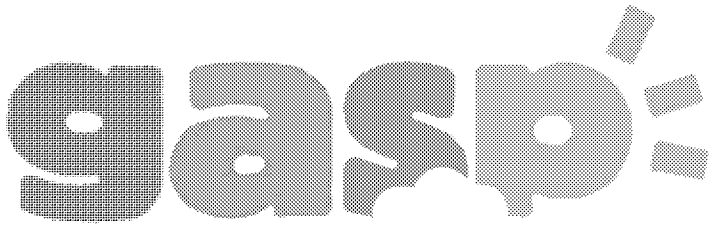

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"The coal used in the coke plants in the site area was generally obtained from mines in the Birmingham area until the late 1950's.[30]" "Coal mines in the Birmingham area [...] [are] known to have arsenic levels as high as 1,500 [mg/kg]. BaP is a known contaminant from coke ovens and foundries[...]; lead is a known contaminant from foundries and other industrial plants.[31]" Both Walter Coke and ABC Coke have been named by EPA as Potentially Responsible Parties (PRPs)[32] for the 35th Avenue Site[33]. The EPA has also begun a Site Inspection[34], the second step in exercising its CERCLA authority, in Tarrant, Alabama, where ABC Coke is located.

The complaint filed against JCDH alleges that the reissuance of a Major Source Title V Operating Permit to ABC Coke created a disparate impact. The ABC Coke plant operates in a majority African American community[35]. Residents suffer from unpleasant odors, health issues, damage to and interference with enjoyment of property, exposure to an unacceptable cancer risk, soil contamination and risk of low birth weight and pre term birth[36]. Similarly, the complaint filed against JCDH alleges that the reissuance of a Major Source Title V Operating Permit to Walter Coke created a disparate impact. The Walter Coke plant also operates in a majority African

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[30] EPA. HRS Documentation Record, http://www.epa.gov/superfund/sites/docrec/pdoc1897.pdf (last visited Jan. 13, 2015) at 16.
[31] Id. at 16.
[32] Five facilities are identified as possible or likely contributors to the lead, arsenic and/or benzo(a)pyrene (BaP) contamination found in the area of observed contamination: Walter Coke, ABC Coke, U.S. Pipe, KMAC and Alabama Gas Corporation (Alagasco). *See* Id.
[33] The 35th Avenue site is a mixed industrial and residential area of Birmingham, Alabama. "Since 1886 the area has been home to 20 foundries and kilns; seven coal, coke or byproducts facilities[...]By 1981, 20[%] of the land area was devoted to large industrial plants. Id. at 17. EPA has been acting under its CERCLA authority at the 35th Avenue Site since on or about 2010. In 2013, EPA recommended that the site be listed on the NPL. As of the date of this comment, a decision still has not been made by EPA to list the 35th Avenue Site on the NPL.
[34] In July of 2014, Gasp petitioned the EPA to perform a Preliminary Assessment in Tarrant, Alabama. In June of 2015 EPA completed their Preliminary Assessment and based off of their findings, EPA concluded that the site required further investigation to determine potential threats to public health, welfare and/or the environment.
[35] The residential area closest to ABC Coke consists of a census block group (2010 census) of 48.3 to 90.06 percent African-American population, the aggregate average being 66.7 percent. Title VI Administrative Complaint File No. 03R-15-R4 (Mar. 2015) at 15.
[36] Id. at 11.

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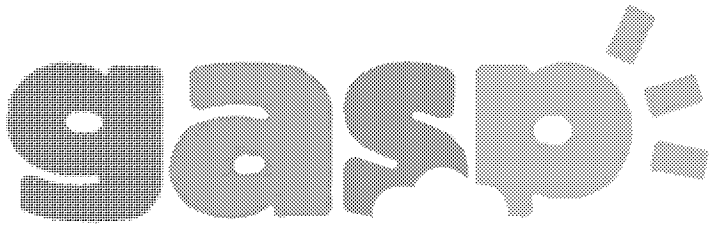

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American community[37]. Residents suffer from unpleasant odors, health issues, damage to and interference with enjoyment of property, exposure to an unacceptable cancer risk, soil contamination and risk of low birth weight and pre term birth[38].

As is evidenced by the three aforementioned complaints, communities in Alabama believe that recipients of EPA funds are violating Title VI. It should be noted that other communities who have not yet filed complaints with EPA also believe their rights under Title VI are being violated. Alabama played an important role in the Civil Rights Movement, and was the setting for many important milestones toward President Lyndon B. Johnson signing into law the Civil Rights Act of 1964. Just as before, Alabama is failing its citizens and communities when it comes to environmental justice. Accordingly, Alabama is in a unique position to urge the EPA's OCR to strengthen its Title VI program and bring much needed relief to these communities.

III. The Interim Case Resolution Manual

a. The Interim Case Resolution Manual is a strong resource for procedural guidance for civil rights cases.

Gasp applauds EPA's proactive and comprehensive approach in drafting the Interim Case Resolution Manual. This manual is a major step forward for EPA's OCR. In many ways, this Case Resolution Manual directly addresses the aforementioned historical issues with the Title VI program. This Interim Case Resolution Manual gives meaningful procedural guidance to OCR staff on how to process Title VI Complaints.

The Interim Case Resolution Manual makes very clear critical elements of a Title VI program. It explains the legal role of OCR and clearly describes the protected classes. The measurable goals[39] also make it clear not only to employees what expectations are, but they also make very clear the

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[37] Within one mile of the Walter Coke facility, the percent of the population that is African American is 88 percent; 76 percent within three miles; and 59 percent within six miles. Title VI Administrative Complaint File No. 08R-15-R4 (Aug. 2015) at 16.
[38] Id. at 10.
[39] "(1) ensure prompt, effective and efficient complaint docket management, (2) enhance OCR's external compliance program through proactive compliance reviews, policy developments, and engagement of critical EPA, federal and external partners and stakeholders (*e.g.* recipients and communities); and (3) strengthen OCR's workforce through strategic human capital planning, organizational development and technology training to promote a high-performing organization." EPA, Interim Case Resolution Manual (Dec. 1, 2015), http://www.epa.gov/sites/production/files/2015-12/documents/ocr_crm_final.pdf at i.

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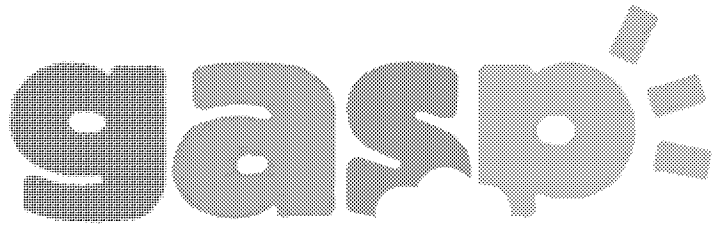

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standards to which OCR is holding itself when strengthening its external compliance program. It is also very helpful that the Manual clearly cites and quotes the statutory and regulatory authorities giving OCR legal jurisdiction[40]. Similarly, Section 2.6[41] outlining "Other Factors That May Be Considered Before Accepting a Case for Investigation" are comprehensive and would clearly assist a Case Manager in processing complaints.

Chapter 4 of the Manual, "Investigation and Voluntary Compliance" clearly defines the roles and responsibilities of Case Managers in completing an investigation of a complaint of discrimination and the possibilities for resolving the complaint. The Manual establishes a realistic goal that furthers the mission of the Title VI program where it says "OCR will create a Strategic Case Management Plan [...] and outline processing goals or expectations for ensuring *timely and effective processing of cases, particularly within the first 90-calendar days after receipt of complaint.*[42]" The procedural guidance in this section is exhaustive and clear, which should greatly assist Case Managers in fulfilling their duties, and thus hopefully result in a more expeditious and responsive Title VI program than has existed in the past.

Finally, Chapter 5 addressing Compliance Reviews[43] could be instrumental in creating a more robust Title VI program that ensures EPA funds are not being used in a discriminatory manner that affects the protected classes under the Civil Rights Act. Specifically, enabling Case Managers to initiate a periodic compliance review based off of prior complaints, among other factors, could directly address legacy issues in overburdened communities. Both periodic compliance reviews and post-award compliance reviews could create a more proactive and thus responsive approach to ensuring EPA funds are not being used in a discriminatory manner.

b. Loose deadlines in the Interim Case Resolution Manual could run afoul of OCR's goal of strengthening its external compliance program.

As will be discussed in greater detail regarding the Notice of Proposed Rulemaking, the removal of deadlines and/or non-binding deadlines and timelines could result in continued delays and poor performance of EPA's OCR. Under Section 3.2, The Manual states that "Case Managers should begin to draft an Investigative Plan [...] *as early as possible* and soon after a

[40] *See* Id. at 8.
[41] *See* Id. at 12.
[42] Id. at 24 (emphasis added).
[43] *See* Id. at 30-31.

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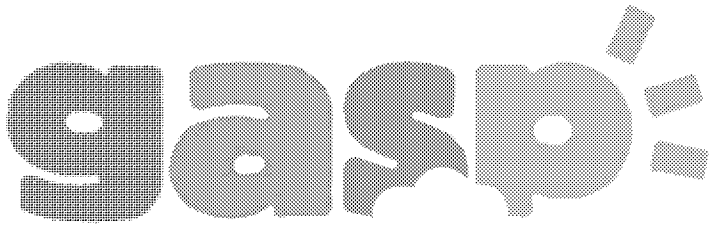

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decision to accept the case for investigation has been made.[44]" Although the Manual clearly highlights a sense of urgency, "as early as possible" and "soon after" are subjective, undefined terms. For example, in the aforementioned complaints from Alabama that EPA has accepted, File No. 03R-15-R4 has been pending for 372 days and File No. 08R-15-R4 has been pending for 215 days. Surely, any reasonable person would conclude that "as early as possible" and "soon after" would be well within the 372 day and 215 day window. However, to Gasp's knowledge, there has been little to no progress made on these complaints. Accordingly, without clearer timelines, this type of subjective language could result in complaints continuing to sit on EPA's docket without investigations or resolutions.

IV. Notice of Proposed Rulemaking

In its NPR, EPA is proposing to amend its regulations implementing Title VI of the Civil Rights Act of 1964. EPA's stated goal in amending its regulations are "in order to enable it to create a *model civil rights program which can nimbly and effectively* enforce civil rights statutes in the environmental context.[45]" In the NPR, EPA asserts that the goal of these changes are to improve EPA's civil rights program and allow EPA to be more proactive in monitoring and enforcing compliance with Title VI and other nondiscrimination statutes.

a. EPA's proposal to amend § 7.85(b) should strengthen its ability to perform compliance reviews.

EPA first proposes to amend § 7.85(b) by deleting text that describes when additional information will be sought from recipients.[46]" EPA rationalizes these changes by saying "this proposed rule is intended to clarify the EPA's ability to access such information under the current regulations, while providing the flexibility to establish a successful compliance review program and improve the EPA's External Compliance and Complaints Program.[47]"

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[44] Id. at 14 (emphasis added).
[45] Nondiscrimination in Programs or Activities Receiving Federal Assistance from the Environmental Protection Agency, 80 Fed. Reg. 239, 77284 (proposed Dec. 14, 2015) (to be codified at 40 C.F.R Parts 7 and 9).
[46] EPA plans to delete the following two phrases: "where there is reason to believe that discrimination may exist in a program or activity receiving EPA assistance;" and "and shall be accompanied by a written statement summarizing the complaint or setting forth the basis for the belief that discrimination may exist." Id. at 77286.
[47] Id. at 77286

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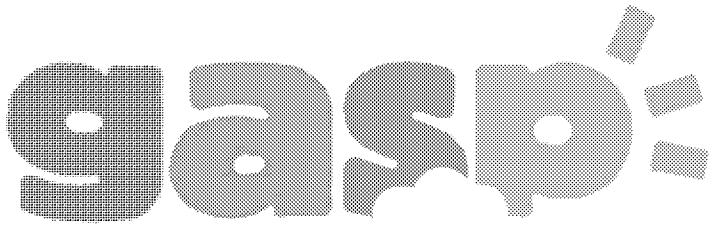

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Gasp sees this as a positive change to the regulations. As previously discussed regarding the Interim Case Resolution Manual, EPA's shifted focus to compliance reviews is a positive step. This would give EPA the discretion to require recipients to submit compliance reports. The proposed change to §7.85(b) could result in EPA being more proactive in its Title VI program. Being more proactive could strengthen EPA's Title VI program by addressing potential discrimination in a timely manner—possibly even before complaints are filed.

b. Amending §§ 7.110(a) and 7.115(a) would strengthen the Title VI program while the proposed changes to §7.115(c) would run afoul of EPA's stated goal of improving its Title VI program.

EPA is proposing to amend the Post-Award Compliance regulations by removing deadlines. "Under the current regulations, on-site reviews for post-award compliance may occur when the OCR 'has reason to believe that discrimination may be occurring in such programs or activities.[48]'"

[48] Nondiscrimination in Programs or Activities Receiving Federal Assistance from the Environmental Protection Agency, 80 Fed. Reg. 239, 77284 (proposed Dec. 14, 2015) (to be codified at 40 C.F.R Parts 7 and 9) at 77287.

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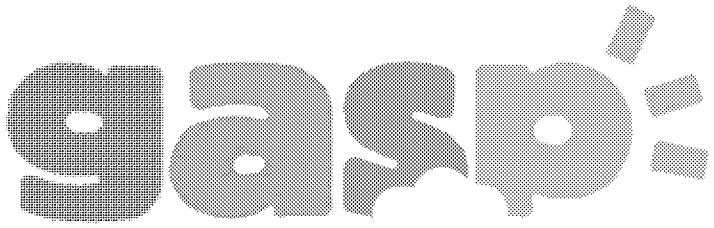

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Specifically, EPA seeks to amend 40 C.F.R. §§ 7.110(a)[49] and 7.115(a)[50],(c)[51]. EPA reasons that "without the burden of an unrealistic, self-imposed deadline,

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[49] 40 C.F.R. § 7.110(a), as proposed to be amended by Nondiscrimination in Programs or Activities Receiving Federal Assistance from the Environmental Protection Agency, 80 Fed. Reg. 239, 77284 (proposed Dec. 14, 2015) (to be codified at 40 C.F.R Parts 7 and 9) provides:

(a) ***Review of compliance information.*** Within EPA's application processing period, the OCR will determine whether the applicant is in compliance with this part and inform the Award Official. This determination will be based on the submissions required by § 7.80 and any other information EPA receives during this time (including complaints) or has on file about the applicant. When the OCR cannot make a determination on the basis of this information, additional information will be requested from the applicant, local government officials, or interested persons or organizations, including aged and handicapped persons or organizations representing such persons. ~~The OCR may also conduct an on-site review only when it has reason to believe discrimination may be occurring in a program or activity which is the subject of the application.~~

[50] 40 C.F.R. § 7.115(a), as proposed to be amended by Nondiscrimination in Programs or Activities Receiving Federal Assistance from the Environmental Protection Agency, 80 Fed. Reg. 239, 77284 (proposed Dec. 14, 2015) (to be codified at 40 C.F.R Parts 7 and 9) provides:

(a) ***Periodic review.*** The OCR may periodically conduct compliance reviews of any recipient's programs or activities receiving EPA assistance, including the request of data and information~~, and may conduct on-site reviews when it has reason to believe that discrimination may be occurring in such programs or activities.~~

[51] 40 C.F.R. § 7.115(c), as proposed to be amended by Nondiscrimination in Programs or Activities Receiving Federal Assistance from the Environmental Protection Agency, 80 Fed. Reg. 239, 77284 (proposed Dec. 14, 2015) (to be codified at 40 C.F.R Parts 7 and 9) provides:

(c) ***Postreview notice.***

(1) ~~Within 180 calendar days from the start of the compliance review or complaint investigation,~~ the OCR will notify the recipient in writing by certified mail, return receipt requested, of:

(i) Preliminary findings;

(ii) Recommendations, if any, for achieving voluntary compliance; and

(iii) Recipient's right to engage in voluntary compliance negotiations where appropriate.

(2) The OCR will notify the Award Official and the Assistant Attorney General for Civil Rights of the preliminary findings of noncompliance.

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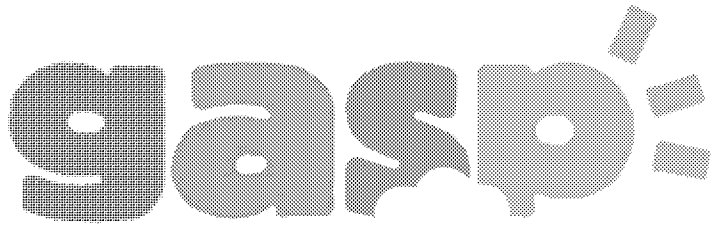

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the EPA will be in a better position to improve the entire External Compliance and Complaints Program, including the compliance review. Even without this deadline, the EPA still must promptly investigate complaints.[52]"

First, the changes to 40 C.F.R. §§ 7.110(a) and 7.115(a) could be positive changes. By removing the limitation that EPA must have reason to believe that discrimination is occurring before conducting a compliance review, EPA is giving itself more latitude in proactively addressing compliance with Title VI. To maintain continuity, and ascertain that OCR can nimbly and effectively enforce civil rights statutes, EPA might also want to bolster the information agencies are required to submit to EPA under 40 C.F.R. §7.80[53]. EPA should also propose to demand additional information from financial assistance applicants. For example, applicants for financial assistance should be required to describe, in writing, the program it employs to ensure that its programs and activities will be conducted in compliance with Title VI.

Second, the changes to 40 C.F.R. §7.115(c) would not be positive changes. By removing deadlines, EPA is weakening the law. When considering the lackluster performance of EPA's OCR, it would be imprudent for EPA to remove the only clear legal hook to hold them accountable.

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[52] Nondiscrimination in Programs or Activities Receiving Federal Assistance from the Environmental Protection Agency, 80 Fed. Reg. 239, 77284 (proposed Dec. 14, 2015) (to be codified at 40 C.F.R Parts 7 and 9) at 77287.

[53] This statute requires the following information in a completed EPA Form 4700-4 (Rev. 06/2014):

- List all civil rights lawsuits and administrative complaints pending against the applicant/recipient that allege discrimination based on race, color, national origin, sex, age or disability.
- List all civil rights lawsuits and administrative complaints decided against applicant/recipient within the last year that allege discrimination based on race, color, national origin, sex, age or disability and enclose a copy of all decisions. Please describe the corrective action taken.
- List all civil rights compliance reviews of the applicant/recipient conducted by an agency within the last two years and enclose a copy of the review and any decisions, orders or agreements based on the review. Please describe any corrective action taken.
- Does the applicant/recipient provide initial and continuing notice that it does not discriminate on the basis of race, color, national origin, sex, age or disability in its programs or activities?
- Does the applicant/recipient maintain demographic data on the race, color, national origin, sex, age or handicap of the population it serves?

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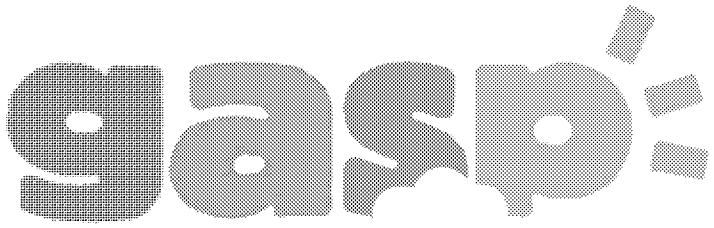

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Research and case law have shown that open-ended deadlines may constitute unreasonable delay by an agency[54,55]. EPA should retain the 180 day deadline for making a preliminary finding of discrimination. Furthermore, Gasp is unpersuaded by EPA's assurances of "promptly investigating complaints[56]." "Promptly" is a subjective, undefined term and would more likely than not result in further delays in processing complaints. Accordingly, EPA would better fulfill its goal of creating a model civil rights program by modifying its approach to meet this deadline.

c. The proposed changes to § 7.120 would not fulfill EPA's stated goal of creating a model civil rights program.

EPA proposes to remove the introductory text of 40 C.F.R. § 7.120 concerning the investigation of "all complaints[57]." EPA purports to adopt language "substantially similar to the regulations of other federal agencies,

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[54] It is also said that agencies set policy by not doing anything at all. Furthermore, the District of Columbia Circuit Court has held that "delays involving human welfare are more important than economic hardships and thus should be given more weight." *See* Zaller C., The Case for Strict Statutory Construction of Mandatory Deadlines under Section 706(1), Wm. & Mary L. Rev. 1545 (2001), http://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1486&context=wmlr at 1545, 2557 and 1569.

[55] In the Rosemere Neighborhood Association case, it was found that "OCR's failure to process the Retaliation Complaint in accordance with the timeline set forth in 40 C.F.R. § 7.115(c)(1) constitutes *agency action unlawfully withheld* pursuant to the Administrative Procedures Act, 5 U.S.C. § 706(1)." "Settlement Agreement" between Rosemere Neighborhood Association and EPA, (Mar. 17, 2010) at 3.

[56] Nondiscrimination in Programs or Activities Receiving Federal Assistance from the Environmental Protection Agency, 80 Fed. Reg. 239, 77284 (proposed Dec. 14, 2015) (to be codified at 40 C.F.R Parts 7 and 9) at 77287.

[57] 40 C.F.R. § 7.115(a), as proposed to be amended by Nondiscrimination in Programs or Activities Receiving Federal Assistance from the Environmental Protection Agency, 80 Fed. Reg. 239, 77284 (proposed Dec. 14, 2015) (to be codified at 40 C.F.R Parts 7 and 9) provides:

The OCR ~~shall promptly investigate all complaints filed under this section unless the complainant and the party complained against agree to a delay pending settlement negotiations~~ will make a prompt investigation whenever a complaint indicates a possible failure to comply.

(a) ***Who may file a complaint.*** A person who believes that he or she or a specific class of persons has been discriminated against in violation of this part may file a

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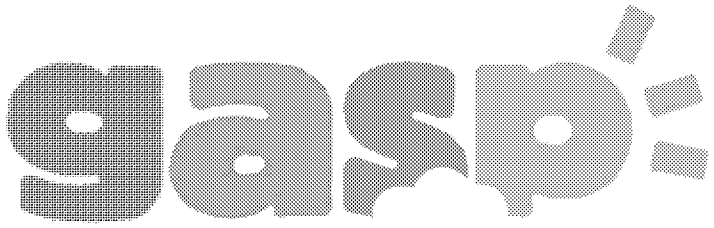

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complaint. The complaint may be filed by an authorized representative. A complaint alleging employment discrimination must identify at least one individual aggrieved by such discrimination. Complaints solely alleging employment discrimination against an individual on the basis of race, color, national origin, sex or religion shall be processed under the procedures for complaints of employment discrimination filed against recipients of Federal assistance (see 28 CFR part 42, subpart H and 29 CFR part 1691). Complaints of employment discrimination based on age against an individual by recipients of Federal financial assistance are subject to the Age Discrimination in Employment Act of 1967 and should be filed administratively with the Equal Employment Opportunity Commission (*see* 29 CFR part 1626). Complainants are encouraged but not required to make use of any grievance procedure established under § 7.90 before filing a complaint. Filing a complaint through a grievance procedure does not extend the 180 day calendar requirement of paragraph (b)(2) of this section.

(b)*Where, when and how to file complaint.* The complainant may file a complaint at any EPA office. The complaint may be referred to the region in which the alleged discriminatory acts occurred.

(1) The complaint must be in writing and it must describe the alleged discriminatory acts which violate this part.

(2) The complaint must be filed within 180 calendar days of the alleged discriminatory acts, unless the OCR waives the time limit for good cause. The filing of a grievance with the recipient does not satisfy the requirement that complaints must be filed within 180 days of the alleged discriminatory acts.

(c)*Notification.* The OCR will notify the complainant and the recipient of the agency's receipt of the complaint ~~within five (5) calendar days~~.

(d)*Complaint processing procedures.* After acknowledging receipt of a complaint, the OCR will immediately initiate complaint processing procedures.

(1)*Preliminary investigation.*

(i) ~~Within twenty (20) calendar days of~~ After the acknowledgment ~~of the complaint~~, the OCR will promptly review the complaint for acceptance, rejection, or referral to the appropriate Federal agency.

(ii) If the complaint is accepted, the OCR will notify the complainant and the Award Official. The OCR will also notify the

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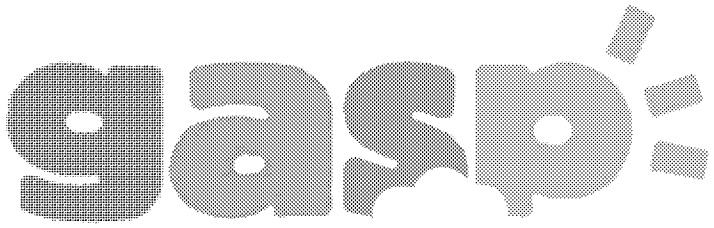

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requiring investigation of complaints that 'indicate a possible failure to comply.[58]'" EPA reasons that "the proposed rule is intended to reflect that a path to resolution must be tailored to the specific facts of the case and such a path may not be identical for every complaint." EPA also proposed to remove the deadlines in § 7.120(c) and (d)(1). Again, EPA points to other federal agencies and reasons that this removal is "not only reasonable, but will provide EPA with the flexibility and time necessary to complete a comprehensive and thorough initial review to identify the most appropriate path to resolve the complaint.[59]"

First, EPA's removal of the world "all" is imprudent. In fact, it is unclear how EPA deems this change reasonable. As previously mentioned,

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applicant or recipient complained against of the allegations and give the applicant or recipient opportunity to make a written submission responding to, rebutting, or denying the allegations raised in the complaint.

(iii) The party complained against may send the OCR a response to the notice of complaint within thirty (30) calendar days of receiving it.

(iv) Complaints alleging age discrimination under the Age Discrimination Act of 1975 will be referred to a mediation agency in accordance with §7.180.

(2)*Informal resolution.*

(i) OCR shall attempt to resolve complaints informally whenever possible. When a complaint cannot be resolved informally, OCR shall follow the procedures established by paragraphs (c) through (e) of § 7.115.

(ii) [Reserved]

(e) ***Confidentiality.*** EPA agrees to keep the complainant's identity confidential except to the extent necessary to carry out the purposes of this part, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder. Ordinarily in complaints of employment discrimination, the name of the complainant will be given to the recipient with the notice of complaint.

[58] Nondiscrimination in Programs or Activities Receiving Federal Assistance from the Environmental Protection Agency, 80 Fed. Reg. 239, 77284 (proposed Dec. 14, 2015) (to be codified at 40 C.F.R Parts 7 and 9) at 77287.
[59] Id. at 77287.

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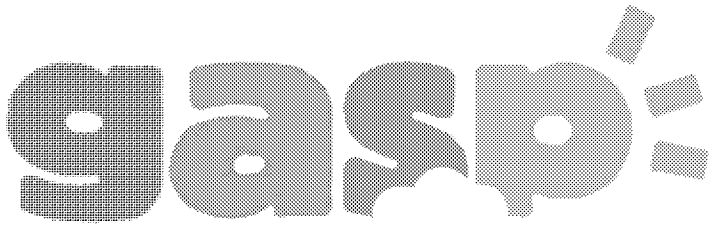

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EPA's OCR has been arguably ineffective in its Title VI program. Accordingly, if the intent of EPA is to build a model civil rights program, the NPR should reflect improvements and accountability. Instead, by offering itself the discretion to not accept all complaints, EPA seems to be weakening its accountability and opening the door to further inaction.

Second, as previously mentioned, the removal of deadlines would weaken the Title VI program. It does not compute that a solution to a backlog of complaints spanning over many years is to remove deadlines to respond to and process complaints. Surely, where EPA struggled to meet the current deadlines, the NPR needs to propose a solution to that issue. However, where mandatory deadlines did not compel action on the part of OCR, it is highly unlikely that non-binding and subjective terms like "promptly" would improve the process. Although it is positive that EPA intends to create internal procedures and policies to guide staff in determining what constitutes reasonably prompt, without the current deadlines, the much needed accountability EPA needs would be severely weakened.

Furthermore, EPA points to language substantially similar to the regulations of other federal agencies as support for eliminating the requirement that they investigate all complaints filed. However, Gasp is unpersuaded by this reasoning. In fact, EPA's current regulations are already consistent with policies and practices in other federal agencies[60].

The changes EPA proposes to make to § 7.120 do not reflect the EPA's goal of creating a model civil rights program that can nimbly and effectively enforce civil rights statutes. OCR's poor record of performance paired with the findings in the Deloitte Report clearly point to EPA's failure to comply with the timelines and reflect problems within the agency itself, and not the timelines or regulations. Accordingly, removing "all complaints" and the deadlines from § 7.120 constitute a step back rather than a step forward and would weaken EPA's Title VI program.

V. Recommendations

While the Interim Case Resolution Manual was a positive step, and a few of the changes in the NPR would strengthen the Title VI program, EPA could have used this opportunity to make more meaningful changes that would strengthen their Title VI program. Because Alabama especially

[60] The Federal Highway Administration requires a ten day time frame for jurisdictional review and a 180-day timeframe for completing investigations. *See* Federal Highway Administration, U.S. Department of Transportation, Procedures Manual for Processing External Complaints of Discrimination, Sections 2-2(D) & (H) (May 18, 2012).

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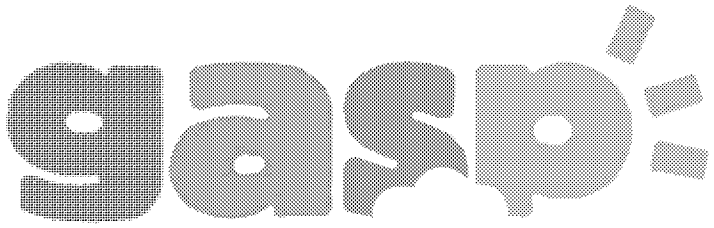

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depends upon the EPA to address environmental justice, there are several changes EPA could and should make to improve their Title VI program.

First, especially in light of the confusion mentioned in the Deloitte Report,[61] EPA should ensure clarity, transparency and uniformity in application of its legal standards and ascertain that those standards comport with civil rights law. The Interim Case Resolution manual addresses these issues in part. However, current ambiguities regarding the rebuttable presumption that compliance with environmental statutes satisfies the impact prong of a disparate impact analysis, as established in *Select Steel*, directly threaten complainants' ability to receive much needed relief. EPA should move away from evaluating its Title VI responsibilities and authority through the lens of solely environmental regulation. This approach runs afoul of civil rights law and ignores the very purpose of OCR's Title VI program. EPA should formally recognize that an adverse impact above de minimis levels can constitute a civil rights violation.

EPA should additionally address legacy issues with unlawful racially discriminatory zoning practices and the effect on environmental justice. *De jure* residential segregation by race was declared unconstitutional in 1917[62]. However, Birmingham established a racial zoning ordinance in 1926 that was not declared unconstitutional by the Alabama Supreme Court until 1951, which resulted in the South's longest-standing racial zoning law[63]. Research shows that zoned-for-blacks neighborhoods were located in or near industrial sites and are four times more likely than white neighborhoods to contain heavy industry[64]. The aforementioned Title VI complaints addressing the

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[61] "OCR staff members also suffer from the absence of the rudiments of organizational infrastructure—well documented policies and procedures, standardized processes, and effective systems. Staff members are often confused about their job duties." Deloitte Consulting, LLP, Evaluation of the EPA Office of Civil Rights (2011), https://assets.documentcloud.org/documents/723416/epa-ocr-audit.pdf at 1.

[62] *See* Buchanan v. Warley, 245 U.S. 60 (1917).

[63] *See* City of Birmingham v. Monk, 185 F.2d 859 (5th Cir. 1950).

[64] *See* Connerly, C.E. The Most Segregate City in America: City Planning and Civil Rights in Birmingham, 1920-1980 (2005). "Racialized zoning and property laws and various related practices [...] in the middle 1900's involved the intent to segregate the races and place industrial facilities in people of color communities [...] because of past discriminatory zoning decisions, new facilities will nevertheless tend to be sited disproportionately where people of color live. Furthermore, such communities over time may come to be seen as 'sacrifice zones' encouraging further siting of noxious facilities." Mohai, P. & Saha, M., "Which came first, people or pollution? A review of theory and evidence from longitudinal environmental justice studies", Environ. Res. Lett., (22 Dec. 2015).

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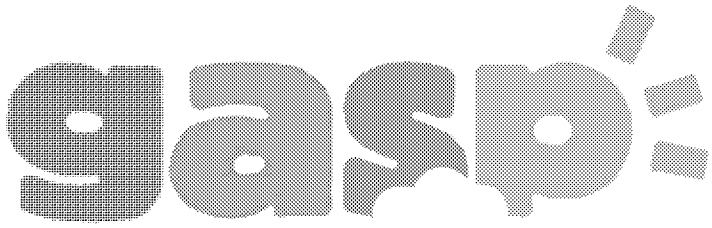

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disparate impact created by the reissuance of Title V [of the Clean Air Act] permits[65] involve neighborhoods that were subject to Birmingham's 1926 unconstitutional racial zoning laws. Where communities such as those in Birmingham were unlawfully restricted to live among polluting industries due to unconstitutional, racially discriminatory zoning laws, the EPA should pay special attention to the disparate impacts created by agencies receiving EPA funds.

Finally, EPA should, at the very least, conduct post-award compliance reviews at least two to three times per year of every agency receiving EPA financial assistance. EPA proposed to conduct six post-award compliance reviews per year by 2018, eleven reviews per year by 2021 and twenty-two reviews per year by 2024[66]. This plan is woefully inadequate. For 2015, EPA gave financial assistance to 792 entities[67]. Based on their proposal, it would take EPA 40 years to conduct a post-award compliance review of every entity receiving their financial assistance. EPA's plan is neither prudent nor does it further their stated goal of nimbly and effectively enforcing civil rights statutes.

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[65] *See supra* notes 29, 30, 31 and 32.
[66] EPA, External Compliance and Complaints Program Strategic Plan-Fiscal Year 2015-2020 (Final Draft for Comment 2015), http://www.epa.gov/sites/production/files/2015-10/documents/strategic_plan.pdf
[67] Analysis of data provided from EPA, Integrated Grant Management Systems, http://www3.epa.gov/enviro/facts/igms/search.htm

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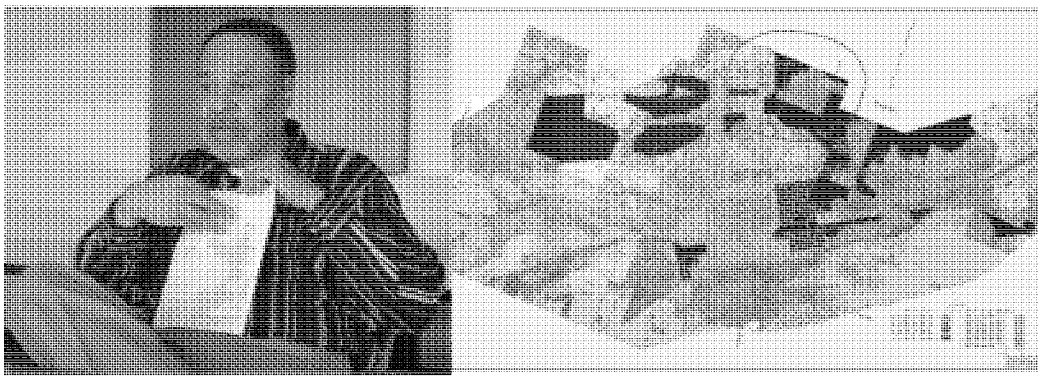
VI. Testimonials

"Just about every child in this picture here has some type of respiratory problem. I worked in [pediatrics] for years and years. I saw babies coming out of Collegeville who had extreme respiratory problems [...] and anomalies that you don't see in other areas[68]."
-Cheryl Brown, Collegeville resident



"Blacks could only live in certain areas [of Birmingham, Alabama.] You would have never put that kind of industrial complex [like in the Northern Birmingham communities] in a zoned for whites only community. Not only were blacks restricted to where they could live, but the industry it seems like sort of surrounded them. All of this stuff is a continuation of the struggle for justice[69]."
-George Munchus, PhD
University of Alabama at Birmingham

[68] Picture and quotation pulled from Gasp, Toxic City: Birmingham's Dirty Secret (June 2014), http://gaspgroup.org/toxic-city-birminghams-dirty-secret/
[69] Picture and quotation pulled from Id.

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"If I could go to another area, I would. Because I want to live like everybody else. I want a healthy life too[70]."
-Bobby Hogan
Collegeville Resident

"[Makaya] wants to play and be a cheerleader like other kids but can't because of her asthma. She's been hospitalized, espeically when it's hard winds and the dust really picks up—everybody gets sick.[71]"
-Tamra Parish, speaking about her daughter
Collegeville Residents

VII. Conclusion

Gasp strongly supports EPA's OCR in its stated goal of creating a model civil rights program that nimbly and effectively enforces civil rights statutes in the environmental context. Alabama has historically struggled with civil rights, and is currently struggling with civil rights in the environmental context. Accordingly, EPA's OCR could be the much needed relief that Alabama communities seek. However, the historical, lackluster performance

[70] Picture and quotation pulled from Gasp, Toxic City: Birmingham's Dirty Secret (June 2014), http://gaspgroup.org/toxic-city-birminghams-dirty-secret/

[71] Picture and quotation pulled from Gasp, Toxic City: Birmingham's Dirty Secret (June 2014), http://gaspgroup.org/toxic-city-birminghams-dirty-secret/

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of EPA's Title VI program should be strengthened by the Interim Case Resolution Manual and the NPR. Although some improvements have been proposed, other proposed changes are troubling to Gasp. We look forward to EPA's OCR strongly considering our analysis and recommendations and developing a stronger Title VI program.

We appreciate the opportunity to comment.

Sincerely,

Haley C. Lewis

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Staff Attorney

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