

# The Systematic Exclusion of Complainants and Impacted Communities in EPA External Civil Rights Compliance Office’s Title VI Resolution Process: Recommendations for ECRCO and States

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## ABSTRACT

*The Environmental Protection Agency’s (“EPA”) Office of External Civil Rights Compliance’s (“ECRCO”) history of failure to adequately enforce Title VI of the Civil Rights Act of 1964 (“Title VI”) has been the subject of publications and lawsuits. Those who file a Title VI complaint with ECRCO are often excluded from any significant role beyond reporting in the complaint resolution process. Complainants’ inclusion is often discretionary (if at all). Resolutions are primarily undertaken between those in violation of the law and EPA. Such resolutions are usually voluntary and inadequately enforced. This Note advocates for a greater degree of formal inclusion of complainants and impacted communities in Title VI cases, with a specific focus on environmental racism cases where an EPA funding recipient has violated Title VI against a community. To accomplish this goal, this Note advocates for an adoption of elements of EPA’s Superfund Portland Harbor Community Involvement Plan and Connecticut’s recently revised environmental justice statute as a framework for increased, structured complainant involvement in ECRCO’s complaint resolution process. This Note references the Title VI lawsuit filed by residents of Uniontown, Alabama as a case study for application of this argument and acknowledges the barrier of the current gaps in Title VI enforcement by EPA and individual states.*

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## INTRODUCTION

When an individual files a complaint under Title VI of the Civil Rights Act of 1964 (“Title VI”) with the Environmental Protection Agency (“EPA”) alleging that a recipient of EPA funds has discriminated based on a protected trait, they do not receive the same rights and opportunities we think of when someone files a lawsuit. Instead, they submit their complaint to the Office of External Civil Rights Compliance (“ECRCO”). Thereafter, the complainant’s job is essentially done. Whether the discrimination is remedied — and what that remedy consists of — is largely determined by ECRCO and the actor accused of discrimination. ECRCO provides little formal opportunity for the involvement of complainants and others impacted by the alleged discrimination. Part I of this Note provides background information regarding how ECRCO fits into the Title VI framework. This includes the legal theories and rights of action that litigants may pursue. Part II discusses past failures and criticisms of ECRCO, including: EPA’s failure to resolve cases in a timely manner and the lack of complainant and community involvement in the resolution process. Part III situates the current role of complainants within the recent developments announced by ECRCO in response to widespread criticism. Part IV proposes some improvements, and Part V addresses the topic of enforcement on the state level. Specifically, Part IV advocates for the implementation of community involvement plans by reference to EPA’s Superfund Portland Harbor Community Involvement Plan. Part V points to Connecticut’s environmental justice statute as a prototype. Both Parts IV and V reference the Title VI environmental racism lawsuit filed by residents of Uniontown, Alabama in 2013 as an illustration of the issues caused by ECRCO’s current procedures and as a sample application of this Note’s recommendations.

### I. EXTERNAL CIVIL RIGHTS COMPLIANCE OFFICE’S ROLE IN ENFORCING TITLE VI

Title VI prohibits recipients of federal funds from discriminating on the basis of race, color, or national origin.<sup>1</sup> ECRCO is responsible for enforcing Title VI compliance from applicants and recipients of EPA funds.<sup>2</sup> ECRCO was originally part of EPA’s Office of Civil Rights (“OCR”) but became a separate office in December 2016.<sup>3</sup> EPA claims this was done to “strengthen the agency’s ability to

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1. 42 U.S.C. § 2000d; U.S. ENV’T PROT. AGENCY, EXTERNAL C.R. COMPLIANCE OFF. (TITLE VI), <https://perma.cc/7TM7-24M5> (last visited Feb. 26, 2022).

2. EXTERNAL C.R. COMPLIANCE OFF., *supra* note 1.

3. *Id.*

carry out its external civil rights enforcement responsibilities.<sup>74</sup> There are currently two ways for victims of environmental racism to pursue relief under Title VI: they may sue the recipients of federal funds in federal court under Title VI for intentional discrimination or file a complaint with EPA.<sup>5</sup>

Currently, no private right of action exists against recipients of federal funding for disparate impact discrimination under Title VI in federal court. Two Supreme Court cases made it much more difficult for victims of discrimination to pursue relief. First, *Guardians Ass'n v. Civil Service Commission* held that plaintiffs must prove intentional discrimination to receive compensatory relief such as retroactive seniority under section 601 of Title VI.<sup>6</sup> This means that plaintiffs must show that the recipient acted, at least in part, because of plaintiffs' actual or perceived protected status. For a disparate impact claim, on the other hand, plaintiffs would only have to prove that the outcome was discriminatory. Proving intentional discrimination is a high burden and makes it more difficult for plaintiffs to bring successful cases. Second, *Alexander v. Sandoval* held that the disparate impact prohibitions outlined in section 602 of Title VI do not create a private right of action based on congressional intent.<sup>7</sup> Therefore, filing an administrative complaint with EPA is the only remaining relief for disparate impact discrimination in violation of Title VI on the federal level.

Although Title VI lawsuits in federal court have been limited to allegations of intentional discrimination, there are three legal theories of discrimination under which a complaint may be filed with ECRCO: disparate/different treatment, disparate impact/effects, and retaliation.<sup>8</sup> Disparate/different treatment occurs when similarly situated persons are treated less favorably due to the protected factors.<sup>9</sup> Disparate impact/effects applies when an otherwise neutral policy treats similarly situated persons less favorably than others based on the protected factors.<sup>10</sup> Retaliation means that a recipient or other person intimidates, threatens, coerces, or discriminates against an individual or group with the purpose of interfering with their rights or privileges under Title VI or for making a complaint, testifying, assisting, or participating in an investigation, proceeding, or hearing.<sup>11</sup>

Once a complaint has been filed, EPA must immediately begin processing the complaint and accept, reject, or refer the complaint within twenty days.<sup>12</sup> A complainant is an individual or group who files a complaint with ECRCO. A recipient is the recipient of EPA funding who the complainant accused of committing a

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4. *Id.*

5. 532 U.S. 275 (2001).

6. *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582 (1983).

7. *See generally* *Alexander v. Sandoval*, 532 U.S. 275 (2001).

8. U.S. ENV'T PROT. AGENCY, CASE RESOLUTION MANUAL: EXECUTIVE SUMMARY JANUARY 2017 16, <https://perma.cc/3BYX-UUZZ> (last visited Feb. 26, 2022).

9. *Id.*

10. *Id.*

11. *Id.*

12. 40 C.F.R. § 7.120(d)(1).

discriminatory act in violation of Title VI. If accepted, ECRCO has 180 days from the date the investigation began to notify the complainant of its findings and recommendations for voluntary compliance.<sup>13</sup>

There are several ways a complaint can be resolved, including: alternative dispute resolution, early complaint resolution, informal resolution, a voluntary compliance agreement, a letter of insufficient evidence, or a preliminary finding of non-compliance.<sup>14</sup> The resolution of complaints often leads to one of three results: dismissal, an informal resolution, or a voluntary compliance agreement between ECRCO and the recipient.

## II. ECRCO'S FAILURE TO ADEQUATELY ENFORCE TITLE VI

ECRCO has received widespread criticism from environmental justice advocates and community members impacted by environmental racism for its failure to adequately enforce Title VI.<sup>15</sup> In 2011, Deloitte published a report evaluating the OCR. The report provided recommendations for increasing the OCR's efficiency and effectiveness.<sup>16</sup> This Note is specifically focused on EPA's failure to involve the complainants, their attorneys, and the community in the resolution process.

In 2011, EPA finally made its first and only preliminary finding of a prima facie violation of Title VI to date in *Angelita C., et al. v. California Department of Pesticide Regulation*.<sup>17</sup> The original complaint, which alleged that the California Department of Pesticide Regulation ("CDPR") discriminated against Latino children with its renewal of the toxic pesticide methyl bromide registration, had been filed in 1994.<sup>18</sup> EPA reached a settlement with the State of California requiring the CDPR to install one new air monitor, maintain existing air monitors for a two-year period, and "conduct outreach to the Latino

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13. *Id.* § 7.115(c)(1).

14. CASE RESOLUTION MANUAL, *supra* note 8.

15. Naveena Adasivam, *Report: Environmental Agencies Are Violating Civil Rights Laws—and the EPA Is Letting Them*, GRIST (Oct. 6, 2020), <https://perma.cc/2WJW-CDRQ>; Marianne Engelman-Lado, Camila Bustos, Haley Leslie-Bole & Perry Leung, *Environmental Injustice in Uniontown, Alabama, Decades after the Civil Rights Act of 1964: It's Time for Action*, AM. BAR ASS'N (May 21, 2021), <https://perma.cc/KZ3Z-V6PK>.

16. See generally DELOITTE, FINAL REPORT: EVALUATION OF THE EPA OFFICE OF CIVIL RIGHTS (Mar. 21, 2011), <https://perma.cc/B39S-8DH4>. This report also noted on page two that OCR failed to follow its own statutory timeline, which can be found at 40 C.F.R. § 7.115(c)(1). It revealed that only six percent of the Title VI complaints received by the OCR were dismissed within the 20-day time limit, and that there was a backlog of Title VI complaints reaching as far back as 2001, far surpassing the 180-day deadline as set forth in 40 C.F.R. § 7.115(c)(1). Two notable lawsuits in which EPA was sued for its failure to resolve cases in a timely manner are *Rosemere Neighborhood Ass'n v. U.S. Env't Prot. Agency*, 581 F.3d 1169 (9th Cir. 2009) and *Padres Hacia Una Vida Mejor v. Jackson*, 922 F. Supp. 2d 1057 (E.D. Cal. 2013).

17. Engelman-Lado, *supra* note 15. See <https://perma.cc/AP3Z-624P>.

18. *Id.*

community.”<sup>19</sup> The complainants and their attorneys were not consulted in the creation of the settlement agreement.<sup>20</sup> As a result, in *Garcia v. McCarthy*, three complainants filed a lawsuit alleging that EPA violated their Fifth Amendment Due Process rights when EPA investigated, negotiated, and settled their administrative complaint without allowing them to participate.<sup>21</sup> In their 1999 complaint, the complainants alleged EPA and CDPR “engaged in private settlement discussions and did not invite the complainants to participate or to examine the underlying documents for EPA’s decision” prior to entering into an informal compliance agreement with CDPR.<sup>22</sup> The complainants asserted that the settlement was deficient, in part because it provided neither relief nor remedy for those who had been exposed to the pesticides and allowed for further discrimination through the continued application of dangerous pesticides near the schools of Latino children in California. The court ultimately granted the defendants’ motion to dismiss for lack of subject matter jurisdiction and that decision was affirmed on appeal.<sup>23</sup>

In 2017, a group of environmental activists wrote a letter to the U.S. Commission on Civil Rights requesting that the Commission further “inquire into measures that EPA is taking to include affected communities in the settlement process.”<sup>24</sup> The letter referenced the Commission’s 2016 Environmental Justice Report (“EJ Report”), which was written the previous year, throughout.<sup>25</sup> The EJ Report stated that the “EPA continues to struggle to provide procedural and substantive relief to communities of color impacted by pollution” including Title VI enforcement.<sup>26</sup> Part of the EJ Report’s recommendation was that the “EPA should include affected communities in the settlement process.”<sup>27</sup> The activists’ letter noted that in 2017, the “EPA continues to exclude complainants in all facets of the process” (although in some cases complainants have been briefed regarding developments).<sup>28</sup>

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19. *Id.*

20. *Id.*

21. *Garcia v. McCarthy*, No. 13-cv-03939-WHO, 2014 U.S. Dist. LEXIS 5983 (N.D. Cal. Jan. 16, 2014); *Garcia v. McCarthy*, 649 F. App’x 589 (9th Cir. 2016). See *Angelita C. v. Cal. Dep’t of Pesticide Regulation*, EPA File No. 16R-99-R9 (<https://perma.cc/Y23R-MP8D>).

22. *Garcia v. McCarthy*, No. 13-cv-03939-WHO, 2014 U.S. Dist. LEXIS 5983, at \*6 (N.D. Cal. Jan. 16, 2014).

23. *Garcia v. McCarthy*, No. 13-cv-03939-WHO, 2014 U.S. Dist. LEXIS 5983; *Garcia*, 649 F. App’x 589 (9th Cir. 2016) (finding that EPA’s decision to settle — and the scope of its investigation — are committed to agency discretion).

24. Letter from Marianne Engelman-Lado, Visiting Clinical Professor of Law, Yale L. School, to Catherine Lehamon, Chair, U.S. Comm’n on C.R., *Re: Request for Follow-up on USCCR September 2016 Enforcement Report* 8 (Aug. 8, 2017) (<https://perma.cc/C5RW-VNJM>).

25. *Id.* (citing U.S. COMM’N ON C.R., ENVIRONMENTAL JUSTICE: EXAMINING THE ENVIRONMENTAL PROTECTION AGENCY’S COMPLIANCE AND ENFORCEMENT OF TITLE VI AND EXECUTIVE ORDER 12,898 (Sept. 2016), <https://perma.cc/ARB6-XLT7>).

26. *Id.* at 2.

27. *Id.*

28. *Id.* at 7.

The lack of complainant and community involvement in EPA's Title VI complaint resolution process is an ongoing issue that environmental justice advocates and other impacted individuals across the nation have been trying to bring attention to for years to no avail.

### III. CURRENT ROLE OF COMPLAINANTS

To preface the forthcoming recommendations for the involvement of complainants during case resolution, it is important to provide an assessment of the current role of complainants in that process. Complainants currently have few rights during ECRCO's settlement process, which is underscored by EPA's policy paper on the Role of Complainants and Recipients in the Title VI Complaints and Resolution Process (the "Paper").<sup>29</sup> The Paper states, "a Title VI complainant is not like a plaintiff in court" and indicates that a complainant plays primarily a reporting role and EPA "does not take an adjudicatory role."<sup>30</sup> Importantly, the Paper states that EPA does not "prescribe a role for the complainant once he or she has filed a complaint."<sup>31</sup>

To participate in alternative dispute resolution ("ADR"), a method of settling disputes outside the courtroom, EPA must deem the case appropriate for ADR. Although ADR is paid for by ECRCO, both parties must agree to participate.<sup>32</sup> This creates a two-layered barrier for complainants. According to the American Bar Association, ADR has several advantages. For instance, ADR can provide the parties with greater participation in reaching a solution and more control over the dispute's outcome.<sup>33</sup> Therefore, ADR presents an opportunity for the complainants to be more involved in the resolution process. But, ECRCO has created obstacles that decrease the use of ADR.

The language of the Paper is clear: the primary victims of environmental racism are reduced to a mere reporting role, the primary actors in the resolution process are EPA and the entity accused of discrimination, and ECRCO has wide discretion over the level of inclusion complainants are given each step of the way. For example, the Paper states that resolution discussions occur between EPA and the recipient.<sup>34</sup> If the complainant's input is sought at all, EPA "may" consider it and "may" forward the input to the recipient for discussion but is not obliged to do so.<sup>35</sup> Recipients and complainants are not provided the same

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29. See generally U.S. ENV'T PROT. AGENCY, TITLE VI OF THE CIVIL RIGHTS ACT OF 1964: ROLE OF COMPLAINANTS AND RECIPIENTS IN THE TITLE VI COMPLAINTS AND RESOLUTION PROCESS (May 4, 2015), <https://perma.cc/T82U-RBRZ> (last visited Mar. 13, 2022).

30. *Id.* at 2.

31. *Id.*

32. *Id.* at 6.

33. AM. BAR ASS'N, DISPUTE RESOLUTION PROCESSES, <https://perma.cc/D9YL-CZMA> (last visited Dec. 31, 2020).

34. ROLE OF COMPLAINANTS, *supra* note 30, at 6.

35. *Id.*

opportunities, and recipients play a significant role in negotiating their own resolution. The same is true for voluntary compliance agreements.<sup>36</sup> EPA “may” seek the complainant’s input on potential terms.<sup>37</sup> However, given that (1) EPA only provides complainants with a right of action if intentional discrimination is alleged; and (2) EPA often fails to enforce compliance with these agreements, complainants are left with little to no tangible Title VI protections against recipients of EPA funds in federal court.

This Note does not advocate for mandatory adoption of all input provided by complainants during the resolution process. However, it does advocate for a mandatory opportunity for complainants to provide input during the process. Although this Note generally argues for greater structural inclusion of complainants in the resolution process, this Note specifically argues for mandatory community involvement plans in cases where a recipient accused of discrimination against a community enters into an informal or formal resolution. The 2017 Case Resolution Manual is an important reference point for this argument.

Following the Deloitte report and criticism, ECRCO published a Case Resolution Manual (“the Manual”) in January 2017.<sup>38</sup> ECRCO published the Manual to provide guidance to its case managers.<sup>39</sup> However, this Manual falls short of the improvement needed in community involvement. Instead, the Manual confirms in writing that ECRCO consistently fails to include complainants and community members in the case resolution process, and that there is no current requirement to do so. The sections most relevant to this Note are Chapters 3 and 4, which cover preliminary investigation and resolution and investigation and voluntary compliance respectively.<sup>40</sup> Section 3.1 of the Manual, titled “Role of Complainants and Recipients,” states that “the EPA’s regulations do not prescribe a role for the complainant once s/he has filed a complaint.”<sup>41</sup> Nevertheless, one of EPA’s stated goals is to “promote appropriate involvement by complainants and recipients in the External Compliance complaint process.”<sup>42</sup> These statements are contradictory.

Sections 3.12 through 3.17 provide an overview of the informal resolution process.<sup>43</sup> Section 3.12, titled “Informal Resolution Process in General,” states that “Informal Resolution occurs between ECRCO and the recipient.”<sup>44</sup> Section 3.13, titled “Engagement with Complainants and Recipients during Informal Resolution,” notes that ECRCO has discretion in whether and when to engage

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36. *Id.*

37. *Id.*

38. CASE RESOLUTION MANUAL, *supra* note 8.

39. *Id.* at ii.

40. *Id.* at 1.

41. *Id.* at 15.

42. *Id.*

43. *Id.* at 22–25.

44. *Id.* at 22.

with complainants who wish to provide input during the resolution process.<sup>45</sup> Sections 4.9 and 4.10 of the Manual outline the procedures for voluntary compliance agreements.<sup>46</sup> Section 4.9 states that ECRCO drafts the voluntary compliance agreement, shares it with the appropriate Deputy Civil Rights Official(s) for comment and input, and contacts the recipient in an attempt to negotiate a voluntary compliance agreement.<sup>47</sup> ECRCO will also “notify the complainant that it intends to negotiate” a voluntary compliance agreement.<sup>48</sup> The word “community” is found only one time in the Manual.<sup>49</sup>

ECRCO also published a revised 2015–2020 Strategic Plan (the “Plan”) in January 2017.<sup>50</sup> The three primary goals laid out in the Plan are to: (1) enhance strategic docket management, (2) develop a proactive compliance program, and (3) strengthen ECRCO’s workforce to promote a high-performing organization.<sup>51</sup> The Plan lacks any mention of complainants or community involvement in the complaint resolution process. Instead, the Plan vaguely mentions “community engagement/outreach” and “community concerns/issues.”<sup>52</sup>

The second goal of the Plan is to develop a proactive compliance program.<sup>53</sup> Specifically, the goal is to “[c]onduct engagement with external partners and stakeholders, such as recipients and communities through technical assistance and outreach.”<sup>54</sup> According to the Plan, ECRCO aims to implement several measures to improve communication and transparency with external partners and stakeholders.<sup>55</sup> Some of these measures include developing informational marketing materials such as pamphlets in English and other prominent languages, enhancing the website, developing training materials and policy guidance for recipients and communities, and meeting with local advocates and representatives.<sup>56</sup> Notably, the Plan states, “ECRCO will seek to develop innovative, joint agreements with recipients and other federal agencies to address discrimination issues in communities holistically.”<sup>57</sup> However, the Plan does not include in its goals or benchmarks any efforts to integrate the community into the complaint resolution process. Instead, it aims to take a proactive approach to encourage compliance.<sup>58</sup>

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45. *Id.* at 22–23.

46. *Id.* at 30–32.

47. *Id.* at 30.

48. *Id.*

49. *Id.* at 31.

50. *See generally* U.S. ENV’T PROT. AGENCY, EXTERNAL CIVIL RIGHTS COMPLIANCE OFFICE STRATEGIC PLAN (Jan. 2017), <https://perma.cc/HF38-ZHAT> (last visited Dec. 31, 2020).

51. *Id.* at 3.

52. *Id.* at 5–6, 11.

53. *Id.* at 10.

54. *Id.* at 12.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* at 4.



Therefore, this Note's recommendations address a significant gap in the current ECRCO complaint resolution framework.

#### IV. COMMUNITY INVOLVEMENT PLANS

To create a structural role for complainants and their communities, this Note urges ECRCO to adopt a community involvement plan ("CIP") requirement in the case resolution process where a recipient is accused of discrimination against a community. This Note points to the example of the current EPA Superfund CIPs, specifically Sections 4 and 7 of the current Portland Harbor Superfund Site CIP, as examples of work in which EPA is already engaged and could be adopted by ECRCO.<sup>59</sup> This Section will (A) describe the Superfund CIP framework and the key differences between Superfund and ECRCO, (B) propose utilizing parts of the Superfund CIP in ECRCO's process, and (C) apply this argument to the case of Uniontown, Alabama.

##### A. SUPERFUND CIP FRAMEWORK AND KEY DIFFERENCES

Superfund, formally known as the Comprehensive Environmental Response, Compensation, and Liability Act, was established in 1980 as a way for EPA to clean up sites contaminated with toxic waste.<sup>60</sup> It holds contaminating parties responsible by requiring them either to perform cleanups or reimburse the government for cleanups led by EPA.<sup>61</sup> According to EPA, Superfund's primary goals are to protect human health and the environment by cleaning up contaminated sites, make responsible parties pay for cleanup work, involve communities in the Superfund process, and return Superfund sites to productive use.<sup>62</sup>

A CIP is a tool that documents EPA's strategy for community involvement at Superfund sites and aims to address community concerns.<sup>63</sup> The National Oil and Hazardous Substances Pollution Contingency Plan ("NCP"), the plan used by the federal government when responding to oil spills and releases of hazardous substances, requires that CIPs be prepared prior to the start of remedial investigation field activities.<sup>64</sup>

However, there are key differences between Superfund and ECRCO. For one, Superfund CIPs are currently required by the NCP, whereas there is no current requirement for implementation of CIPs by ECRCO in response to Title VI

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59. U.S. ENV'T PROT. AGENCY, PORTLAND HARBOR SUPERFUND SITE COMMUNITY INVOLVEMENT PLAN (Aug. 2020), <https://perma.cc/R4TJ-NTNP> (last visited Dec. 31, 2020).

60. U.S. ENV'T PROT. AGENCY, WHAT IS SUPERFUND?, <https://perma.cc/NG38-GV2E> (last visited Dec. 31, 2020).

61. *Id.*

62. *Id.*

63. U.S. ENV'T PROT. AGENCY, COMMUNITY INVOLVEMENT PLANS, <https://perma.cc/K6KZ-8XLY> (last visited Dec. 31, 2020).

64. U.S. ENV'T PROT. AGENCY, NATIONAL OIL AND HAZARDOUS SUBSTANCES POLLUTION CONTINGENCY PLAN (NCP) OVERVIEW, <https://perma.cc/48KU-JCGJ> (last visited Feb. 26, 2022).

discrimination.<sup>65</sup> Another difference is the purpose of the document. Generally, Superfund CIPs are created to inform EPA's cleanup effort with an emphasis on the geography and history of the area and the potential environmental impacts of EPA's actions. The CIPs proposed by this Note would emphasize some of the same aspects as Superfund CIPs — such as transparency and community input — but instead target the actions of the alleged violating organization. Additionally, the stance toward the community would focus less on educating the community and more on providing them with a greater role in the resolution process. For instance, ECRCO CIPs would ask: how has this organization harmed the community? How does the community believe this harm should be addressed? Superfund's use of CIPs provides an insightful look into creating a formal structure for community involvement.

#### B. PROPOSED ADOPTIONS AND OBJECTIVE ANALYSES

Specifically, this Note proposes adopting Section 4 (Community Background, Issues, Concerns, and Requests) and Section 7 (EPA's Community Involvement Action Plan) of the Superfund Portland Harbor Community Involvement Plan.<sup>66</sup> Section 4 of Portland's CIP discusses the information regarding the affected communities' "Background, Issues, Concerns, and Requests."<sup>67</sup> This information was gathered via interviews with community members.<sup>68</sup> Section 7 describes EPA's action plan to address community concerns and needs.<sup>69</sup> For example, Objective 3 of Section 7 is to "[p]romote transparency, communicate early, provide opportunities for informal feedback, and inform of formal public comment periods."<sup>70</sup> Implementing the methods used in these sections would increase complainant involvement in ECRCO's complaint resolution process.

In Portland's CIP, EPA requires formal public comment before any final decisions are made on significant changes to the Record of Decision.<sup>71</sup> In Superfund, a Record of Decision serves as the final cleanup plan or "Final Remedy."<sup>72</sup> This differs from ECRCO where formal notice-and-comment are not required before reaching a remedy.

Similar to the voluntary compliance agreements, ADR, or other informal agreements utilized by ECRCO, EPA may settle Superfund liability through administrative agreements or judicial consent decrees.<sup>73</sup> Of significant note,

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65. COMMUNITY INVOLVEMENT PLANS, *supra* note 64.

66. PORTLAND HARBOR SUPERFUND, *supra* note 60, at 25.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at 69.

72. *Id.* at 14.

73. *Id.* at 69.

public comment is required prior to any settlement regarding the liability of potentially responsible parties in Superfund cases.<sup>74</sup>

Objective 4 of Section 7 is to “invite tribal members, tribal representatives, and community members to EPA-sponsored meetings and events, especially to quarterly meetings.”<sup>75</sup> The CIP specifies that these meetings are “open to the public and feature education, presentations, and interaction with EPA, Oregon Department of Environmental Quality, the community, potentially responsible parties, and other parties as appropriate.”<sup>76</sup> The CIP indicates that these meetings are opportunities to update the public on site developments; address community questions; build relationships; and hear concerns, ideas, and informal feedback.<sup>77</sup> These meetings are facilitated by a neutral third party and following completion, EPA issues a meeting summary.<sup>78</sup> Community leaders are invited to provide input on the proposed agenda topics. Sections 4 and 7 of Portland’s CIP would be applicable to cases where a recipient of EPA funding is accused of community-wide discrimination under Title VI.

### C. UNIONTOWN, ALABAMA CASE STUDY

Uniontown, Alabama is a current example of the failure of ECRCO to properly enforce Title VI and a case where a CIP may have proved beneficial. In 2013, thirty-five Uniontown residents filed a complaint with the OCR alleging that the Alabama Department of Environmental Management (“ADEM”) violated Title VI when it authorized the construction of the Arrowhead Landfill.<sup>79</sup> The complaint alleged this action had a disparate impact on the African-Americans in the community.<sup>80</sup> Uniontown’s population is ninety-seven percent Black, and its median household income is \$22,159.<sup>81</sup> The legal dispute began with resident opposition to the development of the Arrowhead Landfill near their community.<sup>82</sup> In 2008, the landfill began accepting toxic coal ash from Tennessee.<sup>83</sup> ADEM approved the transportation of this ash to Uniontown where residents had alleged suffering from foul odors, upset appetite, respiratory issues, headaches, dizziness, nausea, vomiting, and excessive dust encroaching on their property due to the

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74. *Id.* at 69.

75. *Id.* at 71.

76. *Id.*

77. *Id.* at 71.

78. *Id.* at 71.

79. Complaint at 1, EPA OCR File No. 01R-12-R4 (May 30, 2013), <https://perma.cc/6Q4G-FQHM> (last visited Feb. 26, 2022).

80. *Id.*

81. U.S. CENSUS BUREAU, AMERICAN COMMUNITY SURVEY 5-YEAR ESTIMATES: CENSUS REPORTER PROFILE PAGE FOR UNIONTOWN, ALABAMA, <https://perma.cc/FV26-4556> (last visited Jan. 15, 2023).

82. Shaila Dewan, *Clash in Alabama Over Tennessee Coal Ash*, N.Y. TIMES (Aug. 29, 2019), <https://perma.cc/EB8R-QVSX> (last visited Feb. 26, 2022).

83. Engelman-Lado, *supra* note 15.

nearby Arrowhead Landfill.<sup>84</sup> Some Perry County political leaders emphasized the financial benefits of receiving the ash, although many residents did not believe the ash was safe.<sup>85</sup> In 2018, five years after the Title VI complaint was filed, EPA dismissed the complaint, determining that there was insufficient evidence to support a causal connection between the permitted actions and the alleged harms.<sup>86</sup> Instead of finding relief through their Title VI complaint, three residents in Uniontown were successful in a civil suit in Alabama state court in which they argued that the landfill's use of tarps as alternative cover violated state law.<sup>87</sup> On appeal, the residents were victorious. The Alabama Court of Civil Appeals ruled that ADEM exceeded its statutory authority under Ala. Code § 22-27-17 when it allowed landfill operators to use material other than earth to cover solid waste.<sup>88</sup>

The question of implementation remains. There are multiple places where a plan like the one suggested in this Note could be positioned. For example, ECRCO could require a CIP prior to initial funding approval or after a formal finding of discrimination. This author believes, however, that the most effective implementation of mandatory CIPs would be a CIP requirement as part of the voluntary compliance agreement for cases in which complainants allege discrimination against a community.

One potential concern with adopting this process is the length of time that it takes to create a thorough CIP. Portland's CIP notes that EPA conducted outreach over the course of three years in order to identify their main goals and objectives.<sup>89</sup> Portland Harbor was listed as a Superfund site in 2000, yet remedial action did not begin until December 2019.<sup>90</sup> However, it is important to recognize that a CIP for a Title VI complaint could differ significantly from one utilized for a Superfund site. For example, several sections of Portland's CIP would be unnecessary, irrelevant, or considerably shortened if applied to Uniontown. Further, ECRCO only received fifty-seven Title VI complaints between 2016 and March 2020.<sup>91</sup>

Each community has different characteristics which may lead to variability in the amount of time required to create a community involvement plan. For instance, the Portland Harbor Superfund Site contains ancestral homelands to

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84. *Environmental Injustice in Alabama's Black Belt*, EQUAL JUSTICE INITIATIVE (October 22, 2018), <https://perma.cc/F5PQ-PEPJ> (last visited Feb. 26, 2022).

85. Dewan, *supra* note 83.

86. Letter from Lilian Dorka, Dir. for the External Civil Rights Compliance Office, Office of Gen. Counsel to Lance LeFleur, Dir. for the Alabama Dep't of Env't Mgmt., Closure of Administrative Complaint, EPA File No. 12R-13-R4 (March 1, 2018), <https://perma.cc/4PTJ-SML8> (last visited Feb. 26, 2022).

87. *Smith v. LeFleur*, 329 So.3d 598, 612 (Ala. Civ. App. Oct. 11, 2019).

88. *Id.*

89. PORTLAND HARBOR SUPERFUND, *supra* note 60, at 56.

90. *Id.* at 16.

91. U.S. ENV'T PROT. AGENCY OFFICE OF INSPECTOR GEN., IMPROVED EPA OVERSIGHT OF FUNDING RECIPIENTS' TITLE VI PROGRAMS COULD PREVENT DISCRIMINATION 13 (Sept. 2020), <https://perma.cc/6XER-6GX9>.

several Native Tribes, including the Multnomah, Wasco, Cowlitz, Kathlamet, Clackamas, Bands of Chinook, Tualatin Kalapuya, Molalla.<sup>92</sup> Uniontown has an estimated zero percent native population.<sup>93</sup> The affected neighborhoods in Portland’s CIP consist of a population of over 72,000.<sup>94</sup> Uniontown has a population of about 2,000.<sup>95</sup> Together, these factors could lead to a significantly shorter timeline for the development of a CIP for Uniontown.

Further, like its self-imposed timelines for complaint resolution, EPA could impose its own time restrictions on CIPs to ensure that the process is completed in an efficient and timely manner. ECRCO’s 2017 revised strategic plan has already set out to improve docket management.<sup>96</sup>

Regulatory agencies involving complainants in the dispute resolution process is neither a new nor novel idea. One current example where complainants have been involved in the resolution of their discrimination complaints is the process used by the U.S. Equal Employment Opportunity Commission (“EEOC”). The EEOC allows all parties to participate in mediation, settlement, or conciliation.<sup>97</sup> In addition, the EEOC has laid out a process for “fairness hearings” which may be used in class actions to allow affected individuals to object to a proposed settlement.<sup>98</sup> Like the EEOC, Superfund’s CIPs provide an avenue for structured community involvement. Applying this heightened involvement to ECRCO complaints would assist in ensuring that their concerns are properly addressed.

## V. STATE ENFORCEMENT OF TITLE VI

Another potential concern with adopting CIPs is enforcement. In addition to federal enforcement, states can enact legislation that requires and enforces community involvement in Title VI cases. A 2011 EPA Office of Inspector General (“OIG”) report concluded that states “frequently do not meet national enforcement goals” and that there was great variation in enforcement among states.<sup>99</sup> In 2017, the Institute for Policy Integrity at New York University School of Law issued a brief asserting that states “can’t and won’t make up for inadequate federal enforcement of environmental laws.”<sup>100</sup> Although it is framed in response to

92. PORTLAND HARBOR SUPERFUND, *supra* note 58, at 11.

93. U.S. CENSUS BUREAU, *supra* note 77.

94. PORTLAND HARBOR SUPERFUND, *supra* note 58, at Appendix A.

95. U.S. CENSUS BUREAU, *supra* note 82.

96. EXTERNAL CIVIL RIGHTS COMPLIANCE OFFICE STRATEGIC PLAN, *supra* note 49.

97. U.S. EQUAL EMP’T OPPORTUNITY COMM’N, RESOLVING A CHARGE, <https://perma.cc/Z6UW-9F79>.

98. U.S. EQUAL EMP’T OPPORTUNITY COMM’N, SETTLEMENT STANDARDS AND PROCEDURES, <https://perma.cc/693R-8KTR> (last visited 12/30/2020).

99. U.S. ENV’T PROT. AGENCY OFFICE OF INSPECTOR GEN., EPA MUST IMPROVE OVERSIGHT OF STATE ENFORCEMENT 6, 10 (Dec. 2011), <https://perma.cc/Z3B2-EVX2>.

100. *See generally* N.Y.U INST. FOR POL’Y INTEGRITY, IRREPLACEABLE: WHY STATES CAN’T AND WON’T MAKE UP FOR INADEQUATE FEDERAL ENFORCEMENT OF ENVIRONMENTAL LAWS (June 2017), <https://perma.cc/L2UZ-2R2T> (last visited Dec. 31, 2020).

the Trump Administration's 2018 budget proposal, which sought a thirty-one percent reduction in EPA funding, this brief is relevant to our understanding of the current issues with state enforcement.<sup>101</sup> In summary, it argues that states are already overburdened with enforcement responsibility.<sup>102</sup> The NYU brief noted that states bring an estimated ninety percent of environmental enforcement actions.<sup>103</sup> The brief further points to the financial and political barriers to effective enforcement that states are facing.<sup>104</sup> State environmental agency budgets are funded in part by EPA grants and state regulators argue that federal aid must be increased to improve enforcement on the state level.<sup>105</sup> However, EPA grants have decreased over time.<sup>106</sup> Finally, the brief discusses the potential for state reluctance to penalize their own facilities for political reasons and that without the threat of EPA enforcement, which may lead to "fewer and smaller settlements, and less deterrence of future violations."<sup>107</sup>

ADEM is one example of the importance of EPA Title VI enforcement in addition to state enforcement. In June 2018, ADEM rescinded its civil rights complaint policy completely.<sup>108</sup> At that time, there was no other state legal mechanism in Alabama for residents to challenge environmental racism.<sup>109</sup> In response, a complaint was filed with EPA.<sup>110</sup> During its investigation, ECRCO discovered that the "interim procedures," dated August 10, 2018, were only provided to ADEM staff and not publicly available on ADEM's website.<sup>111</sup> Additionally, the procedures did not include retaliation as a basis for discrimination grievances, and the provided procedures were in English only.<sup>112</sup> Months later, ADEM posted its updated grievance procedures on its website in English and other languages.<sup>113</sup> In December 2018, ECRCO closed the complaint, finding insufficient evidence to conclude that ADEM violated Title VI and EPA's non-discrimination legislation.<sup>114</sup> One environmental activist in Alabama stated that

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101. *Id.* at 1.

102. *Id.*

103. *Id.*

104. *Id.* at 3.

105. *Id.* at 2.

106. *Id.*

107. *Id.* at 3.

108. *Id.*

109. *Id.*

110. See generally Letter from Lilian Dorka, Dir. for the External Civil Rights Compliance Office, Office of Gen. Counsel to Lance LeFleur, Dir. for the Alabama Dep't of Env't Mgmt., Resolution and Closure Letter for Administrative Complaint No. 03R-18-R4 (Dec. 3, 2018), <https://perma.cc/R8JC-E8TP> (last visited Jan 4, 2021).

111. *Id.* at 3.

112. *Id.*

113. *Id.*

114. *Id.* at 1.

ADEM enforcement never creates “the resolution necessary to halt violations and remedy the concerns of the community.”<sup>115</sup>

One example of the type of legislation states can enact to require community involvement in Title VI cases is Connecticut’s environmental justice law.<sup>116</sup> Some believe that this law “creates more opportunity for local communities to make their voices heard.”<sup>117</sup> This law requires applicants seeking permits from the Department of Energy and Environmental Protection of the Connecticut Siting Council for proposed facilities in environmental justice communities to file a meaningful public participation plan including an informal public meeting.<sup>118</sup> One of the ways in which the statute defined an environmental justice community is a United States census block group in which thirty percent or more of the non-institutionalized population has an income under two-hundred percent of the federal poverty level.<sup>119</sup> In October of 2020, the law was amended to require newspaper advertisement of the meeting and that actions may not be taken on the permit earlier than sixty days after the meeting.<sup>120</sup> The law further requires that the “chief elected official or town manager of a municipality” participate in the negotiations for community environmental benefit agreements and enforce the agreement, and that the agreement must be approved by the legislative body of the municipality.<sup>121</sup> The law’s language was amended to state, “such methods may include notifying neighborhood and environmental groups, in writing, in a language appropriate for the target audience.”<sup>122</sup>

For the purposes of illustrating the importance of this legislation, this author will apply the Connecticut statute to the Uniontown Title VI lawsuit. Because Uniontown’s median household income is \$22,159 and 60.9 percent of residents live below the poverty line, Uniontown would qualify as an environmental justice community under the statute.<sup>123</sup> The Arrowhead Landfill likely satisfies the statute’s definition of “affecting facility” because it is a “new or expanded landfill, including but not limited to, a landfill that contains ash . . . .”<sup>124</sup> Therefore, had this statute been adopted in Alabama in 2007, when the permit for the landfill was being reviewed by ADEM, community members would likely have had the right to participate in the permit process before the pollution began.<sup>125</sup>

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115. EQUAL JUSTICE INITIATIVE, *supra* note 85.

116. CONN. GEN. STAT. ANN. § 22a-20a (West 2012).

117. *New Environmental Justice Bill Brings Both Sides to the Table*, NAT’L AUDUBON SOC’Y (Oct. 2, 2020), <https://perma.cc/JP26-EWRU> (last visited Mar. 13, 2022).

118. CONN. GEN. STAT. ANN. § 22a-20a (West 2012).

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. U.S. CENSUS BUREAU, AMERICAN COMMUNITY SURVEY 5-YEAR ESTIMATES: CENSUS REPORTER PROFILE PAGE FOR UNIONTOWN, ALABAMA, <https://perma.cc/8YFP-RLDK> (last visited Jan. 15, 2023).

124. CONN. GEN. STAT. ANN. § 22a-20a (West 2012).

125. Engelman-Lado, *supra* note 15.

Unlike Superfund CIPs, Connecticut's statute is most effective at the beginning of the permit process, before the damage (i.e., pollution) is done. It involves communities in the approval process, as opposed to the clean-up process.

#### CONCLUSION

After years of criticism from environmental justice advocates, ECRCO has created plans to improve its docket management and decrease the amount of time it takes to resolve administrative complaints. However, the current resolution process remains flawed. In Title VI cases where discrimination against a community is alleged, there must be community involvement for an adequate solution. In other words, where there is community harm, there must be a community remedy. It is not enough that when corporations discriminate against underrepresented and low-income communities, advocates have only one route toward a solution. At the end of that process, which could take up to a decade, corporations make one-sided agreements with EPA that are poorly enforced. Complainants and their communities are excluded, by design, from ECRCO's complaint resolution process.

This Note begins to outline what an inclusive process could look like, how it could be enforced, and some examples of mechanisms that are already in place. Although the issue of compliance enforcement by EPA remains and must be resolved for the recommendations promoted in this Note to be effective, preventative measures like the Connecticut environmental justice statute can work simultaneously to decrease the pollution that leads to a number of Title VI lawsuits.