

5-31-2014

Hydrofracking and Environmental Justice: A Proposal to Lower the Threshold for Evidence of Discriminatory Impact in Title VI Complaints

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Hydrofracking and Environmental Justice: A Proposal to Lower the Threshold for Evidence of Discriminatory Impact in Title VI Complaints

Mfon Etukeren[†]

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I. INTRODUCTION

The United States is one of the top natural gas producers in the world.¹ In the next 35 years, hydraulic fracturing (hydrofracking) activity is projected to increase both domestically and internationally. Although hydrofracking has been utilized since 1949, it is still considered an unconventional way to drill for natural gas.² Natural gas is conventionally drilled vertically, whereas hydrofracking involves drilling horizontally into shale formations and fracturing it. This method of natural gas extraction is economical because the fracturing process increases the flow of gas, thereby increasing the gas production from the well. With the increased production from hydrofracking, the United States is expected to become the top natural gas producing nation in the world by 2035.³

Though profitable, fracking has negative environmental impacts. As the use of hydraulic fracturing has increased, so have concerns about its potential environmental and human health impacts on low-income minority communities, referred to as environmental justice (EJ)

1. Terry W. Roberson, *Environmental Concerns of Hydraulically Fracturing A Natural Gas Well*, 32 UTAH ENVTL. L. REV. 67, 69 (2012).

2. *FAQ: Natural Gas*, INT'L ENERGY AGENCY, <http://www.iea.org/aboutus/faqs/gas/> (last visited Oct. 29, 2012); see also Brian J. Smith, *Fracing the Environment?: An Examination of the Effects and Regulation of Hydraulic Fracturing*, 18 TEX. WESLEYAN L. REV. 129, 130-131 (2011).

3. *Annual Energy Outlook 2012 Early Release Overview*, U.S. ENERGY INFO. ADMIN., <http://www.eia.gov/forecasts/aeo/er/pdf/0383er%282012%29.pdf> (last visited Nov. 5, 2012).

communities.⁴ The United States Environmental Protection Agency (EPA) further defines environmental justice as the “fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income.”⁵ The primary environmental impact associated with hydrofracking is groundwater contamination either from ruptured wells or from improperly disposed fracking wastewater.⁶ On average, hydrofracking wells have 1.5 to 4 times more violations per well, as compared to conventional oil and gas wells.⁷ These violations include EPA as well as state law environmental violations. The effect is that the groundwater contamination ultimately affects the surrounding community’s access to a clean water source. Contaminated fracking fluid leaking into drinking water supplies and severe air pollution in the area around the drilling site are commonly reported violations.⁸

The number of hydrofracking violations remains high because most hydrofracking activity is not regulated by the federal government, unlike conventional oil and gas activity.⁹ However, as natural gas production increases, the environmental community continues to demand federal regulations that apply to hydrofracking activity.¹⁰ Hydrofracking activity that contaminates water supplies strips away one’s right to live in a clean and healthy environment. However, since most of the hydrofracking activity is exempt from federal statutes, this leaves the states to regulate the activity, producing a patchwork of inconsistent regulations that do not sufficiently address potential EJ violations.¹¹

It is important to address EJ in the fracking context because history has shown that most environmental violations occur in and around poor

4. *CCR Advocacy around Hydraulic Fracturing and the Human Rights to Water*, CENTER FOR CONST. RIGHTS, <https://ccrjustice.org/ourcases/current-cases/human-right-water-and-hydraulic-fracturing-advocacy>, (last visited Apr. 30, 2014).

5. *Environmental Justice*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/environmentaljustice/basics/index.html> (last visited Sept. 9, 2012).

6. Philip E. Karmel, *Plan to Study the Potential Impacts of Hydraulic Fracturing on Drinking Water Resources*, 599 PRACTICING L. INST. 291, 307 (2012).

7. *Natural Gas Drilling: Public-Health and Environmental Impacts, Joint Hearing of the Senate Environment and Public Works Committee and the Water and Wildlife Subcommittee of the Senate Environment and Public Works Committee*, 112th Cong. (2011) (statement of Dr. Conrad Volz, Director for The Center for Healthy Environments & Communities).

8. U.S. HOUSE OF REPRESENTATIVES COMM. ON ENERGY AND COMMERCE MINORITY STAFF, CHEMICALS USED IN HYDRAULIC FRACTURING 1 (April 2011), available at <http://democrats.energycommerce.house.gov/sites/default/files/documents/Hydraulic-Fracturing-Chemicals-2011-4-18.pdf> [hereinafter REP. ON CHEMICALS USED IN HYDRAULIC FRACTURING].

9. Smith, *supra* note 2, at 142.

10. *Id.*

11. Tracy Frisch, *Farmers Get Fracked: How Gas Drilling Might Affect Farmers*, MILLBROOK INDEPENDENT, <http://www.themillbrookindependent.com/environment/farmers-get-fracked> (last visited Nov. 11, 2012).

communities with large minority populations.¹² To determine how fracking triggers EJ violations and affects communities, Congress ordered the EPA to conduct research and analyze the relationship between drinking water sources and fracking, and EJ.¹³ In its mandate to the EPA, Congress said the study should “answer environmental justice questions.”¹⁴ The study will help the EPA determine if: (1) hydrofracking oil and gas wells are disproportionately located near communities with environmental justice concerns; (2) whether the large volumes of water used in hydrofracking is being disproportionately withdrawn from drinking water sources that serve communities with environmental justice concerns; and (3) whether wastewater from hydraulic fracturing operations are disproportionately treated or disposed of in or near communities with environmental justice concerns.¹⁵ The study began in 2011 and is due for completion in 2014.¹⁶ In addition to the study, EPA is also addressing EJ concerns through Title VI. The Civil Rights Act of 1964 provides an avenue for hydrofracking complainants to address EJ violations by filing an administrative complaint with the EPA Office of Civil Rights (OCR).¹⁷ OCR oversees the Title VI process and determines the outcome based on whether the action of the state or local agency caused a disparate impact.¹⁸

This complaint process is how the EPA currently handles hydrofracking issues that raise EJ and Title VI concerns. An OCR complainant can establish disparate impact by showing that the violation of a federal statute adversely and disproportionately impacted a protected Title VI class.¹⁹ For hydrofracking complainants, the lack of a federal framework makes it difficult to prove adverse impact. The result is that hydrofracking complainants are left with no avenues with which to show disparate impact. The solution to this problem is a clarification in OCR’s Title VI Guidance that specifies what constitutes adverse impact in situations where the activity is not regulated by federal statute. The Guidelines are unclear as to how complainants can show adverse impact when the complained activity is not regulated by the federal government.

12. U.S. COMM’N ON CIVIL RIGHTS, NOT IN MY BACKYARD: EXECUTIVE ORDER 12,898 AND TITLE VI AS TOOLS FOR ACHIEVING ENVIRONMENTAL JUSTICE 14 (2003).

13. *Id.* at 361.

14. *Id.* at 361.

15. *Id.* at 361-2.

16. Smith, *supra* note 2, at 130-31.

17. 42 U.S.C. § 2000 (2011).

18. *Id.*

19. Title VI Draft Recipient Guidance and Revised Investigation Guidance, 65 Fed. Reg. 39,668 (June 27, 2000).

If this gap is filled, hydrofracking concerns can be addressed in an efficient and just manner that will preserve the well-being of the affected communities.

Part I of this paper provides background on why the need for environmental justice arose and how EJ communities are affected by hydraulic fracturing activity. Part II describes the existing Title VI framework and the role EPA Guidance plays in the administration of Title VI. Part III discusses the judicial interpretations of environmental cases brought under Title VI as well as the EJ cases filed with OCR. Recent judicial interpretations of Title VI have foreclosed the courts as an option to use and address EJ concerns. To ensure EJ complainants still have an avenue to obtain relief, the EPA continues to investigate and determine the outcome of EJ cases falling under Title VI.

Part IV proposes a clarification to EPA's Investigatory Guidance, regarding hydrofracking complainants and what is necessary to show disparate impact. The lack of clarity in the current guidelines regarding situations where complainants cannot show discriminatory impact by showing a violation of a federal statute fails to protect EJ complainants covered under Title VI. The clarification must address the burden on hydrofracking complainants to show discriminatory impact due to the lack of federal regulation. The proposed clarification will provide a way for hydrofracking complainants to prove adverse impact without having to show actual harm. Asking the EPA to recognize a pitfall in its Guidance could be challenging; however, as hydrofracking activity increases, more minority communities risk being severed from the protections of Title VI.

II. HOW HYDROFRACKING AFFECTS ENVIRONMENTAL JUSTICE COMMUNITIES

A. Environmental Hazards of the Hydrofracking Process

Since 2007, natural gas production in the United States grew by nearly 20 percent.²⁰ This growth is driven by the dramatic increase in domestic shale gas production.²¹ Shale gas exists across much of the

20. Karol Mazur, *Economics of Shale Gas*, ENERGY CENT. (Oct. 3, 2012), http://www.energy.pulse.net/centers/article/article_display.cfm?a_id=2574.

21. The U.S. Energy Information Administration (EIA) estimates that shale gas production will increase by almost 30 percent in the next twenty-five years, from 22 trillion cubic feet in 2010 to 28 trillion cubic feet in 2035. In fact, projections show that by 2021, the United States will be a net exporter of natural gas. See *Annual Energy Outlook 2012 Early Release Overview*, U.S. ENERGY INFO. ADMIN., <http://www.eia.gov/forecasts/aeo/er/pdf/0383er%282012%29.pdf> (last visited Nov. 5, 2012).

United States. The most active shale formations are the Barnett Shale, found in Texas, and the Marcellus Shale, found in Pennsylvania, New York, Ohio, and West Virginia.²² Shale gas refers to natural gas trapped within shale formations, which is a finely grained sedimentary rock²³ that can be a source of petroleum and natural gas.²⁴

The process involves drilling a vertical wellbore for hundreds of feet until it hits the shale formation.²⁵ The well then turns ninety degree and drills horizontally for thousands of feet, into the shale that contains the trapped gas.²⁶ When the formation is too thick to drill through, it has to be fractured.²⁷ Water is mixed with sand and specially patented chemicals, collectively called “frac fluid,” and is pumped under high pressure into the well.²⁸ The pressure permeates the rock and fractures the shale, and the small amounts of sand holds the fractures open.²⁹ As the frac fluid drains, the sand leaves open cracks for gas and oil to flow into the well.³⁰ The water left over after the fracturing is called wastewater or flowback water. This water returns to the surface and is either stored in tanks, or sent to treatment facilities.³¹

Frac fluid composition is 98% fresh water and sand and 2% chemical additives.³² The water is usually drawn from lakes, rivers, streams, wetlands, ponds, and wells and is mixed with the patented chemicals and stored in shallow aquifers for production use.³³ Unfortunately, after the water is used, it cannot be returned to the watershed because it is contaminated with hundreds of additives.³⁴ Over

22. *What is the Marcellus Shale Formation?*, OILSHALEGAS.COM, <http://oilshalegas.com/marcellusshale.html> (last visited Sept. 15, 2012).

23. *What is Shale Gas?*, GEOLOGY.COM, <http://geology.com/energy/shale-gas/> (last visited Sept. 15, 2012).

24. *What is Shale Gas and Why is it Important*, SHALE TRAINING AND EDUC. CENTER, <http://www.shaletec.org/whatis.htm> (last visited Nov. 5, 2012).

25. *The Pennsylvania Guide to Hydraulic Fracturing or Fracking*, NPR.ORG, <http://stateimpact.npr.org/pennsylvania/tag/fracking/?gclid=CMbc48Cv1bMCFQeynQod8mQAJw> (last visited Oct. 4, 2012).

26. *Fracking: The Process*, CLEAN WATER ACTION, <http://www.cleanwateraction.org/page/fracking-process> (last visited Oct. 3, 2012).

27. Nancy C. Carre, *Environmental Justice and Hydraulic Fracturing: The Ascendancy of Grassroots Populism in Policy Determination*, 4 J. OF SOC. CHANGE 1, 3 (2012).

28. Smith, *supra* note 2, at 130-131.

29. *Id.*

30. *Natural Gas Hydrofracking in Shale*, CITIZENS CAMPAIGN, <http://www.citizenscampaign.org/campaigns/hydro-fracking.asp> (last updated May 12, 2012).

31. REP. ON CHEMICALS USED IN HYDRAULIC FRACTURING, *supra* note 8.

32. Smith, *supra* note 2, at 130.

33. *Drilling 101*, SHALESHOCK.ORG, <http://shaleshock.org/drilling-101/> (last visited Nov. 1, 2012).

34. *Id.*

95% of the additives in frac fluids have negative health effects, including brain damage, birth defects, and cancer.³⁵ Although the oil and gas producers try and remove some of the frac fluid from the well after the fracturing is complete, “a substantial amount remains underground” and can leak into ground water and nearby drinking water supplies.³⁶

Studies have shown that fracking in the Marcellus shale, one of the most actively drilled shale formations, has “1.5 to 5.0 times more violations [per well] than conventional oil and gas wells.”³⁷ These violations negatively affect air pollution in the area around the drilling.³⁸ The air quality near violating well sites showed potentially toxic substances and as a result may have contributed to acute and chronic health problems for those living near the sites.³⁹ The high ozone levels can lead to dizziness, a plethora of respiratory complications, lung disease, and cancer.⁴⁰ As a result, hydrofracking violations have a more severe and direct impact on water quality and overall health.⁴¹

Hydrofracking also has negative impacts on water supply and sources. Residents around the well sites have expressed concerns ranging from their water smelling like sulfur to their water catching on fire when it is near an open flame.⁴² In addition, the frac fluid sometimes leaks into drinking water sources as a result of “tank ruptures, equipment or surface impoundment failures, overfills, vandalism, accidents, ground fires, or improper operations.”⁴³ These are some of the dangers associated with hydrofracking, and it triggers EJ concerns. As evidenced by history, minority communities are the most likely to suffer from environmental violations and ills.⁴⁴

Despite these concerns, some are slow to criticize hydrofracking companies because there are very few studies conducted on the effects between hydrofracking, drinking water, and human health impacts.⁴⁵ Critics say the process is too new to determine exactly how

35. *Id.*

36. REP. ON CHEMICALS USED IN HYDRAULIC FRACTURING, *supra* note 8..

37. *Natural Gas Drilling: Public-Health and Environmental Impacts*, *supra* note 7.

38. *Id.*

39. *Id.*

40. SHALESHOCK.ORG, *supra* note 33.

41. *Natural Gas Drilling: Public-Health and Environmental Impacts*, *supra* note 7.

42. Mark Drajem, *Fracking is Safe-Except in Wyoming*, BLOOMBERG BUSINESSWEEK (Sept. 6, 2012), <http://www.businessweek.com/articles/2012-09-06/fracking-is-safe-except-in-wyoming>.

43. Karmel, *supra* note 6, at 350.

44. U.S. COMM’N ON CIVIL RIGHTS, *supra* note 12, at 14.

45. Ian Urbina, *Regulation Lax as Gas Wells’ Tainted Water Hits Rivers*, N.Y. TIMES (Feb. 26, 2011), <http://www.nytimes.com/2011/02/27/us/27gas.html?pagewanted=all>.

hydrofracking impacts human health.⁴⁶ In 2004, the EPA conducted a report to address part of this question.⁴⁷ The report looked at the effects of hydrofracking on drinking water and found that although hydrofracking can introduce harmful chemicals into the water table, fracking did not pose “a significant threat to drinking water.”⁴⁸ When the report was released, it was severely criticized and generated public outcry because it was so contrary to what various communities were already experiencing.⁴⁹ In response to the public outcry, Congress directed the EPA to conduct research and analyze the relationship between drinking water sources and hydrofracking, and EJ.⁵⁰ The study, due for completion in 2014, will help answer how fracking affects EJ communities.⁵¹

Groundwater pollution is a major concern with hydrofracking.⁵² The extensive federal regulations that govern water pollution largely do not apply to protecting the groundwater.⁵³ This includes the Clean Water Act (CWA), the Oil Pollution Act (OPA), the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), and the Resources Conservation and Recovery Act (RCRA).⁵⁴ The Safe Drinking Water Act (SDWA) is the only federal statute applicable to groundwater pollution in urban and suburban areas.⁵⁵ A major component of SDWA is its Underground Injection Control (UIC) program, designed to minimize groundwater contamination by setting requirements for “proper well siting, construction, and operation.”⁵⁶

However, the 2005 Energy Policy Act amended the SDWA, creating what is commonly known as the “Halliburton loophole.”⁵⁷ The amendment excluded hydrofracking fluids, except where diesel fuel is used, from regulation, stating that frac fluid composition does not have to be disclosed to the EPA.⁵⁸ Unless oil and gas companies use diesel, underground injection of chemicals used for hydrofracking is not

46. *Natural Gas Extraction - Hydraulic Fracturing*, U.S. ENVTL. PROT. AGENCY, <http://www2.epa.gov/hydraulicfracturing> (last updated Apr. 24, 2014)

47. Smith, *supra* note 2, at 132.

48. *Id.*

49. *Id.*

50. Karmel, *supra* note 6, at 307.

51. Smith, *supra* note 2, at 130-31.

52. *See generally* U.S. ENVTL. PROT. AGENCY, *supra* note 46.

53. Smith, *supra* note 2, at 140.

54. *Id.*

55. *Id.* at 141.

56. U.S. ENVTL. PROT. AGENCY, *supra* note 46.

57. Smith, *supra* note 2, at 141.

58. REP. ON CHEMICALS USED IN HYDRAULIC FRACTURING, *supra* note 8.

regulated by the EPA.⁵⁹ As a result of the Halliburton loophole, EPA cannot take action against producers whose underground injection activities risk contaminating the groundwater.⁶⁰ Additionally, because hydrofracking activity is exempt from other applicable federal regulations such as the Hazardous Materials Transportation Act (HMTA), and the Emergency Planning and Community Right to Know Act (EPCRA), the EPA cannot address these violations either.⁶¹

Most of the chemicals using in hydrofracking are toxic and dangerous.⁶² Recently, the House Committee on Energy and Commerce launched an investigation to “examine the practice of hydraulic fracturing in the United States.”⁶³ The Committee found that between 2005 and 2009, 14 leading oil and gas service companies “used more than 2,500 hydraulic fracturing products containing 750 chemicals and other components.”⁶⁴ The amount of chemicals is not accurate because, “[i]n many instances, the oil and gas service companies were unable to provide the committee with a complete chemical makeup of the hydraulic fracturing fluids they used.”⁶⁵

However, in total, hydrofracking companies produced and used over 780 million gallons of additives and chemicals.⁶⁶ Of the 750 chemicals used, “29 chemicals are (1) known or possible human carcinogens, (2) regulated under the Safe Drinking Water Act for their risks to human health, or (3) listed as hazardous air pollutants under the Clean Air Act.”⁶⁷ Methanol was the most highly utilized chemical.⁶⁸ Methanol is a flammable and volatile chemical that was used in 342 hydrofracking products the companies used.⁶⁹ Methanol is dangerous because it causes air pollution around the well sites resulting in negative health impacts.⁷⁰ In addition to pollution from methanol, the “diesel generators, drill rigs, trucks and other equipment, condensate tanks, and

59. Smith, *supra* note 2 at 142.

60. U.S. ENVTL. PROT. AGENCY, *supra* note 46.

61. Jennifer Hayes, *Protecting Pennsylvania's Three Rivers' Water Resources from Shale Gas Development Impacts*, 22 DUKE ENVTL. L. & POL'Y F. 395, 392-93 (2012); see also Hannah Wiseman, *Regulatory Adaptation in Fractured Appalachia*, 21 VILL. ENVTL. L. J. 229, 243-44 (2010) (explaining statutory exemptions applicable to shale gas developers).

62. REP. ON CHEMICALS USED IN HYDRAULIC FRACTURING, *supra* note 8.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. Robert Myers, *The Environmental Dangers of Hydrofracking*, LOCK HAVEN UNIV., <http://www.lhup.edu/rmyers3/marcellus.htm> (last visited Apr. 2, 2013).

69. REP. ON CHEMICALS USED IN HYDRAULIC FRACTURING, *supra* note 8.

70. *Id.*

the flaring of wells are significant sources of volatile organic compounds VOC's and nitrogen oxide."⁷¹ This pollution contaminates the area around the well sites, and the surrounding communities. Once-pristine communities in Colorado and Wyoming now have ozone levels higher than those recorded in Los Angeles.⁷² The reported water pollution associated with hydrofracking activities ultimately burdens the affected communities, and is something that must be addressed.

B. The History of the Environmental Justice Movement

Environmental justice (EJ) gives a focal point for tackling concerns like those above; ensuring the health of individuals in a community. EJ is the principle that "humans should have the inherent right to a clean and healthy environment, free from a disparate concentration of environmental ills."⁷³ Historically, poor communities of color suffered disproportionately higher from environmental harms.⁷⁴ Racially discriminatory zoning practices zoned communities of color as industrial, and contributed to disproportionate placement of toxic chemicals in these neighborhoods.⁷⁵ Initially, the federal government fostered this problem by practicing housing segregation that led to poor minority communities suffering adverse effects of environmental discrimination.⁷⁶ These practices included denying African Americans mortgage insurance in integrated communities, but providing mortgage communities in heavily segregated and undesirable communities; redlining by refusing to extend credit to minorities; charging more for services; and supporting racial covenants.⁷⁷

The undesirable environmental conditions present in the neighborhoods caused these "industrial" areas to experienced overall community decline.⁷⁸ As the industrial activity in the neighborhoods increased, property values decreased, and the area became less

71. SHALESHOCK.ORG, *supra* note 33.

72. Urbina, *supra* note 45.

73. Tonya R. Lewis, *The Plenary Power of States to Protect Citizens From Environmental Hazards: Who's Failing: New York State: A Case in Point*, 17 BUFF. ENVTL. L. J. 43, 45 (2009-2010).

74. U.S. COMM'N ON CIVIL RIGHTS, *supra* note 12, at 14.

75. *Almost Everything You Need to Know About Environmental Justice*, THE UNITED CHURCH OF CHRIST, http://www.ucc.org/justice/advocacy_resources/pdfs/environmental-justice/almost-everything-you-need-to-know-about-environmental-justice-english-version.pdf (last visited Jan. 23, 2013).

76. *Id.*

77. *Id.*

78. U.S. COMM'N ON CIVIL RIGHTS, *supra* note 12, at 14.

desirable.⁷⁹ The members that could not afford to move were usually poor minorities without any other housing alternative and little political clout to protest the “permitting and siting decisions that had adverse environmental impacts.”⁸⁰

Continued frustration over housing segregation, racial zoning practices, and infrastructure development became the impetus for the EJ movement in the late 1970s and early 1980s.⁸¹ In 1979 and 1982, litigation began in two of the first EJ cases. In *Bean v. Southwestern Waste Management Corporation*, Texas residents of East Houston alleged that the city’s decision to place a “garbage dump in their neighborhood was racially motivated,” and violated their rights under the Civil Rights Act of 1964.⁸² The district court held that the plaintiffs “established a substantial likelihood of irreparable injury.”⁸³ However, because the plaintiffs did not show a discriminatory purpose for the city’s decision, the plaintiffs did not prevail on the merits of their case.⁸⁴

The injustice continued into the 1980s in North Carolina, where many agree the “EJ movement was born.”⁸⁵ In 1982, the African American residents of Warren County, North Carolina “waged a full frontal assault against the state-sponsored environmental racism.”⁸⁶ The state wanted to make this predominantly black community “a perpetual graveyard for 60,000 tons of highly contaminated PCB-contaminated soil.”⁸⁷ The residents protested and formed a human blockade in front of the trucks ordered to transport the PCBs to the community.⁸⁸ The protesters argued that the African American community was selected not because the site was desirable for the dumping, but because the neighborhood was a poor minority neighborhood.⁸⁹

Scientists that were interviewed corroborated this assessment of the situation by confirming the area was not the most suitable site because the low position of the water table produced an unnecessary and

79. *Id.*

80. *Id.*

81. See generally Lewis *supra* note 21, at 17.

82. U.S. COMM’N ON CIVIL RIGHTS, *supra* note 12, at 14.

83. *Bean v. Southwestern Waste Management Corporation*, 482 F. Supp. 673, 677 (S. D. Tex. 1979).

84. *Id.*

85. Lewis *supra* note 73, at 47.

86. Renee Skelton & Vernice Miller, *The Environmental Justice Movement*, NAT. RES. DEF. COUNCIL, <http://www.nrdc.org/ej/history/hej.asp> (last visited Jan. 23 2013).

87. *Id.* at 46.

88. *Environmental Justice History*, U.S. DEP’T OF ENERGY, <http://energy.gov/lm/services/environmental-justice/environmental-justice-history>, (last visited Jan. 29, 2013).

89. U.S. COMM’N ON CIVIL RIGHTS *supra* note 12, at 17.

increased risk of groundwater contamination.⁹⁰ As the situation in North Carolina boiled over, environmental grassroots organizations and the United Church of Christ protested in solidarity.⁹¹ The protest resulted in the arrest of over 400 people.⁹² Unfortunately, the residents of Warren County were not able to keep the toxic waste from eventually being deposited in their community.⁹³ However, the ultimate outcome was an “alliance between the environmental and civil rights movements” in North Carolina.⁹⁴

The events in North Carolina provide an example of EJ issues that can arise with hydrofracking. As the nation produces more natural gas, communities around production sites are experiencing adverse impacts from the drilling.⁹⁵ In some rural, low-income communities, residents report that their drinking water wells have blown up because of the pressure from the drilling.⁹⁶ Toxic chemicals have been illegally discharged into rivers that supply drinking water to multiple communities.⁹⁷ Waters have become contaminated with radioactivity at “levels higher than previously known, and far higher than the level that federal regulators say is safe.”⁹⁸ Even knowing that waste-water treatment plants are not equipped to handle toxic wastewater treatment, federal and state regulators continue to allow the plants to accept this wastewater anyway.⁹⁹ In Pennsylvania, for example, the untreated toxic water travels to rivers that supply drinking water to as many as fifteen million people in three different states.¹⁰⁰

The communities affected by these events are protesting, but due to their lack of political clout, the protests are falling on deaf ears.¹⁰¹ The toxins in the drinking water are “some of the most powerful carcinogens

90. *Id.* at 14.

91. *Almost Everything You Need to Know About Environmental Justice*, UNITED CHURCH OF CHRIST, available at http://www.ucc.org/justice/advocacy_resources/pdfs/environmental-justice/almost-everything-you-need-to-know-about-environmental-justice-english-version.pdf.

92. Hurwitz et. al., *Using Civil Rights Laws to Challenge Environmental Racism*, 2 J. L. SOC’Y 5, 121 (2001).

93. Skelton and Miller, *supra* note 86.

94. U.S. COMM’N ON CIVIL RIGHTS *supra* note 12, at 11.

95. Urbina, *supra* note 45.

96. Hurwitz *supra* note 92, at 40.

97. *Hydraulic Fracturing or “Fracking,”* NAT’L WILDLIFE FOUND., <http://www.nwf.org/What-We-Do/Energy-and-Climate/Drilling-and-Mining/Natural-Gas-Fracking.aspx> (last visited Jan. 23, 2013).

98. Urbina, *supra* note 45.

99. Kristin Allen, *The Big Fracking Deal: Marcellus Shale—Pennsylvania’s Untapped Resource*, 23 VILL. ENVTL. L.J. 51,61 (2012).

100. Hurwitz, *supra* note 92, at 40.

101. Frisch, *supra* note 11.

known to man, like benzene, toluene, and xylene.”¹⁰² Prolonged exposure to these carcinogens can cause detrimental side-effects such as leukemia, nervous system disorders, birth defects, and brain damage.¹⁰³ These chemicals are illegal in drinking water over one part per billion.¹⁰⁴ As one rural farmer explained, the chemicals in the frac fluid are over ten million times the legal limit.¹⁰⁵ When asked how she was coping with her daughter’s deteriorating health as a result of the fracking, one rural Pennsylvania resident poignantly said, “I’m not an activist, an alarmist, a Democrat, environmentalist or anything like that. I’m just a person who isn’t able to manage the health of my family because of all this drilling.”¹⁰⁶

These are the type of people that EJ is concerned with protecting. Unfortunately, the natural gas industry has turned a deaf ear to the protests of the communities faced with hydrofracking and has silenced their cries by continuing to approve hydrofracking in EJ communities,¹⁰⁷ thereby jeopardizing community health, welfare, and ultimate survival.

C. EPA’s Role in Addressing Hydrofracking in Environmental Justice Communities

An effective way to address EJ concerns is through federal enforcement and regulation. The EPA is the federal agency charged with addressing and regulating environmental activity.¹⁰⁸ President Bill Clinton issued the first piece of environmental justice policy, Executive Order 12,898, in 1992.¹⁰⁹ Executive Order 12,898 focused on eliminating discrimination in federal programs and implementing EJ goals.¹¹⁰ The EPA has integrated the goals of 12,898 into its regulatory provisions.¹¹¹

102. *Id.*

103. Evelyn Talbott & Jeanne Zbrowski, *Leaking Underground Storage Tanks: An Emerging Public Health Risk*, UNIV. OF PITTSBURGH CANCER CTR.: CENTER FOR ENVTL. ONCOLOGY, <http://www.upci.upmc.edu/ceo/storage/> (last visited Dec. 3, 2013).

104. Frisch, *supra* note 11.

105. *Id.*

106. Urbina, *supra* note 45.

107. Frisch, *supra* note 11.

108. *See generally* Title VI Draft Recipient Guidance and Revised Investigation Guidance, *supra* note 19.

109. 3 C.F.R. §859 (1994). (*reprinted as amended in* 42 U.S.C. § 4321 (1994 & Supp. VI 1998)).

110. Lewis, *supra* note 73 at, 48-9.

111. *Environmental Justice*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/environmental-justice/basics/index.html> (last visited Sept. 9, 2012). *See also* Lewis, *supra* note 73, at 52. The EPA has “four primary statutory vehicles through which the Agency attempts to flex its EJ muscles with the greatest impact”: The National Environmental Policy Act (NEPA), The Clean Air Act (CAA),

These statutory frameworks help EPA to carry out its environmental justice mandate, and ensure EJ communities enjoy the same degree of protection from health and environmental violation and equal access to decision making processes.¹¹²

This environmental justice mission of the EPA extends to all of the EPA's work, "including setting standards, permitting facilities, awarding grants, issuing licenses and regulations and reviewing proposed action by the federal agencies."¹¹³ EPA frequently reviews environmental decisions proposed by state and local agencies.¹¹⁴ In situations where the underlying license, permit, or regulation was designed to comply with an overarching federal statutory framework, EPA approval is required before the decision can be finalized.¹¹⁵ Though it is the EPA that prescribes the standards used to review these requests, it is ultimately a "State's responsibility to develop, implement, and enforce a plan for reaching, and maintaining the prescribed standards."¹¹⁶ Therefore, if the underlying local or state decision was not directed at ensuring mandatory compliance with a federal environmental statutory framework, the decision does not require EPA approval.¹¹⁷

III. UTILIZING TITLE VI TO ADDRESS EJ CONCERNS

A. EPA's Use of Title VI Through the Interim Guidance

The Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, sex, or national origin in all federally-assisted programs.¹¹⁸

The Clean Water Act (CWA), The Resource and Conservation Recovery Act (RCRA), and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). *Id.*

112. U.S. ENVTL. PROT. AGENCY, *supra* note 111.

113. *Id.*

114. *Id.*

115. *See generally* Lewis, *supra* note 73, at 56.

116. *Id.* at 56.

117. *Id.* *See also* EPA's Program to Implement Title VI of the Civil Rights Act of 1964, U.S. ENVTL. PROT. AGENCY, www.epa.gov/ocr/t6home.htm (last visited Sept. 1, 2012). EPA additionally addresses environmental and public health issues and concerns by collaboratively and constructively working with all affected parties, including state and local agencies, community groups, and complainants. The Office of Environmental Justice "OEJ" of the EPA was created in 1992 to address public concern and implement recommendations of the environmental community. OEJ generally oversees implementation of EPA policies throughout the agency. However, it is the Office of Civil Rights "OCR" that coordinates EPA's efforts to ensure that recipients of federal funds are administering programs in compliance with federal regulations and statutory guidelines. OCR, rather than OEJ, therefore addresses complaints filed by those alleging a discriminatory impact from environmental activity, permitting, or proposals. *See* Title VI Draft Recipient Guidance and Revised Investigation Guidance, *supra* note 19, at 39,650.

118. Barry Hill, *A Tale of Two Sections*, 29 ENVTL. F. 24, 24 (2012).

Title VI gives federal agencies authority to promulgate regulations that will effectuate the purpose of the Act.¹¹⁹ To help OCR effectively implement Title VI and help recipients comply with Title VI, EPA created the Guidance, which clarifies the Title VI process.¹²⁰ The Guidance has two parts that OCR uses to address EJ concerns.¹²¹ First, the Recipient Guidance is a tool for state and local agencies receiving federal funding to use in administering their environmental programs, permits, regulations, and decision.¹²² It answers questions the agencies often have or are likely to have, and explains to the agencies how to effectively address concerns that lead to Title VI discrimination complaints.¹²³

Second, the Investigation Guidance is the procedural guide that explains how OCR conducts its Title VI investigations.¹²⁴ More importantly, it provides criteria that OCR uses in making its Title VI decisions.¹²⁵ The EPA recognizes that the approach to Title VI implementation is not “one-size-fits-all.”¹²⁶ As such, the EPA lists various factors that can lead to a Title VI violation, including permit violations, adverse health or environmental effects, and lack of public participation.¹²⁷

EJ advocates frequently use Title VI as a tool to address and resolve EJ concerns.¹²⁸ EJ complainants that are protected under Title VI can file an administrative complaint with the EPA’s Office of Civil Rights (OCR).¹²⁹ After EPA acknowledges recipient of the complaint by notifying the complainant, they make a decision on whether to accept the complaint for investigation, reject it, or refer it to the appropriate government agency.¹³⁰ OCR accepts and investigates complaints that meet four jurisdictional criteria.¹³¹ The complaint must (1) be written; (2)

119. Albert Huang, *Environmental Justice and Title VI of the Civil Rights Act: A Critical Crossroads*, 43 ABA TRENDS 6 (2012).

120. Title VI Draft Recipient Guidance and Revised Investigation Guidance, *supra* note 19, at 36,650.

121. 40 C.F.R § 7.120(b)(1) (2011).

122. Title VI Draft Recipient Guidance and Revised Investigation Guidance, *supra* note 19, at 36,650.

123. *Id.*

124. *Id.* at 39,680.

125. *Id.*

126. *Id.*

127. *Id.*

128. U.S. ENVTL. PROT. AGENCY, *supra* note 117.

129. U.S. COMM’N ON CIVIL RIGHTS, *supra* note 12, at 79.

130. Title VI Draft Recipient Guidance and Revised Investigation Guidance, *supra* note 19, at 39,670.

131. 40 C.F.R § 7.120(b)(1).

identify the entity that allegedly committed the discriminatory act(s) in violation of EPA's Title VI regulations; (3) be filed within 180 days of the alleged discriminatory acts; and (4) be filed by someone who was allegedly discriminated against, a person who is a member of a protected Title VI class, or the party authorized to represent the person or class allegedly discriminated against.¹³² In addition to the criteria, the alleged discriminatory action also must disproportionately impact the protected Title VI class.¹³³

Upon acceptance, OCR conducts a factual investigation to determine if there was a discriminatory effect.¹³⁴ Based on the investigation, if OCR finds no discriminatory effect, the complaint is dismissed.¹³⁵ If OCR finds there was a discriminatory effect, it makes a preliminary finding of noncompliance, and notifies both the complainant and the entity complained against.¹³⁶ From there, OCR must give the recipient 10 days to voluntarily comply with Title VI regulations before taking action.¹³⁷ If a recipient does not voluntarily comply, EPA is required to "start procedures to deny, annul, suspend, or terminate EPA assistance" and may use other means authorized by law, including referral to the Department of Justice (DOJ) for litigation.¹³⁸

B. Proving Discrimination: The Title VI Discriminatory Impact Analysis

1. Section 601 and Section 602

As a threshold matter, if a complaint does not prove there was an adverse impact, it cannot prove discriminatory impact, and will not fulfill the jurisdictional requirements that will allow the EPA to review the allegation.¹³⁹ Title VI contains two sections that are used by EJ litigants and complainants to allege discrimination, § 601 and § 602.¹⁴⁰ Section 601, often considered the heart of Title VI, "sets forth the basic principle

132. Title VI Draft Recipient Guidance and Revised Investigation Guidance, *supra* note 19, at 39,672.

133. U.S. COMM'N ON CIVIL RIGHTS, *supra* note 12, at 183.

134. Maura Lynn Tierney, *Environmental Justice and Title VI Challenges to Permit Decision: The EPA's Interim Guidance*, 48 CATH. U. L. REV. 1277, 1306 (1999).

135. Title VI Draft Recipient Guidance and Revised Investigation Guidance, *supra* note 19, at 39,670.

136. *Id.* at 39,671.

137. Title VI Draft Recipient Guidance and Revised Investigation Guidance, *supra* note 19, at 39,671.

138. 40 C.F.R. § 7.115(e) (2000).

139. *Id.* at § 7.120(b)(1) (2011).

140. CLIFFORD RECHTSCHAFFEN ET. AL., ENVIRONMENTAL JUSTICE, LAW, POLICY & REGULATION 492 (Carolina Academic Press, 2d ed. 2009).

that federal funds cannot be used to subsidize discrimination.”¹⁴¹ The soul of Title VI, § 602, is frequently used by EJ advocates filing an administrative complaint with the EPA. Section 602 requires a showing of disparate impact.¹⁴² Showing disparate impact means the complaining party needs to show that the discriminatory actions of the recipient, disproportionately affected a protected Title VI class.¹⁴³ In the disparate impact analysis, a plaintiff can bolster his case by showing that the recipient’s actions have a pattern of disproportionately impacting protected Title VI classes.¹⁴⁴

2. Ways to Prove Adverse Impact

In determining discrimination, OCR considers whether the adverse impact the complainant experienced resulted from “factors within the recipient’s authority to consider as defined by applicable laws and regulations.”¹⁴⁵ These applicable laws and regulations are relevant environmental statutes, EPA regulations, or EPA policies.¹⁴⁶

A way to show adverse impact is to show that the recipient issued a permit in violation of Title VI guidelines.¹⁴⁷ In its Investigation Guidance, the EPA states “recipients of EPA financial assistance may not issue permits that are intentionally discriminatory or have a discriminatory effect based on race, color, or national origin.”¹⁴⁸ If there is no adverse impact from the permitted activity, there can be no finding of discrimination that would violate Title VI and EPA’s implementing regulations.¹⁴⁹

For complaints that do not allege a permit violation, a second way to show adverse impact is to show violation of a federal statutory guideline.¹⁵⁰ Exceeding concentration threshold levels identified in the statute is one example of a violation of federal statutory guidelines that shows adverse impact under Title VI, regardless of whether the activity

141. Hill *supra* note 118, at 24.

142. *Id.*

143. *Id.*

144. *See generally* Bean v. Sw. Waste Mgmt. Corp., 482 F. Supp. 673 (U.S. Dist. Ct. for S. Dist. Tex. 1979).

145. Title VI Draft Recipient Guidance and Revised Investigation Guidance, *supra* note 19, at 39,670.

146. *Id.* at 39,680.

147. *Id.* at 39,668.

148. *Id.*

149. RECHTSCHAFFEN *supra* note 140, at 494.

150. Title VI Draft Recipient Guidance and Revised Investigation Guidance, *supra* note 19, at 39,670.

actually caused harm to the complainant.¹⁵¹ This is because environmental laws are promulgated to ensure human health.¹⁵² Actions that jeopardize human health are adverse actions because the action is in contravention of what the regulation intended.¹⁵³ This in turn violates the regulation, and thereby causes an adverse impact.¹⁵⁴

The lack of a regulatory structure can permanently harm complainants. Finding a violation rests on the activity being regulated. Regulated activities protect communities by mandating a safe level of exposure. Anything above that safe level can have an adverse effect. The regulation is a doorstop that operates to prevent unsafe, and therefore, adverse impacts from environmental activities. If the action in question is not violating a statutory guideline this means affects from the activity cannot statutorily be considered adverse.¹⁵⁵ Apart from a permitting decision or lack of a statutory guideline, a third way to show adverse impact is by showing that the activity caused an adverse health impact.¹⁵⁶ Showing an adverse health impact necessarily means the complainant has to wait for the activity to be implemented; keeping in mind that administrative complaints are not court cases, the burden of showing adverse impact should not be this difficult. Showing imminent harm is enough for a litigant's environmental case to be heard in court.¹⁵⁷ For administrative complaints, a complainant can rely on that standard and should not be required to show actual harm to their health in order to show an adverse impact.¹⁵⁸ However, since complainants must show an adverse health impact, it follows that without a violation, a Title VI complainant will have a difficult time showing that they might experience adverse health impacts from the activity they are complaining about.¹⁵⁹

151. RECHTSCHAFFEN *supra* note 140, at 496.

152. *Our Mission and What We Do*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/aboutepa/whatwedo.html> (last visited Sept. 11, 2012).

153. *See* RECHTSCHAFFEN *supra* note 140.

154. *Id.* at 498.

155. *Id.* at 497.

156. Title VI Draft Recipient Guidance and Revised Investigation Guidance, *supra* note 20 at 39,670 (listing human health effects as a way to show adverse impact).

157. RECHTSCHAFFEN *supra* note 140, at 497.

158. Title VI Draft Recipient Guidance and Revised Investigation Guidance, *supra* note 20 at 39,670.

159. RECHTSCHAFFEN, *supra* note 140, at 492.

IV. LEGAL ANALYSIS UNDER TITLE VI

A. The Effects of Alexander v. Sandoval on Title VI Environmental Justice Cases

Historically, the courts have found that plaintiffs who sue under Title VI have an implied private right of action to enforce regulations.¹⁶⁰ Under this interpretation, litigants have the implicit right to sue the government for not enforcing a regulation.¹⁶¹ Courts have been favorable in recognizing the plaintiff's right to sue and request the courts to compel federal agencies to enforce Title VI where regulating agencies were not enforcing the Title.¹⁶²

Courts have traditionally required the plaintiff to demonstrate intentional discrimination when hearing Title VI cases. However, courts have also allowed plaintiffs to use disparate impact analysis under §602.¹⁶³ Under the disparate impact analysis, the courts look at the EJ impact of the agency's action, as opposed to concentrating only on procedural requirements.¹⁶⁴

1. Pre-Sandoval Era

Before *Sandoval* dismantled it, *Bean v. Southwestern* set the stage for implying a private cause of action in EJ cases.¹⁶⁵ In *Bean*, the plaintiff brought a Title VI action under §1983, which challenged a decision by the Texas Department of Health (TDH) to grant Southwestern Waste Management a permit to operate a solid waste facility.¹⁶⁶ The waste facility was in a minority neighborhood, and the majority of the sites that TDH approved were also in predominantly minority neighborhoods.¹⁶⁷ The U.S. District Court for the Southern District of Texas found the plaintiffs had proven "a substantial threat of irreparable injury" and even showed that the waste facility would negatively impact the entire neighborhood, as the high school was located a mere 1,700 feet from the facility.¹⁶⁸ However, the court reasoned that the plaintiffs had no proof

160. *Id.* at 500.

161. *E.g.*, Hill *supra* note 118.

162. *Id.* at 24.

163. RECHTSCHAFFEN, *supra* note 140, at 494.

164. *See generally* U. S. COMM'N ON CIVIL RIGHTS, *supra* note 12.

165. *Bean v. Sw. Waste Mgmt. Corp.*, 482 F. Supp. 673, 673 (U.S. Dist. Ct. for S. Dist. Tex. 1979).

166. *Id.* at 673.

167. *Id.* at 677.

168. *Id.*

that TDH intended discrimination; thus, the plaintiffs were unlikely to succeed on the merits and the case was dismissed.¹⁶⁹

Courts shifted away from proving intentional discrimination in environmental cases in the Third Circuit Court of Appeals' decision, *Seif v. Chester Residents Concerned for Quality Living*. In 1996, two years after President Clinton signed Executive Order 12,898, residents in Chester, Pennsylvania, brought a suit challenging a permit to operate a waste facility in a predominately African-American neighborhood.¹⁷⁰ The City of Chester's population was 65 percent black and 32 percent white.¹⁷¹ Contrastingly, Delaware County, where Chester is located, had a population that was 6.2 percent African-American and 91 percent white.¹⁷²

Since 1987, the Pennsylvania Department of Environmental Protection (PADEP) has granted seven permits to operate waste facilities in Delaware County.¹⁷³ Five of the permits were in the City of Chester and the other two were elsewhere in Delaware County.¹⁷⁴ The waste facilities in Chester were larger, each having a capacity of 420,000 tons per year, whereas non-Chester facilities only had a capacity of 700 tons per year.¹⁷⁵ Though the plaintiffs could not prove intent, they showed that the waste facilities' placement in their predominantly black neighborhood was so disproportionate that it caused a disparate impact on the African-American population in Chester.¹⁷⁶ The court found an implied right of action under §602 and that the plaintiffs were likely to succeed on the merits.¹⁷⁷ The plaintiffs' victory was short-lived—the decision was vacated by the Supreme Court, leaving a “huge void in this area of [Title VI case]law.”¹⁷⁸

Obtaining a satisfactory outcome in a Title VI EJ litigation can sometimes turn on whether there are any regulatory violations plaintiffs can point to in support of their Title VI claims. *New York Environmental Justice Alliance v. Giuliani* illustrates why a plaintiff's complaints must

169. *Id.* at 677.

170. *Seif v. Chester Residents Concerned for Quality Living*, 132 F.3d 925,928 (3rd Cir. 1997), *cert granted*, 524 U.S. 915 (1998), *vacated*, 524 U.S. 974 (1998).

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. Hurwitz, *supra* note 92, at 31.

be bolstered by evidence of regulatory violations.¹⁷⁹ Here, the plaintiffs sought an injunction to prohibit New York City from demolishing or selling over 600 community gardens dispersed throughout the city, including Manhattan, East Harlem, and Brooklyn.¹⁸⁰ The plaintiffs litigated many theories, including a violation of Title VI.¹⁸¹ For their Title VI claim, the plaintiffs argued that the sale or destruction of the gardens would have a disparate impact on black and Hispanic communities of the city.¹⁸² The court noted that the plaintiffs advanced an unclear Title VI theory, emphasizing the city acted in the public interest by providing affordable commercial space for businesses.¹⁸³ The Court addressed the merits of the case and ultimately ruled the plaintiff would not succeed in either proving intentional discrimination or disparate impact.¹⁸⁴ While an EJ concern and violation likely existed in *Giuliani*, the plaintiffs failed to show an on point regulatory violation, which made it difficult to show that the complained activity caused an adverse impact.¹⁸⁵

These cases illustrate the methods used and hurdles faced by Title VI EJ plaintiffs. The cases also validate the fact that minority neighborhoods historically have suffered the brunt of environmental violations. Pre-*Sandoval* case law emphasized the need for litigants to prove that the environmental activity was intentionally discriminatory. As a result, the litigants were unable to point to evidence of adverse environmental impacts to support their arguments of a Title VI violation, despite the fact that the impacts were born by predominantly minority communities.

Though none of the pre-*Sandoval* cases involve hydrofracking, they help illustrate the likely outcome hydrofracking complainants will experience. Complainants are unable to link the harm they experience to the violation of a federal statute because there are no federal statutes on par that regulate the kinds of activities that hydrofracking complainants tend to complain about. This is the most common method used in Title VI cases to show adverse impact, but it is a method that hydrofracking complainants are unable to utilize. Due to that restriction, the next best way to succeed in a Title VI complaint is to prove intentional

179. N.Y.C. Envtl. Justice Alliance v. Giuliani, 50 F. Supp 2d 250, 254 (S.D.N.Y. 1999), *aff'd* 214 F.3d 65 (2d Cir. 2000).

180. *Id.* at 251.

181. *Id.*

182. *Id.* at 253.

183. *Id.*

184. *Id.*

185. *Id.* at 253.

discrimination. Pre-*Sandoval* case law shows how difficult it is to prove intentional discrimination, despite the fact that the activity complained of may disproportionately impact minority communities.

2. Post-Sandoval Era

a) Alexander v. Sandoval

Since *Bean*, environmental litigation brought under Title VI remained focused on showing intent until the Supreme Court's non-environmental decision in *Alexander v. Sandoval* turned Title VI litigation on its head and overturned years of judicial precedent.¹⁸⁶ In *Alexander v. Sandoval*, the Alabama Department of Public Safety had an official policy of administering all its driver's license exams in English only.¹⁸⁷ The plaintiffs, who were not English speakers, claimed the policy had a disparate impact and challenged this practice under §602 of Title VI.¹⁸⁸ The Court held that Title VI did not authorize an implied right of private action under §602.¹⁸⁹

The Court reasoned that regulation promulgated under §601, if proper, included §601's ban on intentional discrimination into its framework.¹⁹⁰ Section 602 does not create an implied right of private action, but is a mandate for federal agencies "to effectuate the provisions of § 601 by issuing rules, regulations, or orders of general applicability."¹⁹¹ As such, it was "meaningless talk" to use § 602 to create a "separate cause of action to enforce the regulation" apart from what the Title VI statute provided for.¹⁹² Unlike prior judicial decisions that looked at the effect of the agency's action(s) on the plaintiff, the decision in *Sandoval* looked only at the procedural and dismissed the substance of the plaintiff's suit. Without explicit statutory language, a plaintiff is unlikely to prevail on a disparate claim under §602.¹⁹³ This decision forecloses a litigant's implied right to sue for EJ violations,

186. David Galalis, *Environmental Justice and Title VI in the Wake of Alexander v. Sandoval: Disparate-Impact Regulations Still Valued Under Chevron*, 31 B.C. ENVTL. AFF. L. REV. 61, 72 (2004); see also Alma Lowry and Tom Stephens, *The Environmental Justice Movement is Working to Prevent Racial and Social Discrimination in an Environmental Context*, 80 MICH. BAR J. 25, 26 (2001).

187. *Alexander v. Sandoval*, 532 U.S. 275, 279 (2001).

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. U.S. COMM'N ON CIVIL RIGHTS, *supra* note 12, at 95.

thereby effectively barring an EJ plaintiff from enforcing a disparate impact discrimination in court.¹⁹⁴

b) *South Camden v. New Jersey Department of Environmental Protection*

The decision in *Sandoval* immediately impacted the EJ community and affected future Title VI environmental litigation.¹⁹⁵ In *South Camden Citizens in Action v. New Jersey Department of Environmental Protection*, the plaintiffs challenged the issuance of an air permit granted by the New Jersey Department of Environmental Protection (NJDEP).¹⁹⁶ The air permit granted the operation of a cement grinding facility in Waterford South, a predominately minority neighborhood, comprising of 63 percent African Americans, 23.8 percent Hispanics, and 9 percent white residents.¹⁹⁷ The plaintiffs claimed that issuing the permit caused a disparate impact.¹⁹⁸

Waterford South is one of twenty-three neighborhoods in Camden and “hosts 20 percent of the city’s contaminated sites.”¹⁹⁹ On average, Waterford South has more than twice the number of facilities with permits to emit air pollution than exist in the area encompassed within a typical New Jersey zip code.²⁰⁰ Due to the activities’ potential to affect air quality in the area, the cement company completed an analysis that showed its operation would not have adverse health impacts and that the pollution emitted from the facility would remain within applicable pollution thresholds set by NJDEP.²⁰¹ The court did not consider EJ factors of the case but determined at the onset that, because of the Supreme Court’s decision in *Sandoval*, the plaintiff’s claim would not succeed.²⁰² The court ruled that a private plaintiff is barred from using §1983 to bring a §602 Title VI action in court.²⁰³

Today, the decisions in *Sandoval* and *South Camden* make it difficult for a plaintiff to succeed under §602.²⁰⁴ *Sandoval* introduced

194. *Id.* at 55.

195. *Id.* at 86.

196. *S. Camden Citizens in Action v. N.J. Dep’t of Env’tl. Prot.*, 274 F.3d 771, 777 (3rd Cir. 2001).

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. U.S. COMM’N ON CIVIL RIGHTS *supra* note 14, at 86.

204. Alma Lowry & Tom Stephens, *The Environmental Justice Movement is Working to Prevent Racial and Social Discrimination in an Environmental Context*, 80 MICH. BAR J. 25, 27 (2001).

inconsistency to a relatively consistent process of bringing EJ claims under §602, the Title VI disparate impact framework.²⁰⁵ The court's decision in *Sandoval* allowed the court in *South Camden* to brush aside substantive EJ concerns for a strict and narrow reading of §602.²⁰⁶

B. EPA Decisions on Title VI Complaints

The stumbling block in Title VI litigation presented by *Sandoval* diminishes EJ advocates' opportunities to address EJ concerns. As a result, the EPA Title VI administrative process is the best avenue to use in pursuing relief for Title VI environmental violations. However, success sometimes depends on the clarity of the EPA Title VI guidelines. Clearer guidelines mean that OCR will be able to properly decide a case on its merits. The 1998 OCR Interim Guidance exemplifies EPA's attempt to clarify the Title VI for all parties involved.

1. Shintech

The first case decided by the OCR after the release of the Interim Guidance was supposed to be an example of how the OCR would use the guidance in addressing Title VI EJ complaints.²⁰⁷ In making its decision, the EPA looked at the applicable federal regulations to use as a benchmark in determining any violation and how the violation would impact the community.²⁰⁸ In the Shintech administrative complaint, the complainants alleged that the Louisiana Department of Environmental Quality's (LDEQ) decision to issue final air quality operating permits to Shintech caused a disparate impact on the minority population in St. James Parish.²⁰⁹ The area was a highly industrialized town with a predominantly African American population.²¹⁰ Shintech had proposed to construct a polyvinyl chloride plant and the permit granted by LDEQ permitted the facility to emit toxic substance such as polyvinyl chlorides, chlor-alkali, and vinyl chloride monomer.²¹¹

205. U.S. COMM'N ON CIVIL RIGHTS *supra* note 14, at 95.

206. *Id.* at 95. (Though the Third Circuit has spoken on this right, federal circuits are currently split on using §1983 to enforce regulations promulgated under §602, leaving more debate as to the future of EJ claims under §602.)

207. Paul Hastings LLP, *EPA Using Title VI of Civil Rights Act of 1964 to Persuade States to Mitigate Environmental Justice Concerns Raised in Issuing, Modifying or Renewing Pollution Control Permits*, FINDLAW (March 26, 2008), <http://corporate.findlaw.com/law-library/epa-using-title-vi-of-civil-rights-act-of-1964-to-persuade-states.html>.

208. U.S. COMM'N ON CIVIL RIGHTS *supra* note 14, at 38.

209. *Id.*

210. *Id.*

211. *Id.* at 38-39.

Although the complaint was highly politicized and publicized, the allegations were supported by facts that showed proof of the violations.²¹² For example, the average Louisiana resident was exposed to 21 pounds of toxic air pollutant releases.²¹³ However, the average resident in St. James was exposed to 360 pounds of toxic air pollutant releases, seventeen times the average pollution a Louisiana resident was exposed to.²¹⁴ Furthermore, 18 toxic waste facilities were already located within a four mile radius of St. James.²¹⁵ The communities within the four miles were largely African American.²¹⁶ The facilities around these communities together housed 20 percent of Louisiana's air pollution.²¹⁷ Despite pressure to reject the complaint, OCR accepted the complaint, determining that the disparate impact claims "deserve[d] serious attention."²¹⁸ Though OCR did not elaborate as to what it meant by serious attention, the mere acceptance of the complaint upset many industrialists but was a victory for EJ supporters. This decision by OCR evidenced how clarity in the regulatory process can help EJ complainants obtain relief.²¹⁹ By having a clear statutory framework, the complainants in this case were able to support their disparate impact claim, thus making it possible for OCR to accept the complaint. In the absence of a statutory framework, OCR can still have provided relief to the complainants, so long as there is clear guidance that specifies when certain activities were adverse.

2. Select Steel

In contrast with *Shintech*, *Select Steel* illustrates how the lack of clarity within OCR Guidance can negatively impact a Title VI EJ complainant. In 1998, the Michigan Department of Environmental Quality (MDEQ) approved a Clear Air Act permit for Select Steel to build a steel recycling facility near a largely African American neighborhood in Flint, Michigan.²²⁰ The St. Francis Prayer Center filed a complaint alleging that the mill would have a discriminatory impact on

212. *Id.* at 39.

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

220. Lowry & Stephens, *supra* note 204, at 26.

the minority residents, and, further, that MDEQ conducted the permitting process in a discriminatory manner.²²¹

Using the Interim Guidance, OCR found that there was no disparate impact. OCR stated that there were no EPA regulations monitoring the types of dioxin emissions that would be present in the Select Steel facility. The Interim Guidance did not provide a standard for evaluating allegations of environmental violations without a statutory basis. Moreover, in evaluating the plant's Volatile Organic Compounds (VOC) emissions, OCR noted that the lead emissions complied with National Ambient Air Quality Standards (NAAQS), and determined the air quality standards for emissions are a health based standard that has been set at a level designed to protect public health. The Interim Guidance provided that meeting statutory requirements could not result in a finding of adverse impact.²²²

Therefore, even though there was an increase in VOC emissions that was likely to actually cause adverse health impacts to the residents, there could be no adverse impact within the meaning of Title VI as long as the emissions did not fall outside the regulatory threshold. Due to these findings, The EPA decided that "emissions from the Select Steel facility could not be viewed to be harmful or adverse to the neighboring community," and, as such, there was "no need to determine whether there was an adverse disparate impact."²²³ As such, EPA decided that the Michigan Department of Environmental Quality's approval of a permit did not violate Title VI. The Office of Civil Rights was able to make this decision by analyzing whether the states' decision complied with the federal statute regulating the activity, the air quality.²²⁴ Two things made it possible for OCR to decide the case on its merits. One, there were regulations by which to judge emission levels against, and two, the Guidance allowed the EPA to consider violations of a federal statute in its determination.²²⁵

Both *Shintech* and *Select Steel* illustrate the need to have regulations as a benchmark when evaluating Title VI EJ cases. In the absence of such regulation, EPA Guidelines should be clear as to what criteria will constitute a violation that causes disparate impact. Without a foundation on which to analyze a claim, Title VI EJ complainants risk an incorrect evaluation of their claim.

221. U.S. COMM'N ON CIVIL RIGHTS *supra* note 14, at 40.

222. RECHTSCHAFFEN, *supra* note 140, at 500.

223. U.S. COMM'N ON CIVIL RIGHTS *supra* note 14, at 41.

224. *Id.*

225. RECHTSCHAFFEN, *supra* note 140, at 495.

3. Alabama

In a recent EPA decision, OCR dismissed a complaint because the argument was contrary to the Interim Guidance.²²⁶ In 2008, coal ash, a metal-laden waste generated after coal is burned, spilled from one of the Tennessee Valley Authority's (TVA) power plants.²²⁷ This ash was often stored as sludge in pits next to power plants and large dams, sometimes 100 feet tall, held back the sludge.²²⁸ The spill was the result of a dam breaking, and over 4 million tons of coal ash contaminated the predominately (91 percent) white town of Harriman, Alabama.²²⁹ To clean up Harriman,²³⁰ the Alabama Department of Environmental Management had the coal ash moved to Perry County, approximately 350 miles from the spill.²³¹ Perry County is one of the poorest counties in Alabama.²³² It has an African American population of almost 70 percent²³³ and its landfill was located closest to the heavily populated African American communities in Unitown, Alabama.²³⁴ The residents of Unitown filed a complaint, alleging that the state's decision to move the coal ash to Perry County caused a disparate impact.²³⁵

After a short investigation, the EPA dismissed the complaint on procedural grounds delineated in OCR guidance.²³⁶ In the dismissal letter, OCR director Rafael DeLeon said,

In situations where the allegations raised in the complaints involve the same facts that are also the subject of litigation in federal court, such that the result of those proceedings could affect the outcome of the Title VI investigation, it is OCR's general practice to dismiss

226. Shaila Dewan, *Clash in Alabama Over Tennessee Coal Ash*, N.Y. TIMES (Aug. 29, 2009), <http://www.nytimes.com/2009/08/30/us/30ash.html>.

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.*

231. Tom Zeller Jr., *Alabama's Arrowhead Landfill Investigated By EPA For Civil Rights Violations*, HUFFINGTON POST (June 19, 2012 11:44 AM), http://www.huffingtonpost.com/2012/06/19/alabama-arrowhead-landfill-epa-civil-rights_n_1608786.html.

232. *Id.*

233. *Citing Lawsuit, EPA Dismisses Civil Rights Complaint Against Alabama*, ENVIRO LAWYER (October 4, 2012), <http://www.enviro-lawyer.com/Citing%20Lawsuit.pdf>.

234. Dewan, *supra* note 226.

235. Emily Enderle, *Tr-Ash Talk: Dumping a Civil Rights Issue, One Town's Tr-"ash" is no one's Treasure*, EARTHJUSTICE (Feb. 10, 2012, 10:20 AM), <http://earthjustice.org/blog/2012-february/tr-ash-talk-dumping-a-civil-rights-issue>.

236. ENVIRO LAWYER, *supra* note 233.

without prejudice the administrative complaint, pending results of the litigation.²³⁷

Due to the fact that the substance of the pending litigation was the same as the complaint, OCR, per its guidance, dismissed the complaint and told the complainants to re-file after the litigation was resolved.²³⁸ OCR's decision received heavy criticism by environmental groups and the residents of Perry County.²³⁹ However, because the Guidance was clear, it left OCR with no discretion in its determination.

The results of the three cases show that OCR guidance affects the Title VI process. In the hydrofracking context, the Guidance is unclear. It does not specify how OCR will determine adverse impact in cases where there is no federal regulation that addresses the activity in question. It will help OCR address EJ concerns if the Guidance is clarified as to what criteria constitutes adverse impact in the event that the alleged activity is not regulated.

V. EPA SHOULD CONSIDER TITLE VI HYDROFRACKING COMPLAINTS ALLEGING HARM AS SUFFICIENT EVIDENCE OF AN ADVERSE IMPACT

The risks to EJ communities associated with unregulated hydrofracking activity, the inability of hydrofracking complainants to show adverse impact, and lack of clarity in OCR Guidance, threatens to extinguish the ability of these complainants to obtain relief.

Hydrofracking activity is widely unregulated: although there are federal regulations that apply to the activity, the effect of the Halliburton loophole left a void in this area of regulatory law. Congress claimed that frac fluid composition does not need to be revealed to the EPA, which is in direct contradiction to the authority EPA has to promulgate environmental regulations.²⁴⁰ This decision by Congress is still widely criticized by EJ advocates because it leaves those affected by hydrofracking activity in limbo. Without knowing the composition of frac fluid, the EPA is not able to ensure hydrofracking activity remains safe for everyone, especially those living in and around the drill sites.

With the United States poised to become the top producer of natural gas in less than thirty-five years, there is no reason to keep things the way they are.²⁴¹ Clarity in the Guidance that delineates what is considered adverse impact in situations where there is no federal

237. *Id.*

238. *Id.*

239. *Id.*

240. Roberson, *supra* note 1, at 69.

241. U.S. ENERGY INFO. ADMIN., *supra* note 3.

regulation on point will help all affected parties. This includes OCR, who ultimately determines the outcome of the complaint. If this provision is not in the Guidance hydrofracking complainants will not have a way of showing adverse impact in their EPA complaints. This leaves them in a situation where obtaining relief is not possible. Though this is a situation unique to the hydro fracking complaints, it can easily be addressed. Providing an explanation of the kinds of unregulated fracking activity that can cause adverse health impacts is one step in addressing the issue. Adding this provision in the Guidance will provide a clear standard for OCR to use in evaluating hydrofracking complaints, as well as a standard for complainants to use in supporting their case. In turn, during the process of evaluating the complainants' allegations, OCR can use these standards to hold states accountable for not promulgating regulations for all aspects of hydrofracking activity that can cause a Title VI violation.

A. The Problem of Proving Discrimination in a Fragmented System of Regulation

The benefit of having federal regulations is for consistency and uniformity.²⁴² With the lack of federal regulations applicable to most hydrofracking activity, the full responsibility falls on state and local government to regulate this activity.²⁴³ These state regulations generally vary widely in their requirements and stringency, causing many to criticize the state and local agencies for not properly regulating hydrofracking activity.²⁴⁴

Under such a fragmented system, it becomes increasingly difficult for EJ communities to prove adverse impact if the community cannot point to violations of federal regulation, or if the permitted activity has not yet caused actual adverse health impacts.²⁴⁵ Even without a federal regulation, hydrofracking complainants cannot rely on state regulations either. If the state or local agency does not regulate the activity, no matter how much benzene, toluene and xylene the oil and gas companies discharge into the water, there will be no statutory violation to use as evidence of an adverse impact.²⁴⁶

242. ZYGMUNT J.B. PLATER ET. AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY 210 (Aspen Publishers, 2d ed. 2010).

243. Rep. Doug Lamborn Holds A Field Hearing on Federal Hydraulic Fracturing Regulation, *The House Committee on Natural Resources, and the Subcommittee on Energy and Mineral Resources*, 112th Cong. (2012) (statement of Representative Rush Holt, N.J. Congressman).

244. *Id.*

245. *Id.*

246. See generally RECHTSCHAFFEN, *supra* note 140.

Due to the trans-boundary nature of environmental ills, it is inefficient to have a patchwork of inconsistent state regulations rather than a uniform federal framework.²⁴⁷

B. EPA Should Accept a Complaint that Alleges Harm as Evidence of Discrimination

Given that hydrofracking complainants do not have the benefit of federal regulations that regulate the activity causing adverse environmental and human health impacts, these complainants deserve the opportunity to have OCR address their Title VI environmental concerns in a more effective way: the EPA should alternatively accept the complaint for investigation. Moreover, the allegation in the complaint should suffice as evidence of discriminatory impact, provided that the complainant meets the basic four jurisdictional requirements. If the EPA accepts the complaint, given the unique situation hydrofracking complainants have been placed in, the affected parties can perhaps begin to help formulate a unique remedy for these complainants, as opposed to refusing to address the issue at all. After EPA accepts the complaint for investigation, it can begin the process of investigating the complainant's allegations and working with the recipient agency to make sure that it complies with Title VI. This is keeping with the spirit of Title VI as well as the EPA because the Interim Guidance encourages working with all affected parties to fashion an appropriate case by case remedy for each situation.²⁴⁸

Accepting these complaints for investigation is an equitable way to address hydrofracking complainants because it addresses Title VI concerns and gives the complainants hope of obtaining relief or working towards a remedy that can decrease the adverse environmental and human health impacts.

C. The EPA Should Clarify What Constitutes Discriminatory Impact in Assessing Hydrofracking Complainants

In the event that the EPA does not want to accept the complaint that alleges harm from a discriminatory act as evidence of discrimination, the EPA should clarify in the Guidance what constitutes discriminatory impact for hydrofracking complainants. This is necessary for the complaints whose allegations cannot be linked to the violation of a

247. PLATER, *supra* note 242, at 79.

248. Title VI Draft Recipient Guidance and Revised Investigation Guidance, *supra* note 19, at 39,672.

federal regulation and because OCR relies heavily on the Guidance when investigating Title VI complaints. Clarity in the Guidance helped OCR determine the outcome of the Select Steel Case.²⁴⁹ Consequently, it can help OCR determine the proper outcome for hydrofracking complaints.

A way for OCR to clarify the Guidance for hydrofracking complaints is to state that OCR will review allegations that do not fall under federal regulations with the same scrutiny as if the alleged act were regulated. This will ensure that at least hydrofracking complaints will be considered. In addition, defining what “adverse impact means” in the hydrofracking context, particularly when there is no federal regulation that pertains to the activity complained of, would aid in clarifying guidance. Just as the Guidance list examples of what constitutes adverse impact in situations of regulatory violations, OCR can clarify the Guidance by listing examples of what constitutes an adverse impact in situations where the activity is not regulated by the federal government. This clarification would entail a determination that the complainant will be accepted for review, provided it alleges harm from a discriminatory environmental act and meets the other jurisdiction requirements for review.

In the Guidance, a discriminatory environmental act that meets the jurisdictional requirement for discriminatory impact is one that alleges discriminatory effect from various types of activities.²⁵⁰ The Guidance specifies kinds of activities that cause a discriminatory impact, such as permitting decisions, emissions that violate applicable sections of the CAA, or actions by an agency that violate the SDWA.²⁵¹ Unlike other activities, hydrofracking is a very unique case because most activity is exempt from applicable federal regulations. As a result, the activities that would violate SDWA or CAA and cause a discriminatory impact would not meet the threshold requirement for jurisdiction. For that reason, it becomes necessary to list different types of discriminatory acts in the hydrofracking context that can meet the jurisdictional requirements for a discriminatory impact analysis. These should include actions that can cause harm or an adverse impact to the community and should not be limited to actions that have already harmed or adversely impacted the community. In the hydrofracking context, these range from discharging chemicals into water that harms the water source of a minority

249. RECHTSCHAFFEN *supra* note 140, at 500.

250. Title VI Draft Recipient Guidance and Revised Investigation Guidance, *supra* note 19, at 39,677.

251. *See generally* Title VI Draft Recipient Guidance and Revised Investigation Guidance, *supra* note 19.

population or using injection methods that causes chemicals or frac fluid to harm the groundwater of a minority population.

The Guidance is not one-size-fits-all, and thus allows for this kind of clarification. Currently, what constitutes adverse impact in the hydrofracking context does not fit anywhere in the Guidance.²⁵² This is simply because the Guidance does not address situations where the possible violation taking place was not a regulated activity. This is OCR's opportunity to be proactive and delineate clear examples as to how it will approach complaints whose allegations do not constitute the violation of a federal regulation. The answer cannot be the same answer OCR gave in *Select Steel* when it said that the nonexistence of federal regulations means that there can be no finding of adverse impact.²⁵³

VI. CONCLUSION

Healthy people help maintain a healthy nation. Being free from environmental ills is a necessary part of that equation. In a society unmotivated by politics, hydrofracking activity would not be exempt from federal regulation, especially when its counterpart, convention oil and gas drilling, is regulated by the federal government. The job of federal regulations is to provide consistency. Consistency puts everyone on the same level and ensures that everyone is working with the same system, broken or otherwise. However, when regulations fail, it creates a scattered system of individual state regulations, which is reminiscent of an era before federal regulations. In essence, we are going backwards; and we are doing so at a time when EJ communities need us to move forward. The best way to move forward is to properly regulate hydrofracking activity so that hydrofracking complainants can have a threshold standard to use and prove adverse impact. However, in the absence of such regulations, having clearer Guidance is the first step in ensuring that hydrofracking complainants have an opportunity for OCR to properly review the substance of their complaint.

As the need to clarify the Guidance for hydrofracking complainants becomes apparent, success in the process will depend on whether the complaint process is progressing to accommodate hydrofracking activity. Millions of people living in the United States will be affected by that decision. Forward movement will mean that the EPA will take the initiative to clarify the Guidance for hydrofracking complainants. The domino effect from this is that states will not feel pressure to regulate

252. *Id.* at 39,650.

253. RECHTSCHAFFEN *supra* note 140, at 500.

fracking activity to a level that ensures the health of its citizens remains intact. Those living around the fracking activity will be better off in the long run, because their health will not suffer severe impacts from activity that is not well regulated. As a result, it leads to healthier community and, consequently, a healthier country.