

Brandywine/TB, Southern Region
Neighborhood Coalition

An Introduction to Title VI of the Civil Rights Act of 1964

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TITLE VI IN A NUTSHELL

- **Title VI prohibits discrimination in services and programs against people in the United States on the basis of race, color, and national origin by recipients of federal financial assistance.**
- Codified at 42 USC §2000d
- (Title VII covers employment discrimination)
- (Title VIII covers housing discrimination)

TITLE VI IN A NUTSHELL

- Title VI, separate from and in addition to the strictures of state and local law, both authorizes and requires recipients to manage their programs in a way that avoids discriminatory cumulative burdens and distributional patterns.
- Title VI also authorized all federal agencies to adopt regulations to implement its ban on discrimination by recipients.

Constitutional Origin of Title VI

- Title VI rests on the power of Congress to fix the terms on which federal funds are made available to prohibit entities that receive federal funds from engaging in discrimination (Spending Clause)

Title VI Bans Discrimination

- Discrimination is an act or failure to act, intentional or unintentional, the effect of which is to exclude from participation; deny access, benefits, opportunities, services; or otherwise subject to unequal, disparate, or adverse treatment a person or group because of a legally identified and protected characteristic.

Title VI Bans Discrimination

- Discrimination is a harm to real live people; it is not theoretical.
- Not all different treatment is discrimination. Sometimes extra services are provided to people, such as those with disabilities.
- If the recipient treats everyone equally badly, that isn't discrimination.

Who Is Protected by Title VI?

- Title VI bans discrimination on the basis of race, color or national origin.
- National origin includes ethnicity, limited English proficiency, and sometimes accent.
- Everyone has a race. Everyone has a national origin. A white or Anglo person can file a complaint under Title VI.
- Title VI protects citizens and non-citizens alike.

Who is a Recipient of Federal Funds?

- Recipient is an entity that receives money and/or a transfer of goods from the federal government
- All activities of a recipient are covered by Title VI—not just the particular program that receives and uses the federal money.
- Also covered are sub-recipients of recipients—entities that the basic recipient passes along money to.
- Recipients of federal funds have to sign assurances, saying they won't discriminate.

What doesn't Title VI cover?

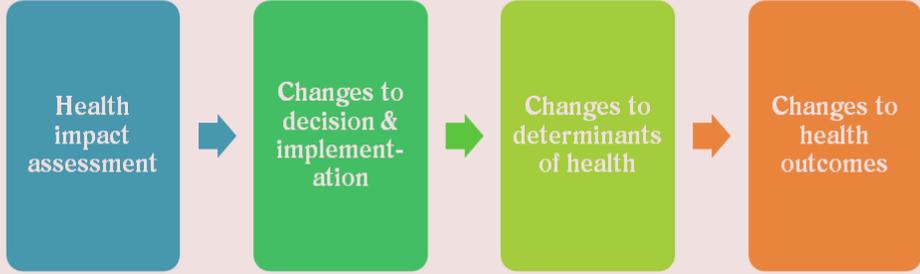
- **Income, religion, sex, disability.** Other federal laws cover those, except almost no federal laws cover low income discrimination.
- Religion isn't covered much, except by the Constitution.
- Almost no federal laws cover sexual orientation and gender identity.

Examples of Unlawful Discrimination

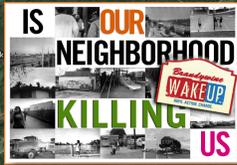
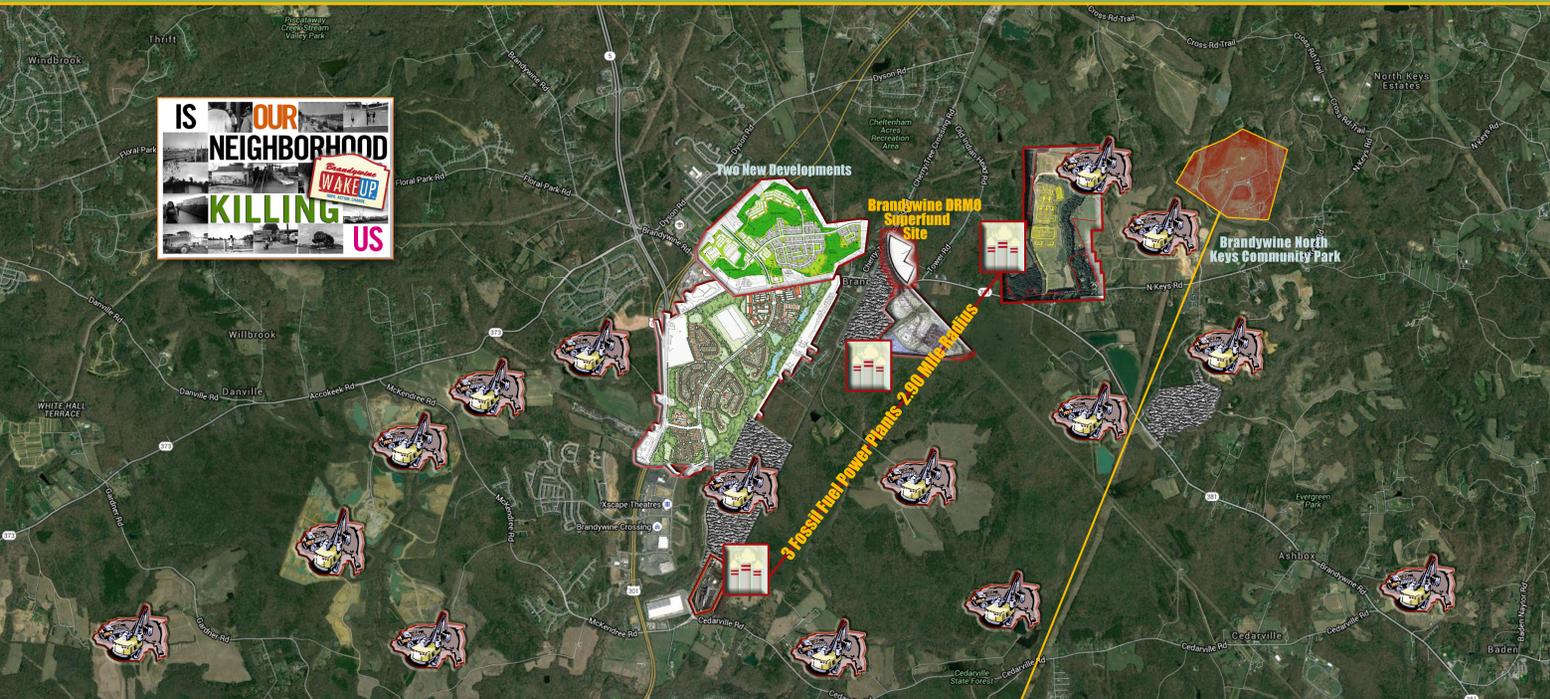
- Segregation
- Denial of services
- Exclusion from services
- Decreased services
- Poor services, low quality services, unsafe services
- Denying a person the opportunity to participate as a member of a planning or advisory body

Title VI Bans disparate, or adverse treatment

Brandywine Health Impact Assessment



The Brandywine community, people of color are disproportionately burdened by environmental hazards and locally unwanted land uses including mining operations, power plants, landfills, diesel truck traffic, and other noxious land uses. This leads to a degradation in air quality and other negative environmental impacts. Additionally, the cumulative impacts of this pollution can have a negative effect on human health including causing asthma, heart disease, emergency department visits, hospitalizations, premature mortality, and negative birth outcomes including low birth weight births and infant mortality. The high concentration of pollution-emitting facilities and related activities including the high number of diesel truck trips has created a riskscape for local residents. The riskscape is not safe for individuals who are vulnerable to adverse health outcomes including individuals with chronic disease issues, seniors with co-morbidities, children, and pregnant women.



Brandywine Environmental Hazards Map

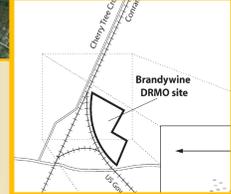
1. This map does not include the Rubble Dump Site(s)
 2. The new development and power plants construction will bring more diesel trucks



13 Heavy Industrial Zone



Fossil Fuel Gas Power Plant



Brandywine DRMO Superfund



Aggregate Surface Mining Wash Plants • Mud Ponds



Coal Mine Fly Ash Site



Sludge Lagoon



Diesel Fumes & Carbon Emissions



Transportation,

DISPARATE BURDENING IMPACT LAWSUITS UNDER TITLE VI,

SECTION 602: CAN A LEGAL TOOL BUILD ENVIRONMENTAL JUSTICE?

Over the past decade, environmental justice commentators and advocates increasingly have focused on the role that Title VI of the Civil Rights Act of 1964 could play in remedying environmental problems in communities of color. Specifically, this attention recently has targeted the application of civil rights law to the processes employed by government agencies in issuing industrial use facility siting permits and the disparate impacts that these practices have on minorities.

Introduction

We feel that the environmental disparate impacts are here because we are a 72% minority community and our governmental agencies have failed us. Our constitution grants to all citizens the right to equal access to clean air, land and water, and the policy making in transportation. We are being viewed as powerless bedroom community especially concerning the environmental injustices. We're being viewed as being vulnerable... We're being viewed as being politically insignificant... We're as a community we are enduring the exploitation and co-optation by parachuters, even though we as a community in taking action and having the actionable intelligence in that we are very capable in having a viable voice; that we speak for ourselves within a movement of and by real life community members not by the industrial complex. And that's why we believe these disparities are here.

It is well known that people have become increasingly concerned generally about environmental disamenities, which would make them less willing to pay as much for properties where there are these disamenities. There are concerns with the property value loss in an area with these disparate environmental impacts, and power plant based on a detailed scientific analysis of the property values data. The power plants in the vicinity where these disamenities have an affect on tax revenues that would then equate to reduction of public services and facilities.

For the third gas-fired plant to be permitted in Brandywine is at the heart of discriminatory cumulative burdens and distributional patterns of environmental racism and socio-economic injustice. Our regulatory governmental agency's decisions have failed us".

The Brandywine community is 72% African-American having an elevated senior population and within a .35 - 1.2 mile radius of an elementary school. Principles of environmental justice are due process, and equal protection to a healthy environment as a fundamental right to clean air, land, water, and food.

Enforcement of regulations and laws, the deliberate targeting of industrial facilities, the official sanctioning of the presence of life threatening poisons and pollutants. Relegated to marginalized residential rural spaces our regulatory governmental agency's decisions have failed us".

HIA found high levels of diesel vehicle exhaust due to heavy traffic loads Brandywine inequities in planning, zoning, and development including transportation planning infrastructure, i.e., highway development and expansion.

State and local policymakers actions must be taken at multiple levels of government to ensure environmental justice "healthy zoning", and equitable development initiatives. Community-based participatory is integrated into all policies, programs framework and local zoning ordinances similar to "Healthy Communities Act of 2007" in order to eliminate environmental injustices and improve health.

LAWSUITS UNDER TITLE VI,

Foundation of the Environmental Justice Movement

For almost twenty years, environmental justice advocates have been exposing and opposing the fact that communities of color bear a disproportionately high burden of environmental hazards. Community groups and environmental and civil rights attorneys involved in the environmental justice movement have used a number of legal tools in their fight for recognition and eradication of the problem, including a variety of environmental laws,³ civil rights laws, ⁴ common law property claims, ⁵ and constitutional challenges. In the early to mid-1990s, environmental justice advocates began to pay heightened attention to the role that Title VI of the Civil Rights Act of 1964 could play in remedying perceived environmental problems. Over the past two years, this effort has focused on the application of civil rights law to the processes employed by states and local municipalities in issuing industrial use facility siting permits and the potentially disparate impacts these processes impose on minorities.

We seek and explore the ongoing debate over private claims brought under Title VI against local agencies for issuing permits to industrial facilities that disproportionately impact minority populations. As awareness of racial disparity in the distribution of locally undesirable land uses (LULUs) grows, and other legal and regulatory actions fail to secure equity, disparate impact litigation under Title VI has become a lightning rod. Environmental advocates both praise and critique it, the United States Department of Justice supports it, and business and local governmental concerns roundly condemn it.

Section I of this article briefly summarizes the background of the environmental justice movement and the legal tactics that the movement has used in its attempt to end disparate siting of LULUs. Section II discusses Title VI of the Civil Rights Act of 1964, explaining both its regulatory nature and its potential as a private right of action. Section III explores the contours of private litigation under Title VI and asks whether it can be an effective tool for environmental justice plaintiffs. This article concludes by: (1) acknowledging that, as a civil rights issue, discriminatory siting of objectionable facilities is in its infancy; and (2) posing a series of questions, the answers to which will greatly determine the vitality of Title VI as a tool for environmental justice.

United States Environmental Protection Agency (EPA) Administrator Carol Browner reflected in 1998 that “thirty-four years ago, when the Civil Rights Act was adopted, no one fully appreciated that pollution could also be a means for effecting some communities more than others.” Today, the concept that minorities bear a disproportionate percentage of environmental burdens is at the core of the environmental justice movement.

LAWSUITS UNDER TITLE VI,

Section 602 and EPA's Disparate Impact Enforcement

Once a complaint is accepted for review, EPA will undertake a five-step analysis to determine whether a disparate impact has been created. Initially, EPA must “identify the population affected by the permit that triggered the complaint,” generally determined by proximity to the facility. Once the population that “suffers the adverse impacts” is determined, the racial and/or ethnic composition of that population must be established. To establish whether a “cumulative burden or patterns of disparate impact exists,” EPA must next determine what other permitted facilities should be included in the analysis and the racial compositions of the populations affected by those permits.¹⁰⁸ Based upon all of this information, EPA conducts a disparate impact analysis that compares the racial characteristics of the allegedly suffering population with that of the non-affected population to determine whether “persons protected under Title VI are being impacted at a disparate rate.” Finally, EPA evaluates the significance of the disparity, which, if statistically significant, results in EPA making a prima facie finding of disparate impact.

If EPA makes a prima facie determination of discrimination under the guidance, the state permitting agency is afforded an opportunity to rebut the finding or to submit a proposal to mitigate the unequal effects.¹¹¹ Even where rebuttal of the complainant's prima facie case or mitigation efforts fail, a party has one last opportunity to avoid loss of funding by “justifying” the issuance of the permit despite the proven disparate effects.¹¹² To do so, the permitting authority must demonstrate a “substantial, legitimate interest . . . some articulable value to the recipient in the permitted activity.” These interests may include broader governmental interests, such as: (1) whether the disparate impact is weighty; (2) whether the permit in question is a renewal that provides demonstrated benefits; or (3) whether a newly issued permit is likely to benefit the surrounding community. However, EPA will not consider justification where a less discriminatory alternative to the current process of permitting exists.

Throughout this process, EPA encourages the use of informal resolution where possible, but ultimate failure to comply may lead to denial, suspension, or termination of funding by EPA. However, even if EPA's investigation reveals a violation of Title VI, a fund recipient has many remaining procedural rights. According to EPA's implementing regulations, if EPA concludes that a funding recipient is in violation of Title VI, the recipient may, within thirty days, request a hearing before an administrative law judge (ALJ). Following the ALJ's findings, the recipient is entitled to appeal the decision to an EPA Administrator. While the Administrator has the power to refuse, postpone, or discontinue EPA funding to the particular offending program or “part thereof,” the Administrator must first make a full report regarding the decision to all congressional committees with legislative authority over the program and allow Congress thirty days to respond. Further, should EPA decide to terminate funding, the recipient may ask for a judicial review of the agency's decision?

EPA's Title VI Regulations

40 CFR § 7.30 General prohibition.

- No person shall be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving EPA assistance on the basis of race, color, national origin . . .

EPA's Title VI Regulations

40 CFR § 7.35 Specific Prohibitions.

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

EPA Title VI Regulations

40 CFR § 7.35 Specific Prohibitions.

- (c) A recipient shall not choose a site or location of a facility that has the purpose or effect of excluding individuals from, denying them the benefits of, or subjecting them to discrimination under any program or activity to which this part applies on the grounds of race, color, or national origin; or with the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of this subpart.

EPA Title VI Regulations

40 CFR § 7.35 Specific Prohibitions.

- (a)(7) In administering a program or activity receiving Federal financial assistance in which the recipient has previously discriminated on the basis of race, color, sex, or national origin, the recipient shall take affirmative action to provide remedies to those who have been injured by the discrimination.

EPA Title VI Regulations

40 CFR § 7.90. Grievance Procedures

- Each recipient shall adopt grievance procedures that assure the prompt and fair resolution of complaints which allege violation of this part.

How do you prove discrimination under Title VI?

- **Disparate impact:** Statistically high and disproportionate adverse or negative effect. A rule that is neutral on its face, but which has a discriminatory effect. **STANDARD APPLIES ONLY TO ADMINISTRATIVE COMPLAINTS**
- **Intent:** “No Irish need apply.” “Colored Only” water fountains, swimming pools, buses, schools. A rule that is discrimination on its face and in its plain language.
- **NOTE:** Title VI law suits can only be brought under the intent standard

Factors to consider in determining an adverse effect

- Pervasiveness, extent, severity, persistence of the impact on the protected population.
- Duration of impact: Is the adverse impact historical, or did it come into exist solely because of the proposed project?
- An inconvenience, or limits major life activities?
- Does it limit the protected population's ability to participate in or benefit from some aspect of their environment?

Factors to consider in determining an adverse effect

- Must the protected population incur economic or monetary costs to cope with the adverse impact, compared to little or no cost to the general population?
- Limited in geographic scope or wide-spread?
- Avoidable or unavoidable by the protected population?
- Reversibility: Is the impact reversible, or irreversible?
- Is the impact on the protected population foreseeable? Predictable?

Factors to consider whether discrimination is “intentional”

- 1. The impact of the official decision-- whether it bears more heavily on one race than another.
- 2. The historical background of the decision.
- 3. The series of events prior to the decision, which could reveal the decisionmaker’s purpose.
- 4. Any departures, substantive or procedural, from the normal decisionmaking process.
- 5. The legislative and administrative history of the decision.

How Is Title VI Enforced?

- Every federal agency is supposed to enforce the law by conducting prompt and equitable investigations of complaints, and to resolve the issues under dispute.
- The Civil Rights Division of US Department of Justice is supposed to oversee federal agencies, and can litigate (file lawsuits).
- Title VI can be enforced by private persons in Court, but only where “intentional” discrimination alleged.

Investigation of the Complaint

- The federal agency should send out a data request letter to the recipient, with a long list of questions.
- You don't have a right to be present during the actual investigation, but you can suggest that the federal agency hold a public meeting to hear from witnesses and victims at your site.

Investigation of the Complaint

- You can also offer to take the investigator to the site of the discrimination, see things as they are for themselves, and meet real live injured people.
- The witnesses you listed should be interviewed by the federal investigator.
- The federal investigator should be able to conduct the in-person parts of the investigation in the language spoken by the local people.
- You may be given a chance to rebut what the recipient—the institution you complained about

Title VI Compliance Reviews

- Federal agencies can also do **compliance reviews**—self-initiated investigations.
- Compliance review does not require a complaint, but may be commenced in connection with a complaint.
- OCR may require recipients to submit data and information specific to certain programs or activities to determine compliance where there is reason to believe that discrimination may exist in a program or activity receiving EPA assistance.
40 CFR § 7.85(b)

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