

COMMENTS OF LAWYERS' COMMITTEE OF CIVIL RIGHTS UNDER LAW SUBMITTED TO THE U.S. COMMISSION ON CIVIL RIGHTS

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The Lawyers' Committee is a nonprofit civil rights organization founded in 1963 by the leaders of the American bar at the request of President Kennedy to help defend the civil rights of racial minorities and the poor. For over fifty years, the Lawyers' Committee has been at the forefront of many of the most significant cases involving race and national origin discrimination and has actively advocated for environmental justice since the 1990s.

The U.S. Commission on Civil Rights is investigating civil rights environmental justice enforcement in low-income communities of color pursuant to Title VI of the Civil Rights Act of 1964. During the course of this investigation, the Lawyers' Committee was asked to submit a comment regarding an important environmental justice matter in which the Federal Highway Administration (FHWA) entered into a settlement of a Title VI complaint against with the Texas state highway agency concerning the Harbor Bridge project in Corpus Christi, Texas.

I. INTRODUCTION

In 2003, the Commission investigated the implementation of Executive Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 11, 1994), at § 1-101, and Title VI of the Civil Rights Act, 42 U.S.C. § 2000d *et seq.*, as tools for achieving environmental justice and found that the U.S. Environmental Protection Agency ("EPA") and the other four federal agencies had not fully implemented the Executive Order and Title VI in the environmental decision-making context. U.S. Comm'n on Civil Rights, *Not in My Backyard: Executive Order 12,898 and Title VI as Tools for Achieving Environmental Justice* 9 (2003) ("Not in My Backyard"). The Commission's report focused on the need for reform:

Federal agencies must more fully integrate environmental justice into their core

missions and put in place evaluation criteria and accountability measures to assess policies and programs. Without more concerted effort on the part of federal agencies to promote and ensure environmental justice, and appropriate congressional action, minority and low-income communities all across this nation will continue to bear the unfair risk of exposure to environmental hazards.

Id. at 9. More than a decade later, civil rights enforcement in the environmental justice context, particularly at EPA, remains meagre and low-income communities of color continue to bear a disproportionate burden of exposure to environmental hazards. However, the processing and response of the Federal Highway Administration (FHWA) to the Title VI environmental justice complaint filed by residents of the Hillcrest and Washington-Coles neighborhoods in Corpus Christi, Texas in 2015 provides an example of progress in this increasingly important area of civil rights enforcement. This comment is designed to describe the process that FHWA followed in investigating and working out a settlement of this matter and how it is a significant improvement over some of the major shortcomings in the EPA enforcement of Title VI that have been raised repeatedly for over 15 years.

BACKGROUND

The Corpus Christi Title VI complaint was filed by the Texas RioGrande Legal Aid and University of Texas Law Environmental Clinic on behalf of low income and minority residents from the Hillside and Washington-Coles communities.¹ It alleged that a major bridge replacement known as the Harbor Bridge Project which had been proposed by the Texas Department of Transportation (TxDOT) to be financed in part by federal funding from the Department of Transportation violated the civil rights of residents of the Hillcrest and

¹ Attorneys for the complainants are preparing an article for the *Clearinghouse Review* concerning this matter and will provide it to the Commission when it published. The Texas Low Income Housing Information Service headed by John Henneberger assisted these attorneys throughout the process and the Lawyers' Committee provided input during the negotiations of the settlement.

Washington-Coles neighborhoods as a result of a proposed road to be built as part of the project that would cause unacceptable disparate harmful impacts to residents of these neighborhoods, including isolation, noise, air pollution, and other impacts.

The current Harbor Bridge is located at the mouth of the Corpus Christi ship channel. The new bridge would be moved farther up the channel and be raised by 68 feet to allow the larger ships that can pass through the new Panama Canal to access the Port of Corpus Christi. The highway that connects to the bridge would be relocated away from downtown Corpus Christi and would bisect the Hillcrest and Washington-Coles neighborhoods, Corpus Christi's historic black communities. These neighborhoods have a long history of past discrimination preceded the Harbor Bridge project stretching back to the days of Jim Crow segregation of African Americans.

The Hillcrest neighborhood was first platted in 1916 and developed in the 1930s and 40s, along with the Washington-Coles and other nearby neighborhoods, prior to the industrialization of the Corpus Christi Ship Channel. At that time, Washington-Coles was specifically designated as the neighborhood for black residents. In 1944, the City Council allowed black homeowners to move into the Hillcrest neighborhood after being informed that Washington-Coles had no more room for new residents. Over the next two decades, Hillcrest transformed from a predominantly white community to a predominantly black community. Despite this history of segregation, the Northside neighborhoods have a history of well-attended schools, vibrant churches, restaurants, locally owned businesses, and community activism. The Harlem Theater on North Staples was the only theater with open seating for blacks. The Old Bayview Cemetery, on Waco Street, is the city's oldest, with graves dating back to 1845, including those of the City's first mayor and sheriff, pioneer families, and Buffalo Soldiers.

But, over time, decisions to locate undesirable land uses near the neighborhoods took their toll. Interstate 37 was constructed through the neighborhoods, dividing them and isolating current day Hillcrest and Washington-Coles from the rest of residential Corpus Christi. Land around the neighborhoods was developed for Port and industrial purposes, including petrochemical refineries. Today, the Hillcrest and Washington Coles neighborhoods are surrounded by oil refineries, the Port of Corpus Christi, and highways. Residents live with air pollution, noxious odors, sirens, and industrial flares. Industrial accidents have caused evacuations as well as "shelter-in-place" warnings, and residents live the constant fear of a major accident or pollution release. The Harbor Bridge Project would exacerbate these problems.

II. THE FHWA'S PROCESSING OF THE TITLE VI COMPLAINT

One of the major problems in environmental justice enforcement at EPA is a longstanding record of noncompliance with the regulatory deadlines, a record that has caused real harm to communities burdened by the effects of environmental harm. This record has been well-documented -- in the 2003 U.S. Civil Rights Commission Report, "Not in My Backyard;"² a 2011 report prepared by Deloitte Consulting, "Evaluation of the EPA Office of Civil Rights;"³ and in a recent investigation by Center for Public Integrity.⁴ It is perhaps illustrated most vividly in *Rosemere Neighborhood Ass'n v. EPA*, 581 F.3d 1169 (9th Cir. 2009) which sets forth the pervasive failure of EPA to meet regulatory deadlines

² U.S. Commission on Civil Rights, *Not in My Backyard: Executive Order 12,898 and Title VI as Tools for Achieving Environmental Justice*, October 2003, at 57, available at <http://www.usccr.gov/pubs/envjust/ej0104.pdf>

³ Deloitte Consulting, LLP, *Evaluation of the EPA Office of Civil Rights, Final Report*, March 21, 2011, available at <https://assets.documentcloud.org/documents/723416/epa-ocr-audit.pdf>

⁴ Talia Buford, *Thirteen years and counting: anatomy of an EPA civil rights investigation*, Ctr. for Pub. Integrity (Aug. 7, 2015), <http://goo.gl/qGpYBS>

The processing of the Corpus Christi Title VI complaint by the FHWA is in stark contrast to this pattern of enforcement and instructive for any federal agency's Title VI program. The complaint was received by FHWA on March 13, 2015. FHWA began its investigation soon after that and issued a letter accepting the complaint and beginning the investigation on April 3rd. FHWA Office of Civil Rights staff were responsible for the investigation and immediately initiated a proactive investigation, making visits to Corpus Christi several times which included meetings with residents in the impacted neighborhoods to explain the status of the investigation and possible outcomes. FHWA also put the Harbor Bridge Project on hold during the investigation which created time and leverage for the investigation and negotiations to occur in a timely matter.

A second important environmental justice enforcement issue has long been how to determine when a Title VI disparate impact violation has occurred. Historically, EPA has been unwilling to find a civil rights violations unless one of the standards set by EPA pursuant to environmental protection statutes has been violated. In fact, it has applied a presumption that Title VI is not violated if there is compliance with the environmental standards set by these statutes. This practice often results in ignoring other important factors, including the big picture of all of the burdens a community has to bear, how those burdens compare to those of other communities and the history of discrimination in the community impacted. When Title VI compliance is found based on this narrow presumption, it does not mean that minority populations are not adversely affected by federally funded programs. Indeed, most of the environmental standards that exist don't consider cumulative impacts of multiple pollutants and sources of pollution and don't consider other burdens the community may experience that make the negative impacts of pollution on that population more likely. In short, relying on

environmental standards does not fully capture the harms to public health or a population's way of life.

Although FHWA never issued formal Title VI findings of a violation in the Harbor Bridge matter, it is the understanding of the attorneys who represented and assisted the complainants that FHWA avoided this kind of cramped analysis of Title VI compliance. Applying disparate impact analysis in an environmental context can be difficult. Therefore, complainants reached out to both the Department of Housing and Urban Affairs (HUD) and EPA, asking them to confirm the disparate impacts of the bridge on the minority communities. FHWA was helped in this regard by drawing on the Department of Justice's civil rights expertise in applying a disparate impact analysis to its determination of Title VI compliance. Especially important, FHWA appeared to consider the cumulative impact of the project on the community as well as the likely impacts on the community, regardless of whether any environmental standards were violated.

Another ongoing problem in environmental justice enforcement has been the failure to involve the complainants and members of an affected community in the Title VI investigation and in discussions of a remedial plan designed to settle the complaint. The worst example of this is found in an EPA complaint styled *Angelita C. v. California Department of Pesticide Regulation*. In this case, twelve years after the filing of a Title VI complaint, EPA concluded that there was sufficient evidence to make a preliminary finding of a Title VI violation as a result of the disparate impact on Latino children in California from the application of a pesticide near the children's school. However, at that point, not only did EPA fail to inform complainants of

this finding, it then proceeded to negotiate a settlement agreement with absolutely no involvement of the complainants in the negotiating process.⁵

By contrast, in the Harbor Bridge review FHWA sought input from complainants and members of the Hillside and Washington-Coles communities from the time of the initial investigation through negotiations concerning the settlement agreement entered on December 17, 2015. In addition, other federal agencies participated in the process. Community involvement in the negotiations made it apparent that there would be neighborhood-wide impacts from the project outside of just the right-of-way which led to discussions of a broad remedy that would address impacts to an entire neighborhood.

Even before the Title VI complaint was filed, EPA and the Department of Housing and Urban Development (HUD) had filed comments about the project echoing concerns being expressed by the affected community about the addition of air pollution and soil contamination to an already overburdened community, noise impacts, reductions in property values, and impacts to nearby subsidized housing residents. During negotiations of the settlement agreement, complainants and the FHWA sought input from HUD and EPA to assist in crafting a settlement. The Department of Justice also played a role in trying to coordinate the actions of these agencies through the Civil Rights Division's Federal Coordination and Compliance Section. This Section is tasked with ensuring that all federal agencies consistently and effectively enforce civil rights statutes and Executive Orders that prohibit discrimination in federally conducted and assisted programs and activities and is especially well-suited for promoting this kind of coordination.

⁵ The *Angelita C* case is discussed in more depth in *Garcia v. McCarthy*, No. 13-cv-03939-WHO, 2014 WL 187386 at *2 (N.D. Cal. Jan. 16, 2014).

It was also clear early in the negotiating process that a satisfactory neighborhood-wide settlement could not be reached and funded unless a number of parties who were not directly involved in the Title VI complaint participated, including: (1) the Port of Corpus Christi, with a keen interest in seeing the Harbor Bridge constructed, (2) the Corpus Christi Housing Authority, responsible for the public housing that would be directly impacted by the bridge, and (3) the City of Corpus Christi. Each of these entities contributed to the settlement and the contribution of the Port, which is funding \$20 million of the settlement, was crucial to the settlement. In sum, FHWA's willingness to include other federal and local agencies in settlement discussions was crucial to this settlement.

The multi-million dollar settlement has been lauded as a landmark by Dr. Robert Bullard, Dean of the School of Public Affairs at Texas Southern University and known as the father of environmental justice. It resulted from a collaborative effort by the Port of Corpus Christi, City, the Housing Authority of Corpus Christi; the Federal Highway Administration (FHWA); and the Texas Department of Transportation (TxDOT). While complainants and neighborhood residents participated in the negotiating process, they are not a signatory to the agreement. Specifically, the agreement focuses on enhanced mitigation options for affected residents and includes:

- A voluntary relocation program for homeowners and renters to relocate to a comparable home in a healthy environment, including relocation assistance by a relocation counselor, moving costs for both homeowner and renters, title and closing costs, appraised value of the original home and the comparable home ;
- Financial assistance for neighborhood churches, small businesses, and owners of rental properties that choose to relocate to comparable properties;
- A City Liaison in the neighborhood for four years to provide information on their options pursuant to the settlement and to connect residents to City services such as weatherization and home improvement programs;

- Improved parks, including a new historic park, to be designed with input from a community advisory board, that will recognize the unique history and contributions of Corpus Christi's historic black neighborhoods;
- Mitigation of construction impacts, such as noise, dust, air pollutants, and traffic; and
- Relocation of tenants in a public housing property impacted by the project.

III. CONCLUSION

There are several positive aspects of the Harbor Bridge Title VI matter for the Commission to consider in evaluating Title VI environmental justice enforcement. In particular, the timeliness of the investigation and resolution of the matter and involving complainants and affected communities, as well as other federal agencies and local governmental entities, in the Title VI process should be standard practice. Environmental justice matters have a broad impact and typically raise complex factual and legal issues. Reaching out for assistance and coordination is important in fully addressing these issues.

At the same time, there are areas of this process that can be improved. First, while it is our understanding that FHWA sought assistance from the Department of Justice in applying a disparate impact analysis to this matter, explicit standards and guidance for analyzing disparate impact in the environmental justice context is badly needed, not only for EPA but for all agency Title VI programs. Second, it is not clear that the Department of Justice's Federal Coordination and Compliance Section has played the type of coordinating role in other environmental justice matters that it did in the Harbor Bridge matter. It should increase this role in the future. Third, while complainants were consulted in negotiating the settlement agreement, they were not permitted to be signatories to the settlement agreement and this will complicate any future enforcement of the agreement that may be necessary. It is not clear if this is standard practice of federal agencies in all Title VI enforcement matters. But as third party beneficiaries of such

settlements, complainants should be signatories to them. Indeed, in an early Title VI enforcement matter by the Department of Transportation, it appears that complainants were part of the settlement agreement. : See

http://www.fhwa.dot.gov/environment/environmental_justice/case_studies/case3.cfm and

<https://www.dropbox.com/s/8nbx2ns3prf9x6h/North%20Carolina%20Title%20VI%20Article%2022ClearinghouseRev4422.pdf?dl=0>.